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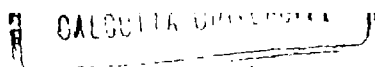
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THE FOURTH YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE¹

BY MANLEY O. HUDSON

Bemis Professor of International Law, Harvard Law School

The year 1925 has been the busiest year in the history of the Permanent Court of International Justice to date. During some part of every month of the year, with the exception of September and December, the court has been in session. Its sixth (extraordinary) session began on January 12 and ended on March 26; its seventh (extraordinary) session began on April 14 and ended on May 16; its eighth (ordinary) session began on June 15 and ended on August 25;² and its ninth (extraordinary) session began on October 22 and ended on November 21. During 210 days of the year, the judges were at work at The Hague, and without counting the days required for travelling for which indemnities are paid, they exceeded by ten the 200 days during which indemnities are paid to them to supplement their salaries. The result of the work of these four sessions was three judgments and three advisory opinions, each of which has contributed to the settlement of some difficult problem. In four years, the court has handed down six judgments and twelve advisory opinions.³ Taken together these judgments and opinions constitute a significant addition to our international jurisprudence, and if they cannot be said to have dealt with problems which might have led to war, they have nevertheless served useful ends in contributing to the removal of possible sources of friction.

THE EXCHANGE OF GREEK AND TURKISH POPULATIONS

The Greek and Turkish Governments signed a convention at Lausanne, on January 30, 1923, providing for a mutual exchange of populations, and the convention came into force on or soon after August 6, 1924.⁴ On

¹ In continuation of the writer's series of articles on the work of the court published in this JOURNAL in previous years. See "The First Year of the Permanent Court of International Justice," Vol. 17, pp. 15-28; "The Second Year of the Permanent Court of International Justice," Vol. 18, pp. 1-37; "The Third Year of the Permanent Court of International Justice," Vol. 19, pp. 48-75. The three previous articles are included in a volume entitled *The Permanent Court of International Justice and the Question of American Participation* (Harvard University Press, 1925).

² The session was suspended, however, from June 19 to July 15, pending the submission of documents.

³ This volume compares very favorably with the early work of the Supreme Court of the United States, which in its first four years handed down but three opinions. See 2 Dallas, 402, 415, 419.

⁴ 32 League of Nations Treaty Series, p. 75; British Treaty Series, No. 16 (1923), Cmd. 1929, p. 174. The date of the convention's coming into force is slightly indefinite, for the

November 16, 1924, the mixed commission established according to the terms of this convention decided to request the Council of the League of Nations to ask the court for an advisory opinion on certain questions which had arisen in the course of its work. Previous consideration of these questions by the mixed commission had disclosed a difference of views among members of the commission, which had not only precluded the commission from taking any decision, but had rendered it difficult for the commission to meet. On October 22, 1924, the Greek Government, acting under Article 11 of the Covenant,⁵ had appealed to the Council of the League of Nations; protesting that Greeks not subject to the compulsory exchange provided for in the convention were being expelled from Constantinople by the Turkish authorities. On October 31, 1924, the Council had invited the mixed commission to meet, and had suggested the possibility of the submission of the existing differences to the court, either directly by the interested governments or indirectly through the Council's asking for an advisory opinion. It was in consequence of this suggestion that the mixed commission made its request of the Council.

The Lausanne Convention (Article 2) provides that Greek inhabitants of Constantinople shall not be subject to the compulsory exchange, and stipulates that "all Greeks who were already established before the 30th of October, 1918, within the areas under the Prefecture of the City of Constantinople, as defined by the law of 1912, shall be considered as Greek inhabitants of Constantinople." Similar precision is employed in defining "the Moslem inhabitants of Western Thrace." In applying the convention, the mixed commission found it necessary to fix the meaning of the word "established" as used in the convention, and the question was discussed extensively without any decision being reached.⁶ On December 13, 1924, with the concurrence of representatives of the Greek and Turkish Governments, the Council voted to ask the court for an advisory opinion on the following questions:⁷

What meaning and scope should be attributed to the word "established" in Article 2 of the Convention of Lausanne, of January 30th, 1923, regarding the exchange of Greek and Turkish populations, in regard to which discussions have arisen and arguments have been put forward which are contained in the documents communicated by the Mixed Commission? And what conditions must the persons who are described in Article 2 of the Convention of Lausanne under the name of "Greek inhabitants of Constantinople" fulfil in order that they may be

convention provides that "it shall come into force immediately after the ratification" of the treaty of peace signed at Lausanne, by the high contracting parties. The treaty of peace did not come into force until a *procès-verbal* of the deposit of ratifications was drawn up, and this may have taken place after August 6, 1924. See 28 League of Nations, Treaty Series, p. 11.

⁵ League of Nations Official Journal, November, 1924, pp. 1663 ff.

⁶ League of Nations Official Journal, November, 1924, p. 1672.

⁷ League of Nations Official Journal, February, 1925, p. 155.

considered as "established" under the terms of the Convention and exempt from compulsory exchange?

The Council's request was forwarded on December 18, 1924, and notice of it was given by the Registrar to all members of the League of Nations, to Ecuador and the United States as states mentioned in the Annex to the Covenant, to Turkey, to other states on the court's list, and to the mixed commission sitting at Constantinople. In view of the urgency of the question, the President of the court acted under Article 23 of the Statute and convoked an extraordinary session for January 12, 1925.

All of the judges were present on that date except Judges de Bustamante, Moore and Pessôa, who were replaced by Deputy-Judges Beichmann, Negulesco, and Yovanovitch. Both the Greek and Turkish Governments submitted memoranda of their views, and on January 16 the court heard oral arguments by M. Politis, on behalf of the Greek Government, and by Tewfik Rouchdy Bey, on behalf of the Turkish Government.⁸ The opinion was handed down on February 21, 1925.⁹

The court was of opinion that the questions submitted did not include any reference to the special position of the Ecumenical Patriarchate of Constantinople. The word "established" was not to be defined in the abstract, but as used in Article 2 of the Lausanne Convention. This definition had given rise to an international dispute, involving a question of international law, and was not simply a domestic question between the administration and the inhabitants. The provision for exchange had excluded "Greek inhabitants of Constantinople" in order to "save that city from the loss which it would have suffered as a result of the exodus of a part of the population which constitutes one of the most important economic and commercial factors in the life of the city." The French text of the convention was controlling, and *établissement* embraces both residence and stability. It involves "an intention to continue the residence in a particular place for an extended period." While the conception is akin to that of domicile, the two are not identical.¹⁰ The convention does not expressly refer the determination of the meaning of *établissement* to national legislation, and it seems to connote a "situation of fact" rather than domicile in any legal sense determined by local legislation. The conclusion follows that the "convention is self-contained," and that the mixed commission, in order to decide what constitutes an established inhabitant, must rely on the natural meaning of the term. The court could not accept the contention of Tewfik Rouchdy Bey that the convention referred to national legislation, and it cited the Wimbledon Case¹¹ as a precedent for saying that this conclusion

⁸ See Publications of the Court, Series C, No. 7-I.

⁹ Publications of the Court, Series B, No. 10.

¹⁰ On the English law of domicile, see Westlake, *Private International Law* (6th ed. by Norman Bentwich, 1922), p. 344.

¹¹ Decided on August 17, 1923. See Publications of the Court, Series A, No. 1.

involved no infringement of Turkey's sovereign rights. The Turkish representative had contended that it was for the municipal courts to say whether a person was established or not; but the court thought this would be incompatible with "the rapid fulfilment" of the convention, and such power had been expressly conferred on the mixed commission. Indeed, the mixed commission had already affirmed its exclusive jurisdiction to decide questions of the nationality of persons liable to exchange.

With regard to the second question, the court considered that it was not "called upon to prepare in advance solutions for all the problems which may arise in regard to the application of Article 2 of the convention." It could not determine the degree of stability necessary, in addition to residence; but it was made clear that intention to remain permanently in Constantinople was not necessary.¹² For instance, a person might be exempt who had gone to Constantinople with intent to return to his place of origin after making his fortune. Intention to reside for an extended period was all that was required. All cases of hardship to individuals had to be left to the mixed commission, which had the province of finding equitable solution for such problems as those of family unity. Distinctions based on differences in place of origin were excluded by the convention, and a Turkish contention to the contrary was disapproved. It was not the court's province to say how proof of the necessary qualifications should be made before the mixed commission.

After the opinion was read in open court on February 21, a copy was forwarded to the Council of the League of Nations, which on March 11, 1925, took note of the opinion and had it communicated to the president of the mixed commission. Viscount Ishii (Japan), as *rapporteur*, expressed the hope that the opinion would facilitate the task of the commission, and said that he did not doubt that "the mixed commission would attribute to this opinion the same high value and authority which the Council always gave to the opinions of the Permanent Court of International Justice."¹³ Both M. Caclamanos (Greece) and Munir Bey (Turkey) associated themselves with this expression. Viscount Ishii's hope was not in vain, for on June 21, 1925, the Greek and Turkish Governments signed an agreement which disposed of their differences relating to the interpretation of Article 2 of the Lausanne Convention.

INTERPRETATION OF JUDGMENT NO. 3

The third judgment of the court,¹⁴ given by the Chamber of Summary Procedure on September 12, 1924, related to the interpretation of paragraph

¹² The legal section of the mixed commission had required an intention to remain permanently. Publications of the Court, Series C, No. 7-I, pp. 157-160.

¹³ League of Nations Official Journal, April, 1925, p. 441.

¹⁴ Publications of the Court, Series A, No. 3. For comment on this judgment, see this JOURNAL, Vol. 19, p. 54; Ténékidès, "*Les Réparations de Guerre en Grèce en l'Etat Actuel Des Lois et Des Traités*," 13 *Bulletin de L'Institut Intermédiaire International*, 195.

4 of the Annex following Article 179 of the Treaty of Neuilly between the Allied Powers and Bulgaria. The actual contest was between Greece and Bulgaria, and it related to the jurisdiction of the arbitrator appointed by M. Gustave Ador under the terms of the treaty. After the judgment was given, on November 22, 1924, the agent of the Greek Government took advantage of Article 60 of the court Statute¹⁵ to request an authoritative interpretation of that judgment, more especially with respect to whether under the judgment claims might be paid only from the proceeds of Bulgarian property situated in Greek territory. The court informed the Bulgarian agent of the request, and invited the Greek agent to be more specific. On December 30, 1924, the Greek agent informed the court that an interpretation was desired of the second part of the judgment, with special regard to (a) the possible existence of Bulgarian property in Greece out of the proceeds of which the arbitrator might make awards; (b) the possible liquidation of Bulgarian landed property in Greece for providing such a fund; (c) the right of Greece to apply to the Reparation Commission for a redistribution of the total of reparations paid by Bulgaria. On December 30, 1924, the Bulgarian agent filed a memorandum dealing with the Greek request, without disputing the court's jurisdiction to give an interpretation. No oral proceedings were held. The Chamber of Summary Procedure, consisting of President Huber, former President Loder, and Vice-President Weiss, the same judges who had composed it for giving the judgment of September 12, 1924, gave judgment on March 26, 1925.¹⁶

The court took the parties to have agreed on the jurisdiction, and therefore found it unnecessary to determine whether all the conditions for the application of Article 60 of the Statute were present. It found that the Greek request related to a question as to the applicability of that portion of the Treaty of Neuilly which had been interpreted, whereas such applicability had been taken for granted in the original agreement for submission to the court. The previous judgment had, therefore, been confined to the basis and extent of the obligations contained in that part of the Treaty of Neuilly. The Greek request envisaged a wholly different matter; and as the court could not give an interpretation going beyond the judgment itself, it declared that the Greek request could not be granted.

THE MAVROMMATIS JERUSALEM CONCESSIONS

By an application filed with the Registry of the court on May 13, 1924, the Greek Government began a case against His Britannic Majesty's Government "concerning the rights claimed in Jerusalem by M. E. Mavrommatis, a Greek subject, under certain contracts and agreements concluded with the local authorities when the country was under Turkish sovereignty." The

¹⁵ Article 60 provides: "In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

¹⁶ Publications of the Court, Series A, No. 4.

British Government interposed a preliminary plea to the jurisdiction upon which the court delivered judgment on August 30, 1924, holding that it had jurisdiction of this part of the case¹⁷ and instructing the President to fix the times for the deposit of further documents of the written proceedings. The Greek case had been presented on May 23, 1924. In January, 1925, the British Government submitted its counter-case, and the Greek Government a reply and the British Government a rejoinder. In the further consideration of the case on its merits, Deputy-Judges Beichmann, Negulesco and Yovanovitch replaced Judges de Bustamante, Moore and Pessôa, all of whom had sat when the court delivered its previous judgment on the plea to the jurisdiction. M. Caloyanni sat as a Greek national judge. M. Kap-sambelis represented the Greek Government as agent, and MM. Politis and H. G. Purchase appeared as counsel for Greece, Sir Hamar Greenwood having been unable to appear. Mr. R. V. Vernon, vice Sir Cecil Hurst, acted as agent for the British Government, and Sir Douglas Hogg, K. C., Attorney-General, and Mr. Alexander P. Fachiri, appeared as counsel.

Argument of the case on its merits was begun on February 10, 1925, and continued on February 11, 12, 13 and 14. An interesting point arose when objection was taken to the Greek counsel's quoting from the English Parliamentary Debates (Hansard), copies of which had been communicated; but the court overruled the objection after withdrawing to consider the question. Sir Douglas Hogg asked the court to say that the rules of evidence "which are established in every civilized jurisprudence, ought to be observed not less but more closely by an international court, which ought to set an example to the courts of the world;" but the actual ruling of the court in this instance did not relate to rules of evidence in general.¹⁸ Counsel for the British Government also took exception to the inclusion of certain documents in the Greek case and in the annex to the Greek case because they were the result of interviews held and letters written "without prejudice."¹⁹ This led M. Politis to object to the reflections alleged to be contained in the statement of this exception. The final result was that the representatives of the two governments agreed on the suppression of various parts of the documents which had been submitted to the court.²⁰

The Greek contention was that the British Government as mandatory for Palestine was bound to respect the Mavrommatis concessions, to pay compensation for having rendered their realization impossible, and to pay £121,045 with interest at six per cent to acquit its obligation. The British

¹⁷ Publications of the Court, Series A, No. 2. See the comment in this JOURNAL, Vol. 19, p. 48; Fachiri, *The Permanent Court of International Justice* (1925), pp. 203-213. The concessions at Jaffa were eliminated from the consideration of the case on the merits.

¹⁸ Publications of the Court, Series C, No. 7-II, p. 33. The Rules of Court (Articles 47-55) adopted on March 24, 1922, deal with the court's reception of evidence.

¹⁹ On the English law, see *La Roche v. Armstrong*, [1922] 1 K.B. 485. See also Wigmore, *Evidence*, § 1061.

²⁰ See Publications of the Court, Series C, No. 7-II, p. 355.

contention was that the concessions were invalid and not entitled to recognition under Protocol XII annexed to the Treaty of Lausanne;²¹ that otherwise the British Government had not with respect to these concessions violated its international obligations under Article 11 of the mandate;²² that the concessionary contracts had not begun to be put into operation and hence did not fall within provisions of the protocol relating to readaptation; that the concessions were to be maintained without readaptation unless their dissolution should be requested, in which case Mavrommatis would be entitled to an equitable indemnity; and that the compensation claimed was unreasonable and excessive. In its reply, the Greek Government insisted on the readaptation or alternative compensation.

The judgment was handed down on March 26, 1925.²³ The court was first careful to define the issues and the basis of its competence to deal with them. Its jurisdiction was said to be limited "to cases where M. Mavrommatis' concessions have been affected by the acts contemplated by Article 11 of the mandate, in so far as such are contrary to the obligations contracted under Protocol XII." Under Article 26 of the mandate, the court was to deal with a dispute with reference to Article 11 of the mandate. This latter article confers on the mandatory government the power, "subject to any international obligations accepted by the mandatory," to take certain measures with respect to natural resources and public utilities. The only such "international obligation" was contained in Protocol XII, which the court refused to supplement with "principles taken from general international law." The court had to say (1) whether the Mavrommatis concessions were valid, (2) whether the granting of the Rutenberg concessions by the British Government was a violation of an international obligation for which damages should be paid to Mavrommatis, and (3) whether the Mavrommatis concessions fall under Articles 4 and 5 of the Protocol XII relating to readaptation, or under Article 6 relating to dissolution with compensation. For the last question, the court's competence was derived from the parties' agreement contained in the written proceedings and not from Article 26 of the mandate.

The validity of the Mavrommatis concessions was attacked on the ground that M. Mavrommatis was incorrectly described in the concession as an Ottoman subject, that this was essential error, and that the protocol did not apply. But the court found that "the error can only relate to one of the attributes of the concessionaire,"²⁴ and this attribute lost its practical signif-

²¹ For the text, see 28 League of Nations Treaty Series, p. 203; British Treaty Series, No. 16 (1923), Cmd. 1929, p. 203. The protocol is entitled "Protocol Relating to Certain Concessions Granted in the Ottoman Empire," and was signed by the British Empire, France, Italy, Greece, Roumania, the Serb-Croat-Slovene State and Turkey.

²² For the text of the mandate, see League of Nations Official Journal, August, 1922, p. 1007.

²³ Publications of the Court, Series A, No. 5.

²⁴ The American law of contracts would not be different. 3 Williston, Contracts (1924), § 1569.

icance in the provisions for the formation of an Ottoman company and the jurisdiction of the Ottoman courts. Nor did the misdescription prevent the concessions from being recognized as held by a subject of Greece rather than of Turkey, so as to fall within Article 9 of the protocol.

With regard to the relation between the Rutenberg concession granted by British Crown Agents for the Colonies on behalf of the High Commissioner for Palestine on September 21, 1921, and the Mavrommatis concessions, some overlapping had been admitted; but the British contention was that an article in the conditions attached to the Rutenberg contract prevented this from being a violation. In this article (Article 29) it was agreed that on the request of M. Rutenberg's company the High Commissioner would annul any valid preëxisting inconsistent concession, paying fair compensation. The court construed this to oblige M. Rutenberg to respect any such concession which he did not request to be annulled, and it found satisfactory evidence that M. Rutenberg and the Palestine Electric Corporation, Ltd., which he had formed, had renounced all right to request annulment of the Mavrommatis concessions and had agreed not to oppose Mavrommatis' proceeding with his concessions. Yet for a period prior to this renunciation there had been a possibility of such annulment. If this was provided for under the defunct Treaty of Sèvres,^{*} it was not provided for in Protocol XII which clearly provides (in Article 9) for the subrogation of successor states, effective in Palestine from October 30, 1918. Hence "so long as M. Rutenberg possessed the right to require the expropriation of the Mavrommatis concessions," this part of his contract was contrary to Great Britain's international obligation under Protocol XII.

The violation being clear, it remained for the court to say whether M. Mavrommatis had suffered loss which would entitle him to compensation. It was unable to find that actual expropriation had occurred, as the Greek Government contended; nor was it able to say that execution had been rendered impossible by reason of the Rutenberg contract. M. Mavrommatis may have lost financial support, but this was not a clear result of the violation of the British obligation. Too many other questions had to be faced. Hence the court concluded that no annulment had taken place and that no loss had been suffered for which compensation was to be awarded.

The question remained, on the submission by agreement of the parties, whether M. Mavrommatis was entitled to the benefit of the provisions for readaptation of his concessions under Article 4 of the Protocol XII, or merely to the benefit of the provisions for equitable compensation, after requesting dissolution, for survey and investigation works under Article 6. This depended on whether at the date of the protocol, July 24, 1923, the concessionary contracts had "begun to be put into operation [*reçu un commencement d'application*]" within the terms of Article 6. While M. Mavrommatis

^{*} See Article 311 of the treaty between the Allied Powers and Turkey, signed at Sèvres on August 10, 1920, printed in Supplement to this JOURNAL, Vol. 15, p. 270.

had not begun actual work of construction, he had submitted plans and designs within time limits set by his contract, he had obtained credits, and he had availed himself of clauses in his contracts to request extensions of time; if all that he had done had been for the purpose of rendering his concessions unassailable, it was also in fulfilment of the contract. The court concluded therefore that M. Mavrommatis' concessions fell under Article 4 of the protocol and "that they should be brought into conformity with the new economic conditions by means of readaptation." Determination of the method of readaptation did not fall within the court's competence. In reaching its conclusion, the court referred to the fact that during the negotiations at the Conference of Lausanne,²⁶ the term "*commencement d'application*" had been substituted for a previously used expression "*commencement d'exécution*," and "application" was thought to be a "more elastic and less rigid term" than "execution."

In sum, therefore, the court held that the concessions were valid; that in granting the Rutenberg contract, the British Government had not conformed to its international obligations mentioned in Article 11 of the mandate and contracted in Protocol XII of Lausanne; that M. Mavrommatis had suffered no loss from this action; that the Greek claim for indemnity was dismissed; and that M. Mavrommatis was entitled to a readaptation of his concessions under Article 4 of the Protocol XII of Lausanne. In the first, second and fifth of these conclusions, the court was unanimous; only Judge Altamira dissented from the third and fourth conclusions. In view of the last holding, it is difficult to share Professor Borchard's view that the result is "not far different from that to which the court would have come by adopting the view of the minority judges at the first hearing,"²⁷ for presumably negotiations have since proceeded for readaptation.

POLISH POSTAL SERVICE IN DANZIG

By the Treaty of Versailles of June 28, 1919, the Principal Allied and Associated Powers undertook to establish the Free City of Danzig to "be placed under the protection of the League of Nations" (Article 102), and to negotiate a treaty between the Polish Government and the Free City of Danzig with the object (among others) of ensuring to Poland the control and administration of postal communication between Poland and the Port of Danzig (Article 104). Such a treaty, called a convention, was signed at Paris on November 9, 1920.²⁸ Meanwhile a provisional agreement had been

²⁶ In a previous instance, the court has studied negotiations antedating the signature of a treaty. See Advisory Opinion No. 3, in Publications of the Court, Series B, No. 3, p. 41. However, Sir Douglas Hogg (British Empire) opposed this practice very vigorously in his statement before the court on October 26, 1925, with reference to the request for an advisory opinion concerning Article 3 of the Treaty of Lausanne.

²⁷ Edwin M. Borchard, "The Mavrommatis Concessions Cases," this JOURNAL, Vol. 19, pp. 723, 735.

²⁸ 6 League of Nations Treaty Series, p. 189.

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signed by Poland and Danzig on April 22, 1920. The Convention of Paris (Articles 29-32) dealt with the Polish postal service in Danzig, and provided (Article 32) for a special convention dealing with postal tariffs and the necessary detailed arrangements. Such a convention was signed at Warsaw on October 24, 1921, generally called the Warsaw Agreement. This agreement, more particularly Articles 149 and 150, envisages an independent Polish postal service in the port of Danzig, extending "to all classes and branches of the traffic services and of the technical and administrative services and the installations necessary for such services," reserving various questions for special arrangements to be later made (Article 168), as well as certain outstanding questions for decision by the High Commissioner (Article 240). Under the provisions of the Paris Convention, Poland acquired premises in the Heveliusplatz in Danzig, on March 9, 1922. By Article 103 of the Treaty of Versailles all differences between Poland and the Free City, arising under the Treaty of Versailles "or any arrangements or agreements made thereunder," were to be dealt with "in the first instance" by the High Commissioner appointed by the League of Nations; and by Article 39 of the Paris Convention the two parties retained a right of appeal to the Council of the League of Nations.²⁹

The practical problems of the postal situation were the subject of extensive negotiations, in the course of which divergences in the views of the two governments were not removed. On January 5, 1925, after previous notice given to the President of the Senate of the Free City, Poland proceeded to set up a number of letter-boxes bearing Polish inscriptions in certain streets of Danzig.³⁰ This led to a protest by the Senate of the Free City, and the ensuing difference was submitted to the High Commissioner, Mr. M. S. MacDonnell, who, on February 2, 1925, rendered an opinion to the effect that the Polish service should be confined to the one office in the Heveliusplatz; that the use of letter-boxes or postmen elsewhere was inadmissible and contrary to a decision of the High Commissioner, then General Haking, of May 25, 1922;³¹ and that the one office was limited to use by the Polish authorities and to use for through overseas mails. Poland then appealed to the Council of the League of Nations, which on March 13, 1925, adopted a resolution requesting the court to give an advisory opinion on the following questions:³²

²⁹ A new procedure for handling disputes between Poland and the Free City of Danzig has recently been elaborated. League of Nations Official Journal, July, 1925, pp. 880 ff.

³⁰ The painting of these boxes in black, white and red colors, as formerly used by Germany, was reported by the High Commissioner as having taken place on January 7, and created an unfortunate incident. The High Commissioner's report to the Secretary General of the League of Nations was dated January 17, 1925.

³¹ The text of the decision of May 25, 1922, is published in the Decisions of the High Commissioner, 1922, p. 15. These decisions are published in annual volumes, in German and English.

³² League of Nations Official Journal, April, 1925, p. 472.

(1) Is there in force a decision of General Haking which decides . . . the points at issue regarding the Polish postal service, and, if so, does such decision prevent reconsideration by the High Commissioner or the Council of all or any of the points in question?

(2) If the questions set out at (a) and (b) below have not been decided by General Haking,

(a) Is the Polish postal service at the Port of Danzig restricted to operations which can be performed entirely within its premises in the Heveliusplatz, or is it entitled to set up letter-boxes and collect and deliver postal matter outside those premises?

(b) Is the use of the said service confined to Polish authorities and officials, or can it be used by the public?

The request was communicated to the court on March 14, and the Council requested that on account of the urgency of the question, the matter be considered in an extraordinary session in the hope that the Council might have the opinion at its session in June. The President of the court thereupon summoned an extraordinary session for April 14, 1925, and on that date seven judges were present and for the first time all four of the deputy-judges, the latter replacing Judges de Bustamante, Moore, Nyholm and Pessôa.

Notice of the request had been sent to all members of the League of Nations, to the states mentioned in the Annex to the Covenant,³³ to other states on the court's list, and to the Senate of the Free City of Danzig "as being likely to be able to furnish information." The Polish Government and the Senate of the Free City each submitted a memorandum to the court, and later a supplementary note and later a reply, but neither requested an oral hearing. The opinion, therefore, refers to the Polish Government and the Senate of the Free City as "Parties," though in a strict sense there can be no parties when an advisory opinion is requested. Many additional documents were submitted by the Secretary-General of the League of Nations as directed by the Council. The opinion was handed down on May 16, 1925.³⁴

The court addressed itself to the first question put by the Council as a preliminary question relating to the doctrine of *res judicata*. The court found that a decision of the High Commissioner of August 15, 1921,³⁵ drawing a red line to indicate an area within which railway lines were to be considered to serve the port, had not defined the territorial limits of the port of Danzig for postal purposes. Reliance was placed in argument on two other decisions of the High Commissioner, on May 25, 1922 and December 23, 1922,³⁶ and on a letter written by the High Commissioner on January 6, 1923. The decision of May 25, 1922, had been rendered with respect to questions which did not cover points now in dispute. Since the High Commissioner was exercising a judicial function, he could not go beyond the questions sub-

³³ Except possibly the Hedjaz. See Publications of the Court, Series E, No. 1, p. 261.

³⁴ Publications of the Court, Series B, No. 11.

³⁵ Decisions of the High Commissioner, 1921, p. 15.

³⁶ *Ibid.*, 1922, p. 56.

mitted; nor could any personal opinion which he later expressed vary the operative effect of what he had decided. Similarly, the decision of December 23, 1922, did not cover the subject-matter of the present dispute; but in the statement of reasons for his decision, General Haking had gone beyond the dispute before him and had expressed an opinion on which Danzig placed great reliance. Poland had appealed against this decision, but the appeal was not pressed after an agreement which purported to replace the decision but which provided that "this practical settlement of the question does not in any way alter the legal position." The court did not pronounce upon the legal effect of such a "replacement," for it found that the reasons given by General Haking had not added to the operative effect of his decision of the dispute before him. While all parts of a judgment should be considered in determining the scope of its operative portion, as decided by the Permanent Court of Arbitration in the Pious Fund Case, it does not follow that every reason given constitutes a decision. Nor is Danzig's case helped by the insistence that General Haking's decision be treated as a declaratory judgment; even so, the explanation of the declaration would not be part of the declaration itself. In General Haking's letter of January 6, 1923, he had expressed an opinion as to the effect of his previous decision. While he was competent to give a decision interpreting a previous decision, the essentials of judicial procedure would have to be followed in doing so. But the letter in question did not comply with this necessity, and expressed only a personal opinion. The court concluded, therefore, that there was no decision of General Haking in force dealing with the extent of the Polish postal service outside the Heveliusplatz, or with its use by the public as distinguished from Polish authorities and offices.

To answer questions 2 (a) and 2 (b), the court reviewed the applicable treaty texts and found no trace of any provision confining the operations of the Polish postal authorities to the inside of its postal building. The texts had used the expression "port of Danzig" which must be a territorial conception; they failed to draw the territorial limits, but this was a phase of the question which was not before the court. No restriction had been placed on the use of the postal service by the public in the ordinary way, while the Warsaw Agreement (Article 168) had envisaged such use. Within the port, the postal service may clearly be open to public use. Danzig's insistence on a strict construction in her favor could not be accepted by the court, for "the rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed." Hence the court concluded that within a territorial area, which the court could not delimit but which was known as the port of Danzig, the Polish postal service is entitled to set up letter boxes and collect and deliver postal matter outside its premises in the Heveliusplatz, and is not restricted to operations which can be performed entirely within those premises; and that the use of such service may be open to the public.

The opinion, of which the English text is authoritative,³⁷ was at once forwarded to the Council of the League of Nations. On June 11, 1925, the Council "adopted" the opinion,³⁸ and decided "that the boundaries of the port of Danzig shall be traced for the purposes of the Polish postal service with due regard to the considerations put forward in the opinion of the court," and asked a committee of four experts to submit proposals regarding the delimitation of the port of Danzig. This committee was eventually composed of M. Hostie, a member of the legal subcommittee of the Advisory and Technical Committee for Communications and Transit, M. Montarroyos, technical adviser to the Brazilian Delegation in Geneva, Colonel de Reynier, formerly President of the Danzig Harbor Board, and M. Schreuder, Head of the Post Office at Amsterdam. The committee reported to the Council on August 19, 1925; it reached the conclusion that the port in this postal sense should include not merely the area occupied by its technical installations but also the area in which its economic constituents are concentrated. The lines proposed for bounding the latter should be subject to revision every five years. The proposed boundary was also drawn in contemplation of a settlement of details as to deliveries to certain official and unofficial establishments outside the area included, and failing such a settlement, the boundary should be reconsidered. The committee's conclusions, except the last, were approved by the High Commissioner. Both the Polish Government and the Senate of the Free City submitted observations to the Council. At the meeting of the Council on September 19, 1925, M. Sahm, representing Danzig, asked the Council "to entrust the duty of defining and delimiting the Port of Danzig to the Hague Court, either for decision or advisory opinion," preferably a decision. The Council did not accede to this request, but adopted the delimitation proposed by the committee of experts,³⁹ subject to possible revision at the end of five years, and invited the parties to enter into further negotiations for carrying out Article 168 of the Warsaw Agreement.⁴⁰

EXPULSION OF THE ŒCUMENICAL PATRIARCH

On February 11, 1925, the Prime Minister of Greece appealed to the Council of the League of Nations under paragraph 2 of Article 11 of the Covenant, with reference to a dispute between Greece and Turkey arising out of the alleged expulsion from Constantinople of His Holiness Monseigneur Constantin, Œcumenical Patriarch and Archbishop of Constantinople. The Greek Government considered this expulsion to constitute a serious in-

³⁷ The English text is authoritative only for Advisory Opinions Nos. 2, 3, 5, 6, and 11. The French text is authoritative for all the judgments to date, and for all other advisory opinions.

³⁸ See League of Nations Official Journal, July, 1925, pp. 882-887.

³⁹ For the actual line, see League of Nations Document, C/430. 1925. I.

⁴⁰ League of Nations Document, C/35th Session P. V. 13 (1), p. 40.

fringement of the Lausanne agreements⁴¹ regarding the constitution of the Patriarchate and its activities, as well as an infringement of Article 12 of the convention for the exchange of Greek and Turkish populations,⁴² and an infringement of the mixed commission's decisions of January 28, 1925, and of the decisions taken by the Council of the League of Nations at Brussels on October 31, 1924.⁴³ On February 23, 1925, His Holiness addressed a letter from Salonika to the Secretary-General of the League of Nations, forwarding a memorandum concerning the Œcumenical Patriarchate and the expulsion of the Patriarch.⁴⁴ On March 1, 1925, the Turkish Minister of Foreign Affairs addressed to the Secretary-General of the League of Nations an acknowledgment of the receipt of a copy of the Greek appeal, setting forth the Turkish version of the facts, insisting that the mixed commission was exclusively competent and had finally acted, and that the expulsion was in execution of the decision of the mixed commission. It was contended that the position of the Patriarchate is for Turkey a domestic matter, and that the exchange effected was properly a matter for the mixed commission to deal with. The Turkish Government therefore found itself unable to agree to these questions being laid before the Council of the League of Nations. Furthermore, it found Article 11 of the Covenant inapplicable and asked that the Council of the League of Nations refuse to concede the Greek appeal. On March 16, 1925, the Greek Government submitted to the Council a reply to the letter of the Turkish Minister of Foreign Affairs.

On March 14, 1925, the question was considered by the Council of the League of Nations in the presence of a Greek representative sitting on the Council, but without any representative of Turkey being present. The Council's *rapporteur*, Viscount Ishii (Japan), proposed that the Council ask the Permanent Court of International Justice for an advisory opinion on the following question:

Is the Council of the League of Nations empowered by the Covenant to discuss the question placed on its agenda at the request of the Greek

⁴¹ Reliance was placed on the proceedings at a session of the Lausanne Conference on January 10, 1923. See British Parliamentary Papers, Turkey No. 1 (1923), Cmd. 1814, p. 327. The Turkish demand for the removal of the Patriarchate from Constantinople had been withdrawn on the understanding that "the Patriarchate was no longer to take any part whatever in affairs of a political or administrative character, and was to confine itself within the limits of purely religious matters."

⁴² For the text of this convention, see 32 League of Nations Treaty Series, p. 75; British Treaty Series, No. 16 (1923), Cmd. 1929, p. 174.

⁴³ League of Nations Official Journal, November, 1924, pp. 1663-1670.

⁴⁴ League of Nations Document, C. 129. 1925. VII. See also, A. Rustem Bey, "The Future of the Œcumenical Patriarchate," 3 Foreign Affairs 604; Karl Strupp, "Le Différend Gréco-Turc sur l'Éloignement du Patriarche de Constantinople," *Revue de Droit International de Sciences Diplomatiques, Politiques et Sociales*, 3d year, p. 11; Ténékidès, "L'Expulsion du Patriarche Œcuménique et le Conflit Gréco-Turc," 7 *Revue Générale de Droit International Public* (2 ser.), p. 102.

Government as set forth in the said Government's telegram of February 11, 1925, to the Secretary-General of the League of Nations, or is it not so empowered for the reasons given in the Turkish Government's letter of March 13, 1925?

After some discussion in the Council, it was agreed to modify the question to be submitted to the court, and the following text was agreed on:

Do the objections to the competence of the Council raised by the Turkish Government in its letter of March 1, which is communicated to the Court, preclude the Council from being competent in the matter brought before it by the Greek Government by its telegram to the Secretary-General of the League of Nations dated February 11, 1925?

At the time of adopting a resolution embodying the request for an advisory opinion upon this question, the Council expressed a "sincere hope that it would be possible for the question at issue to be settled by private negotiation, perhaps with the good offices of the neutral members of the mixed commission."⁴⁵ The Council's request was communicated to the court on March 21, 1925. Notice of the request was at once sent to all members of the League of Nations, to the states mentioned in the Annex to the Covenant,⁴⁶ to other states on the court's list, and to Turkey; and the request figured in the agenda of the court for the ordinary session beginning on June 15, 1925.

On June 1, 1925, the Greek Government informed the Council that the private negotiations had proved successful and that the Greek Government desired therefore to withdraw its application of February 11, 1925. The Greek Patriarch had abdicated, and it was for the Holy Synod to proceed to the election of a new patriarch. On June 8, 1925, the Council withdrew the question from its agenda. This made it unnecessary to have an advisory opinion as to the Council's competence; the Council therefore instructed the Secretary-General to inform the court that it was no longer necessary for the Council to ask the court to give the opinion contemplated by the resolution of March 14.⁴⁷ The court received this notice on June 12, 1925, and the question was at once removed from the list of questions before the court. At the public sitting on June 19, 1925, the President made announcement of this fact.

There can be little question that in this case, although no action was taken by the court, the fact of the court's existence and the fact that its opinion was requested, assisted the Greek and Turkish Governments in reaching a final and satisfactory settlement.

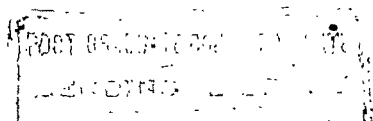
GERMAN INTERESTS IN POLISH UPPER SILESIA

When the boundary between Germany and Poland in Upper Silesia was finally settled, the two governments entered into an elaborate convention at

⁴⁵ League of Nations Official Journal, April, 1925, p. 488.

⁴⁶ Except possibly the Hedjaz. See Publications of the Court, Series E, No. 1, p. 261.

⁴⁷ League of Nations Official Journal, June, 1925, p. 855.



Geneva on May 15, 1922.⁴⁸ Article 23 of this convention provides (translation):

1. Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments, they shall be submitted to the Permanent Court of International Justice.

2. The jurisdiction of the Germano-Polish Mixed Arbitral Tribunal derived from the stipulations of the Treaty of Peace of Versailles shall not thereby be prejudiced.

On May 15, 1925, the German Government filed with the Registry of the court an application instituting proceedings concerning certain German interests in Polish Upper Silesia, in conformity with Article 40 of the Statute of the court and Article 35 of the Rules of Court. The German Government stated that the Polish Government had expropriated certain properties of industrial undertakings at Chorzow, and considered that this action constituted a violation of Article 8 of the Geneva Convention, as well as of Articles 92 and 297 of the Treaty of Versailles of June 28, 1919. The German Government also stated that the Polish Government had announced on December 30, 1924, that it had notified its intention of expropriating certain large agricultural properties belonging to twelve proprietors, and it was considered that in ten of the cases the notices thus given constituted violations of various provisions of the Geneva Convention. Accordingly, the German Government requested the court to give judgment that the violations referred to had occurred, and to state what attitude the Polish Government should have adopted in regard to the companies in question. The German case was later slightly modified in the oral proceedings.

The application was communicated to the Polish Government on May 16, 1925, and on June 12 and 18, the Polish Government informed the court that it was compelled to make "certain preliminary objections of procedure and in particular an objection to the Court's jurisdiction to entertain the suit." Dates were set for the filing of documents and the Polish Government filed a case⁴⁹ on June 26, submitting that with reference to the German request as to the factory at Chorzow, the court should declare that it had no jurisdiction, or in the alternative that the application could not be entertained until the German-Polish Mixed Arbitral Tribunal had given judgment; and with respect to the agricultural properties, the court should declare that it had no jurisdiction, or in the alternative that the application could not be entertained. The German Government filed a countercase on

⁴⁸ 9 League of Nations Treaty Series, No. 271. The convention came into force upon the exchange of ratifications at Oppeln, on June 3, 1922.

⁴⁹ The objection filed by Poland was placed on the court's list, and hence Poland submitted a case. Count Rostworowski therefore speaks of Poland as the applicant. Publications of the Court, Series A, No. 6, p. 31. But in the introduction to the judgment, the court names Germany as applicant and Poland as respondent; and the operative part of the judgment declares that Germany's application is admissible.

July 10. Various additional documents were filed with the court. Count Rostworowski was chosen by Poland to sit as a national judge in the case, and M. Rabel was chosen by Germany to sit in that capacity. Judge Moore was replaced by Deputy-Judge Wang in the consideration of the case. At the public sittings of the court on July 18 and July 20, oral arguments were made by MM. Mrozowski and Limburg, agents for the Polish Government, and by Professor Kaufmann, agent for the German Government.

The court handed down its judgment on August 25, 1925.⁵⁰ The two parties had agreed that Article 23 of the Geneva Convention falls within the category of "matters specially provided for in treaties and conventions in force," mentioned in Article 36 of the court Statute. The Polish Government did not question Germany's compliance with Articles 35 and 40 of the court Statute.⁵¹ The court decided to consider separately the Polish submissions regarding the factory at Chorzow and its submissions regarding the agricultural estates.

As to that part of the case relating to the factory at Chorzow, the Polish Government first made a plea to the jurisdiction of the court, contending (a) that the existence of a difference of opinion within Article 23 of the Geneva Convention had not been established; (b) that the dispute was not one of those contemplated under Article 23; and (c) that the German Government had in effect asked for an advisory opinion which could not be given at the request of a single state. In dealing with this plea to the jurisdiction, the court first called attention to the special character of Article 23 which fails to provide that diplomatic negotiations must first be tried. Hence under Article 23, recourse may be had to the court as soon as one of the parties considers that a difference of opinion exists. Such a difference is shown to exist when one government points out that the attitude adopted by the other conflicts with its own. It was urged that this difference of opinion must relate both to the construction and application of the articles in question. The court thought that this provision in both ordinary and legal language might mean construction or application. Poland then contended that the difference did not fall within Article 23 because it did not relate to Articles 6 to 22 of the Geneva Convention, but solely to the interpretation of a Polish law of 1920. Poland's objection had been made prior to any proceedings with

⁵⁰ Publications of the Court, Series A, No. 6.

⁵¹ At the time Germany was not a member of the League of Nations and not a party to the protocol of the court. She did not file with the court the declaration mentioned in the Council's resolution of May 17, 1922, but the court decided that this was not necessary. See Publications of the Court, Series E, No. 1, p. 261. Article 35 of the court statute provides that "when a State which is not a Member of the League of Nations is a party to a dispute [submitted to the court], the Court will fix the amount which that party is to contribute towards the expenses of the Court." It is notable that with reference to the Wimbledon Case, decided on August 17, 1923, the court decided on September 13, 1923, not to demand any contribution from Germany. See Publications of the Court, Series E, No. 1, p. 256.

reference to the merits, and the court could not in any way prejudge its decision on the merits; but the court felt bound to dispose of the objection even if it should have to touch on subjects belonging to the merits, with the *caveat* that its freedom be maintained. It was concluded that the differences did fall within Article 23, and that the court's jurisdiction was not affected by the fact that the validity of rights involved was disputed on the basis of texts other than the Geneva Convention.

The Polish Government submitted as an alternative that the German application with reference to the factory at Chorzow could not be entertained until the German-Polish Mixed Arbitral Tribunal in Paris had given judgment with reference to a claim submitted to that tribunal on November 10, 1922, by the *Oberschlesische Stickstoffwerke* Company. It was important to say whether the Polish submission was a defense of *fin de non-recevoir*, or a plea of *litispendence*. The court thought it was not the latter, and it was considered a much disputed question whether the doctrine of *litispendence* could be invoked in international relations in the sense that it is applied by national courts; but as a plea of *litispendence*, the plea would fail because the actions were not identical and the courts were not coördinate. Nor could the *fin de non-recevoir* be maintained on the ground that the German Government was seeking an advisory opinion, for the German Government had asked for a decision and the interrogative form of this request did not take its submission outside the scope of Article 23.

With reference to the large agricultural estates, Poland's plea to the jurisdiction also failed. Her own contentions showed that a dispute had arisen whether the Polish Government had given notice in accordance with the terms of the convention or had actually expropriated. There was an undeniable difference of opinion, falling under Article 23 of the convention, and the court, therefore, has jurisdiction. Likewise, the Polish argument as to the inadmissibility of the application with respect to large agricultural estates failed. It was only contended that six of the ten proprietors to whom notice was alleged to have been given had had recourse to the German-Polish Mixed Arbitral Tribunal, so that as to the other alleged expropriations, the Polish Government itself seems to have admitted that a difference existed with respect to which the court would certainly have jurisdiction.

The court decided, therefore, that both with reference to the application relating to the factory at Chorzow, and with reference to the application relating to agricultural estates, the Polish plea should be dismissed, and the German application should be declared admissible and reserved for judgment on the merits. The President was instructed to fix the times for the deposit of further documents of the written proceedings. The opinion was unanimous, except for the dissent of Count Rostworowski, who filed a separate opinion. Judge Anzilotti also filed certain additional observations in which he disagreed with a statement in the judgment to the effect that the differences of opinion contemplated by Article 23 might include differences of

opinion as to the extent of the sphere of application of Articles 6-22. He cited the court's judgment relating to the Mavrommatis Concessions in Palestine,⁵² and concluded that the court's power to deal with the latter differences was derived from its own Statute, and not from Article 23 of the Geneva Convention. Count Rostworowski stood out for a strict application of Article 23 of the Geneva Convention. He thought that the jurisdiction of the Permanent Court of International Justice could not overlap that of the Mixed Arbitral Tribunal in Paris. With regard to the agricultural estates, he found no previously existing dispute between the two governments.

Following the rendition of the court's judgment, on August 25, 1925, the German Government filed a second application in conformity with Article 40 of the court's Statute, stating that since its earlier application, the German Government had received new information on which it reached the opinion that twelve and not ten of the cases of expropriation of large agricultural estates fell within the prohibition of Articles 6-22 of the Geneva Convention. The German Government therefore asked that its second application be joined with its first, and that the court declare that the liquidation of the rural estates in the two additional cases would constitute a violation of Article 6 and other articles of the Geneva Convention. The case now remains to be heard on its merits, and the court is scheduled to meet in February, 1926, for that purpose.

ARTICLE 3, PARAGRAPH 2, OF THE TREATY OF LAUSANNE (FRONTIER
BETWEEN TURKEY AND IRAQ)

While the Conference of Lausanne was in session, on January 23, 1923, Lord Curzon (British Empire) stated his intention to refer to the Council of the League of Nations the case of the disputed frontier between the Turkish domains in Asia Minor and the mandated territory of Iraq.⁵³ Such reference was actually made on January 25, 1923.⁵⁴ On January 30, 1923, Lord Balfour (British Empire) made a declaration to the Council of which the Council took note.⁵⁵ A treaty of peace between the British Empire, France, Italy, Japan, Greece, Roumania, and the Serb-Croat-Slovene State, of the one part, and Turkey, of the other part, was signed at Lausanne on July 24, 1923, and was ratified on August 6, 1924.⁵⁶ This treaty provides, with respect to the frontiers of Turkey with Iraq (Article 3, paragraph 2):

(2) *With Iraq.* The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months.

⁵² Publications of the Court, Series A, No. 2.

⁵³ British Parliamentary Papers, Turkey No. 1 (1923), Cmd. 1814, pp. 400-404.

⁵⁴ League of Nations Official Journal, March, 1923, p. 249.

⁵⁵ *Ibid.*, p. 201.

⁵⁶ 28 League of Nations Treaty Series, p. 11.

In the event of no agreement being reached between the two governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations.

The Turkish and British Governments reciprocally undertake that, pending a decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision.

In Protocol XIV, also signed at the Lausanne Conference,⁵⁷ the British and Turkish Governments agreed that negotiations with a view to this arrangement should follow an evacuation agreed upon and that the period of nine months should begin to run with the opening of the negotiations. The evacuation was completed on October 4, 1923, and the negotiations began on the following day. The period of nine months therefore expired on July 5, 1924, by which time no agreement had been reached.

On August 6, 1924, the British Government requested that the following item be placed on the agenda of the Council of the League of Nations:⁵⁸ "Iraq Frontier: Article 3 (2) of the Treaty signed at Lausanne on July 24, 1923." The British Government filed a memorandum with the Council on August 14, 1924, and the Turkish Government filed a memorandum on September 5, 1924. On August 30, 1924, the Council invited the Turkish Government to be represented on a footing of equality at its discussions of this question;⁵⁹ this invitation was accepted and on September 20, 1924, Fethi Bey took a seat on the Council for a discussion of the matter. On September 25, M. Branting (Sweden), acting as *rapporteur*, asked the question, "How do the British and Turkish delegations understand the reference to the Council provided for in Article 3 of the Treaty of Lausanne? . . . It is obviously important that the Council should know exactly the part that it has to play." To this Lord Parmoor (British Empire) replied: "The British Government does regard the treaty as placing the Council in the position of an arbitrator, whose ultimate award must be accepted by both parties. Therefore, in the most explicit terms, I desire to say that the British Government would consider itself bound by the decision of the Council." Fethi Bey replied: "The Turkish Government recognizes the full powers of the Council as conferred upon it by Article 15 of the Covenant, which is applicable to such disputes brought before the Council." M. Branting took it that both parties "were willing to recognize the Council's decision."⁶⁰ On September 30, M. Branting reported that he had asked Fethi Bey for an undertaking to accept the Council's recommendation, and

⁵⁷ Entitled "Protocol Relating to the Evacuation of the Turkish Territory occupied by the British, French and Italian Forces." See British Treaty Series, No. 16 (1923), Cmd. 1929, p. 215.

⁵⁸ League of Nations Official Journal, October, 1924, p. 1465.

⁵⁹ *Ibid.*, p. 1292.

⁶⁰ League of Nations Official Journal, October, 1924, pp. 1337-9.

that Fethi Bey had replied "that on this point there was no disagreement between his government and the British Government and that he would be prepared to make a declaration in the sense referred to." M. Branting thought that this removed the doubts as to the rôle of the Council.⁶¹ Thereupon the Council decided to set up a commission of investigation.

A question later arose as to the maintenance of the *status quo*, which necessitated the drawing of the so-called "Brussels Line" by the Council on October 29, 1924.⁶² The commission of investigation reported to the Council on July 16, 1925.⁶³ The discussion of the matter was resumed by the Council on September 3, 1925, Mr. Amery, Secretary of State for the Colonies, representing the British Empire, and Tewfik Rouchdy Bey representing Turkey. On September 4, the Council decided to set up a subcommittee to study the situation, consisting of M. Unden (Sweden), M. Quiñones de León (Spain), and M. Guani (Uruguay). On September 19, 1925, this subcommittee reported that two preliminary questions of a purely juridical character would have to be disposed of, and the Council accepted the recommendation that these be referred to the court for an advisory opinion.⁶⁴ The questions submitted were:

- (1) What is the character of the decision to be taken by the Council in virtue of Article 3, paragraph 2 of the Treaty of Lausanne — is it an arbitral award, a recommendation, or a simple mediation?
- (2) Must the decision be unanimous, or may it be taken by a majority? May the representatives of the interested parties take part in the vote?

With reference to these questions, Tewfik Rouchdy Bey expressed the view that an earlier draft of the second paragraph of Article 3 threw light on the meaning of the paragraph,⁶⁵ and in that light he was clearly of opinion that the second paragraph referred to the exercise of "the good offices of the Council" and not to a decision given by the Council "without the parties' consent." He placed special reliance on a statement made by Lord Curzon at the Lausanne Conference on January 23, 1923.⁶⁶ The Turkish Government saw no necessity for referring to the court, and was of opinion that an advisory opinion of the court could not in any way affect the rights of Turkey under the acts of Lausanne, or modify the rôle of the Council laid down by those acts. In spite of this attitude, the Council

⁶¹ *Ibid.*, pp. 1358-1359.

⁶² League of Nations Official Journal, November, 1924, pp. 1659-1662.

⁶³ League of Nations Document, C. 400. M. 147. 1925. VII.

⁶⁴ League of Nations Official Journal, October, 1925, p. 1382.

⁶⁵ For the earlier draft, see British Parliamentary Papers, Turkey No. 1 (1923), Cmd. 1814, p. 688.

⁶⁶ Especially: "Article 5 of the Covenant provides that the decision of the Council upon which the Turkish Government will be represented will have to be unanimous so that no decision can be arrived at without their consent." British Parliamentary Papers, Turkey No. 1 (1923), Cmd. 1814, p. 401.

decided to make the request, and while the record is not quite clear it would seem to have set a precedent as to the Council's power to request an advisory opinion relating to its competence in handling a dispute without the concurrence of the representative of one party to the dispute.⁶⁷

On September 24, 1925, the Council decided to send to Mosul a representative to keep the Council informed of the situation in the locality of the Brussels Line, "in order better to ensure the maintenance of the *status quo* which the two governments have agreed to accept." On September 28, General Laidoner (Esthonia) was appointed as such representative.

The Council's request for the advisory opinion was communicated by the court to the members of the League of Nations, to the states mentioned in the Annex to the Covenant,⁶⁸ to the other states on the court's list, and to Turkey. The Council having intimated a desire to receive the court's opinion at a date which would permit it to resume consideration of the matter in December, 1925, the President of the court convoked an extraordinary session for October 22, 1925. On that date Judges de Bustamante, Moore, Oda and Pessôa were absent, and Deputy-Judges Beichmann, Negulesco and Yovanovitch sat. The British Government had submitted a memorial, and was represented by Sir Douglas Hogg, Attorney General, Sir Cecil Hurst, legal advisor to the Secretary of State for Foreign Affairs, and Mr. Alexander Fachiri. The Turkish Government was not represented by counsel, but the Turkish Government had transmitted officially certain documents. The Turkish Minister of Foreign Affairs, Tewfik Rouchdy Bey, sent a telegram to the Registrar, expressing the view that the questions asked by the Council were of a distinctly political character and could not form the subject of a legal interpretation, and stating that Turkey did not desire to be represented before the court while the questions were being considered. The Turkish Government did, however, subject to the reservations in its telegram, "reply to certain questions which the court had already seen fit to put to it before the hearings," and did furnish the court with copies of certain documents. The court heard oral argument by Sir Douglas Hogg on October 26 and 27.

The court's advisory opinion was handed down on November 21, 1925.⁶⁹ The court traced the text of the treaty through the proceedings of the Lausanne Conference, and reviewed the various proposals which had preceded it, as well as the negotiations which had followed the signing of the treaty and the positions taken before the Council of the League of Nations. The first question to be answered related to the nature of the "decision to be reached" by the Council. This depended first of all on the intention of the contracting

⁶⁷ See Hudson, "The Advisory Opinions of the Permanent Court of International Justice," *International Conciliation*, No. 214 (November, 1925), pp. 349-351.

⁶⁸ Except possibly the Hedjaz. See Publications of the Court, Series E, No. 1, p. 261.

⁶⁹ Publications of the Court, Series B, No. 12.

parties. That the parties clearly intended a final determination of the frontier, "the establishment of a precise, complete and definitive frontier," is indicated by the actual words used, not only in Article 3 but also in Article 16 of the treaty. Indeed the court found Article 3 so clear that it was not necessary to consider the work done in preparation of the Treaty of Lausanne; but as the Turkish Government had cited certain facts connected with the Lausanne negotiations, the court was apparently willing to look to them for light on the construction of Article 3. It examined the statements of Lord Curzon upon which great reliance had been placed, but found that he was not addressing himself to Article 3 for the article did not then exist and was adopted only five months later during the second phase of the Lausanne Conference. Facts subsequent to the signing of the treaty were to be considered only in so far as they were calculated to throw light on the intention of the parties when signing. The Turkish Government had appeared to contend that where several interpretations are admissible, that involving the least obligation should be adopted, and the fact of the Council's request was relied upon as indicating that several interpretations were admissible. The principle was admitted by the court, but found to be inapplicable in this case because the wording of Article 3 is clear.

The definitive settlement of the frontier to be made by the Council might be called an "arbitral award," using that term in a wide sense. But the dispute seems to be governed by considerations not of a legal character, and arbitration in the ordinary sense does not apply. Hence the court refused to be limited by a use of that term. The Council had been entrusted with a power of decision. While the "decision" is not to be a "recommendation" as that term is used in Article 15 of the Covenant, this does not exclude the applicability of that article. Indeed, the "more extensive powers conferred by the parties in this case on the Council merely complete the functions which it normally possesses under Article 15."

Replying to the second question before it, the court expressed the opinion that in a body constituted as is the Council, with a mission to deal with any matter "within the sphere of action of the League or affecting the peace of the world," "observance of the rule of unanimity is naturally and even necessarily indicated." Express provision for such unanimity is to be found in the Covenant, and the British contention that it did not apply in this case was disapproved. The general rule that arbitration tribunals are governed by majority votes⁷⁰ does not apply to a body "already constituted and having its own rules of organization and procedure." While unanimity is required for the decision of the Council, it is "subject to the limitation that the votes cast by representatives of the interested parties do not affect the required unanimity." Such representatives may take part in the vote, for

⁷⁰ See the advisory opinion of the Judicial Committee of the Privy Council in England, with reference to the Irish Boundary Commission, published by the Colonial Office on August 1, 1924. (Cmd. 2214.)

they form part of the Council, and likewise in the deliberations preceding it; but the required unanimity may be had without counting their votes.

This opinion was read in open court on November 21, 1925, and then transmitted to the Council of the League of Nations. It was promptly "adopted" by the Council, which proceeded to take a decision under Article 3 of the Treaty of Lausanne, on December 16, 1925.

PROPOSED SUBMISSION TO THE COURT

At its twenty-fifth session in Geneva, in January, 1925, the Governing Body of the International Labor Office discussed the possible admission of Mexico to membership in the International Labor Organization. The question arose whether a state not a member of the League of Nations could be admitted to membership in the International Labor Organization, and the possibility of seeking the opinion of the court on this question was discussed. The matter was later brought by M. Albert Thomas, Director of the International Labor Office, before the Seventh International Labor Conference in Geneva in June, 1925, but no action was taken.⁷¹

JURISDICTION OF THE COURT

On November 20, 1925, the Hungarian Government deposited with the Secretariat of the League of Nations the Hungarian ratification of the protocol of signature of the court. This protocol has now been signed by 48 members of the League of Nations, of which 37 have ratified it.

On September 25, 1925, M. Hymans, on behalf of Belgium, signed the optional clause annexed to the protocol of signature of December 16, 1920, accepting the compulsory jurisdiction described in Article 36 of the court Statute, in the following terms:

On behalf of the Belgian Government, I recognize as compulsory, *ipso facto* and without special agreement, in relation to any other member or State accepting the same obligation, the jurisdiction of the court in conformity with Article 36, paragraph 2, of the Statute of the court for a period of fifteen years, in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement.⁷²

Belgium is thus the twenty-fourth state to make such a declaration, fifteen states having accepted the court's compulsory jurisdiction unconditionally.⁷³ It seems probable that other states may soon follow suit.⁷⁴

⁷¹ International Labor Conference, Seventh Session, 1925, Report of the Director, pp. 23, 24.

⁷² Journal of the Sixth Assembly of the League of Nations, p. 254.

⁷³ See Hudson, *The Permanent Court of International Justice and the Question of American Participation* (1925), pp. 335-339. Cf., Baker, "The Obligatory Jurisdiction of the Permanent Court of International Justice," *British Year Book of International Law*, 1925, p. 68.

⁷⁴ Apparently such action is contemplated by the Government of Czechoslovakia.

The jurisdiction of the court continues to be enlarged under the provision in Article 36 of the Statute that it shall comprise "all matters specially provided for in treaties and conventions in force." One of the most interesting developments is in connection with the renewal of pre-war arbitration treaties providing for reference to the Permanent Court of Arbitration. On November 9, 1924, Great Britain and Sweden renewed such an arbitration treaty of August 11, 1904, and provided by exchange of notes that in place of reference to the Permanent Court of Arbitration, the reference shall be made to the Permanent Court of International Justice.⁷⁵ A similar exchange of letters took place when on May 13, 1925, Great Britain and Norway renewed their arbitration treaty,⁷⁶ and more recently when Great Britain and the Netherlands renewed their arbitration treaty. On March 18, 1925, the United States and Sweden exchanged ratifications of an arbitration treaty signed on June 24, 1924, with a somewhat similar exchange of notes,⁷⁷ but conditioning the substitution upon favorable action of the United States Senate with respect to a pending proposal for American adhesion to the court protocol. It seems quite clear that if such action becomes general, future resort to the Permanent Court of Arbitration will be much less frequent, and in some measure that body will be superseded by the Permanent Court of International Justice.

For several years past, the Government of the Swiss Confederation has followed an aggressive policy of extending compulsory arbitration and utilizing the Permanent Court of International Justice. It has signed no fewer than thirteen significant treaties to this general end: with Germany, on December 3, 1921;⁷⁸ with Sweden, on June 2, 1924;⁷⁹ with Denmark, on June 6, 1924;⁸⁰ with Hungary, on June 18, 1924;⁸¹ with Brazil, on June 23, 1924;⁸² with Italy, on September 20, 1924;⁸³ with Austria, on October 11, 1924;⁸⁴ with Argentine, on November 17, 1924;⁸⁵ with Japan, on December

⁷⁵ Publications of the Court, Series E, No. 1, p. 419.

⁷⁶ *Ibid.*, p. 433.

⁷⁷ 32 League of Nations Treaty Series, p. 273; U. S. Treaty Series, No. 708. On similar action taken by the United States and other countries, conditioned upon the Senate's giving advice and consent to American adhesion to the court protocol of signature, see this JOURNAL, Vol. 19, p. 64.

⁷⁸ 12 League of Nations Treaty Series, p. 271.

⁷⁹ 33 League of Nations Treaty Series, p. 199.

⁸⁰ 34 League of Nations Treaty Series, p. 175.

⁸¹ *Ibid.*, p. 387.

⁸² 33 League of Nations Treaty Series, p. 415.

⁸³ *Ibid.*, p. 91. See Diena, "*Le Traité de Conciliation et de Règlement Judiciaire entre L'Italie et La Suisse*," 6 *Revue de Droit International et de Législation Comparée* (3d Ser.), pp. 1-16.

⁸⁴ 33 League of Nations Treaty Series, p. 423.

⁸⁵ 12 *Bulletin de l'Institut Intermédiaire International*, p. 318; *Feuille Fédérale*, February 11, 1925, p. 447.

26, 1924;⁸⁶ with Belgium, on February 13, 1925;⁸⁷ with Poland, on March 7, 1925;⁸⁸ with France, on April 6, 1925;⁸⁹ and with Greece, on September 21, 1925. Though the treaties vary, considerably, all of them are designed to realize a general policy formulated in a comprehensive report presented to the Federal Assembly by the Federal Council on December 11, 1919.⁹⁰ The treaty signed by Belgium and Switzerland on February 13, 1925, provides for conciliation of all disputes not settled by diplomatic negotiation, as recommended by the Third Assembly of the League of Nations, and for the submission of all disputes of a legal nature not settled by such conciliation to the court. A novel provision finds place in this treaty, as follows:⁹¹

Article 13. Should one of the contracting parties not accept the proposals of the Conciliation Commission or not come to a decision within the time fixed by that body, either party may refer the dispute, by means of a single application, to the Permanent Court of International Justice, provided that it relates to the interpretation or application of treaties, conventions, or agreements binding the contracting parties or to a universally accepted point of international law.

In the event of a dispute as to whether the matter is suitable for judicial settlement in conformity with the preceding paragraph, the decision shall rest with the Court of Justice.

In placing this treaty before the Belgian Chamber, M. Hymans referred to the Belgian-Swiss treaty of November 15, 1904, withholding from arbitration disputes affecting the respective States' honor and vital interest, as "of the formerly classic type." Such a reservation he said was "hardly in keeping" with the Covenant of the League of Nations and the establishment of the Permanent Court of International Justice.

The whole subject of arbitration treaties has recently been examined by a committee of the first chamber of the Netherlands States General, in the light of the new position created by the Covenant of the League of Nations and the Statute of the court.

Other treaties recently concluded providing for possible reference to the court are: Netherlands and Poland, May 30, 1924, promulgated by the Queen of the Netherlands, May 22, 1925; Denmark and Latvia, November 3, 1924; Germany and Great Britain, December 2, 1924; Czechoslovakia and Poland, April 23, 1925. The convention on conciliation and arbitration signed at Helsingfors on January 17, 1925, by representatives of Esthonia, Finland, Latvia and Poland, contains some interesting provisions for possible reference to the court.⁹² The various documents initialled at Locarno on

⁸⁶ Publications of the Court, Series E, No. 1, p. 422.

⁸⁷ *Ibid.*, p. 423; *Feuille Fédérale*, May 20, 1925, p. 460.

⁸⁸ *Ibid.*, p. 430; *Feuille Fédérale*, May 20, 1925, p. 471.

⁸⁹ *Ibid.*, p. 428; *Feuille Fédérale*, May 20, 1925, p. 450.

⁹⁰ Published as a pamphlet and numbered 1187.

⁹¹ Publications of the Court, Series E, No. 1, p. 423. The original text of the treaty is in the French language.

⁹² 12 *Bulletin de l'Institut Intermédiaire International*, p. 295.

October 16, 1925, and signed at London on December 1, 1925, include arbitration treaties between Germany and France, Germany and Belgium, Germany and Poland, and Germany and Czechoslovakia. These treaties made elaborate provision for the possible use of the Permanent Court of International Justice in connection with the arbitration of disputes.

The court possesses a jurisdiction under the mandates which may prove of great importance in the future. A difference in the texts of the Palestine and East African (Tanganyika) mandates, relating to the court's jurisdiction, was noted by Judges de Bustamante and Moore in their dissenting opinions in the first *Mavrommatis* case,⁹³ and greatly relied upon by Judge de Bustamante. At the sixth session of the Mandates Commission, held in Geneva from June 26 to July 12, 1925, M. Rappard (Switzerland) stated that he had reason to believe that the wording of Article 13 of the British mandate for East Africa, on the one hand, and of the corresponding articles of the other mandates, on the other hand, was due to an accident in the drafting of the Tanganyika mandate. He therefore proposed that the discrepancy be drawn to the attention of the Council with the suggestion that the East African mandate be modified by the omission of the second paragraph of Article 13. His proposal was considered at length by the commission, but was not adopted.⁹⁴

The convention signed at the close of the Second Opium Conference, on February 19, 1925,⁹⁵ follows the lines established by many other international conventions negotiated through the use of the League of Nations machinery, in providing for possible resort to the court. The convention contains the following provisions (Article 32):

4. Disputes which it has not been found possible to settle either directly or on the basis of the advice of the above-mentioned technical body [appointed by the Council of the League of Nations] shall, at the request of any one of the parties thereto, be brought before the Permanent Court of International Justice, unless a settlement is attained by way of arbitration or otherwise by application of some existing convention or in virtue of an arrangement specially concluded.

5. Proceedings shall be opened before the Permanent Court of International Justice in the manner laid down in Article 40 of the Statute of the Court.

7. The parties to a dispute shall bring before the Permanent Court of International Justice any question of international law or question as to the interpretation of the present convention arising during proceedings before the technical body or arbitral tribunal, the decision of which by the Court is, on the demand of one of the parties, declared by the technical body or arbitral tribunal to be necessary for the settlement of the dispute.

⁹³ Publications of the Court, Series A, No. 2, pp. 61, 82.

⁹⁴ Minutes of the Permanent Mandates Commission, Sixth Session, pp. 55-6. League of Nations Document, C. 386. M. 132. 1925. VI.

⁹⁵ League of Nations Official Journal, May, 1925, p. 691. The convention has now been signed by at least thirty-four states or members of the League.

On June 17, 1925, a convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War was signed at Geneva, by the representatives of some twenty-two states, including the United States of America, providing (Article 35):⁹⁶

The high contracting parties agree that disputes arising between them relating to the interpretation or application of this convention shall, if they cannot be settled by direct negotiation, be referred for decision to the Permanent Court of International Justice. In case either or both of the states to such a dispute should not be parties to the Protocol of December 16, 1920, relating to the Permanent Court of International Justice, the dispute shall be referred, at the choice of the parties and in accordance with the constitutional procedure of each state, either to the Permanent Court of International Justice or to a court of arbitration constituted in accordance with the Hague Convention of October 18, 1907, or to some other court of arbitration.

The inclusion in this convention of the expression "in accordance with the constitutional procedure of each state," was due to the insistence of the American delegation.

THE SIXTH ASSEMBLY AND THE COURT

At the request of the Danish Government, the following item was placed on the agenda of the Sixth Assembly of the League of Nations: "Establishment of a Conciliation Commission attached to the Permanent Court of International Justice." The Danish representative submitted a reasoned statement of the purport of the request, to which was attached a draft proposal for establishing such a conciliation commission. On September 22, 1925, the Assembly decided to postpone this proposal for consideration at a later session of the Assembly.⁹⁷

On September 14, 1925, M. Buero (Uruguay) submitted the following resolution to the Sixth Assembly:⁹⁸

The Assembly requests the Council to undertake a detailed examination of the Statute of the Permanent Court of International Justice, taking into account the work and experience of the court and the views expressed in parliaments and scientific and other circles, with a view to the jurisdiction of the court being more widely adopted.

When this resolution was discussed in the First Committee, it met with a very cold reception, as a result of which M. Buero accepted an adjournment of its discussion.⁹⁹

On September 12, 1925, the Swiss delegation to the Sixth Assembly of the League of Nations proposed that the Assembly recommend that those states

⁹⁶ League of Nations Official Journal, August, 1925, p. 1119. See the Proceedings of the Conference, League of Nations Document, A. 13. 1925. IX., pp. 31, 49. The convention has been signed by at least twenty-two states or members of the League of Nations.

⁹⁷ Journal of the Sixth Assembly, p. 192.

⁹⁸ Verbatim Record of the Sixth Assembly, September 14, 1925, p. 2.

⁹⁹ Journal of the Sixth Assembly, p. 145.

which had assumed the obligation contained in the Optional Clause for a limited period which would shortly terminate, should take the necessary steps in order to renew their undertakings. On September 25, 1925, a resolution in that sense was adopted, by which the Assembly requested "the Secretary-General of the League of Nations to draw the attention of such states to the measures to be taken, if they consider it proper, in order to renew in due course their undertakings."¹⁰⁰ On November 4, 1925, the Austrian Government notified the Secretary-General that it desired to renew its declaration,¹⁰¹ and to this end would submit a proposal to the National Council.

ADMINISTRATIVE DECISIONS

The court's administrative decisions, recently published for the first time,¹⁰² contain many interesting points, of which several are significant as showing the extreme conscientiousness of the judges and their manner of work. The court has passed several times on questions of incompatibility of function, under Articles 16, 17 and 24 of the Statute; it has decided that it would be incompatible for a judge to act as a member of an institution such as the *Conseil du Contentieux* of the Italian Foreign Office, or to participate in negotiations even of a non-political character; but that it would not be incompatible for a judge to act as a member of a government commission for testing candidates for the diplomatic service, or to take part in an international conference concerned with the development of law, or to serve on an international conciliation commission or a mixed arbitral tribunal.¹⁰³ In its consideration of cases or questions before it, the court began by entrusting a single member with the preparation of a draft opinion based on the court's deliberations, but since the first session such drafts have usually been prepared by a committee of at least three members.¹⁰⁴ On July 26, 1922, it was decided that the judge or judges acting in that capacity should be chosen by secret ballot. In one case, it was decided that the President should *ex officio* be a member of the drafting committee, and in practice the Registrar has always been a member. In some cases, the general discussion among the judges has been preceded by the presentation of written notes among the judges, and recently the President has summarized the views expressed by the judges and distributed the summary before a drafting committee is set up. The judges deliver their opinions in inverse order of seniority, as in the Supreme Court of the United States.

¹⁰⁰ Journal of the Sixth Assembly, p. 192. Cf., 41 Law Quarterly Review, 373.

¹⁰¹ The original Austrian declaration had been made on March 14, 1922, for a period of five years.

¹⁰² Publications of the Court, Series E, No. 1, pp. 241-272.

¹⁰³ *Ibid.*, pp. 247-8.

¹⁰⁴ *Ibid.*, p. 254.

AMENDMENT TO THE COURT'S RULES

The Statute of the court (Article 30) provides that the court shall frame rules for regulating its procedure. The original rules were promulgated on March 24, 1922.¹⁰⁵ While they do not expressly reserve to the court the power of amendment, that power must reside in the court. On January 15, 1925, the court adopted the following amendment to Article 2 of the Rules which deals with precedence among the judges and their seating:

Nevertheless, the retiring President, regardless of his seniority according to the preceding provisions, shall sit on the right of the President, the Vice-President then sitting on his left. This provision, however, shall not affect other privileges and powers conferred by the Statute or Rules of Court on the Vice-President or the eldest judge.¹⁰⁶

THE BAR OF THE COURT

The court has no bar as that term is ordinarily understood in America. It decided on February 21, 1922, that the rules should not include any restriction on the right of pleading before the court, and that any person appointed by a state to represent it may be admitted to plead in that state's behalf.¹⁰⁷ The possibility of a requirement that such a person should be competent to appear before the highest tribunal of his own country does not seem to have been considered. In a number of cases, states have been represented by lawyers who were nationals of other states. In the *Mavrommatis* case brought by Greece against Great Britain, British nationals appeared for both governments. Language in itself creates some restriction, for only the English and French languages may be used before the court without special permission.

STATES TO WHICH THE COURT IS OPEN

By a resolution adopted by the Council of the League of Nations, of May 17, 1922,¹⁰⁸ in virtue of Article 35, paragraph 2, of the Statute of the court, it was provided that the court shall be open to states not members of the League of Nations and not mentioned in the Annex to the Covenant. On June 28, 1922, the court decided that this resolution should be communicated to all states recognized *de jure*, and on that date it drew up a list of states for that purpose. The list was revised on June 17, 1925, and it now includes the following:¹⁰⁹ Afghanistan, Germany, Egypt, Georgia, Iceland, Liechtenstein, San Marino, Mexico, Monaco, Russia, Free City of

¹⁰⁵ See "The Statute and Rules of the Permanent Court of International Justice," published by the International Intermediary Institute, as a provisional substitute for Publications of the Court, Series D, No. 1. See also, Hudson, *The Permanent Court of International Justice*, pp. 351 ff.

¹⁰⁶ Publications of the Court, Series E, No. 1, p. 127.

¹⁰⁷ Publications of the Court, Series E, No. 1, p. 265.

¹⁰⁸ League of Nations Official Journal, June, 1922, pp. 545-6.

¹⁰⁹ Publications of the Court, Series E, No. 1, p. 260.

Danzig (transmissions through Poland), Turkey. All of these states are now notified of the institution of proceedings before the court, as well as of requests for advisory opinions. Such notice is sent as a matter of course to all members of the League of Nations, and to the United States and Ecuador as states mentioned in the Annex to the Covenant. The Hedjaz, also mentioned in the Annex, is no longer being notified, as previous communications to that state were returned to the court.¹¹⁰

PUBLICATIONS OF THE COURT

The publications of the court promise a significant enrichment of the literature of international jurisprudence and international law. The original plan of the publications of the court called for four series.¹¹¹ Series A includes the judgments handed down, and six numbers in this series have appeared. Series B includes the advisory opinions, and twelve numbers in this series have appeared. Series C includes acts and documents relating to the judgments and advisory opinions, and seven numbers totalling fourteen sizable volumes have appeared. Few courts in the world publish such complete documentation relating to their work. Series D includes acts and documents concerning the organization of the court, and four numbers with three addenda have appeared.

A new Series E was inaugurated in 1925. It will include annual reports concerning the court and its activities. The establishment of these reports may be traced to a suggestion by Dr. Nansen (Norway) and to the ensuing discussion in the Fifth Assembly of the League of Nations on September 3, 1924.¹¹² On December 8, 1924, the Secretary-General of the League of Nations asked the Council whether it wished to invite the court "to consider whether it would be prepared to forward in future, for the information of the Assembly, a report on its work." M. Hymans (Belgium) pointed out that the court "was entirely independent of the Assembly" and he intimated that any discussion of such a report would be unfortunate. The Secretary-General explained that it would be communicated to the Assembly for its information only. The Council apparently agreed upon the invitation,¹¹³ and on December 23, 1924, the Registrar was informed of this decision. On January 24, 1925, the Registrar replied that the court had decided on publishing a yearly statement concerning its activities to appear about August 15 in each year, to be distributed in the same way as others of its publications. The annual report is therefore not to be considered as being addressed to the Assembly or Council.

The first number of Series E is a résumé of the court's work from January,

¹¹⁰ See Publications of the Court, Series E, No. 1, p. 261.

¹¹¹ The publications are distributed in the United States of America by the World Peace Foundation, 40 Mt. Vernon St., Boston, Massachusetts.

¹¹² League of Nations Official Journal, Special Supplement No. 23, pp. 37-39.

League of Nations Official Journal, February, 1925, p. 124.

1922, to June 15, 1925.¹¹⁴ It contains a vast deal of information which was not previously readily available. Chapter I deals with the court and Registry, giving biographies of the judges, and lists of the assessors not previously published, staff regulations, instructions to the registry, the concession of diplomatic privileges in the Netherlands, and the arrangements for the court's occupation of premises in the Peace Palace. Chapter II traces the history of the Statute and Rules of Court. Chapter III sets forth the jurisdiction of the court, and lists various unsuccessful attempts by individuals to invoke the interposition of the court. Chapter IV outlines the judgments handed down by the court, and Chapter V its advisory opinions. Chapter VI gives a summary of the administrative decisions which the court has taken; the decisions relating to procedure are particularly important. Chapter VII describes the court's publications, which it now appears include a confidential bulletin intended for the judges alone. Chapter VIII gives the details of the court's finances. It appears that in 1921, the League of Nations expended 339,603.43 gold francs in organizing the court; in 1922, the total expenditure of the court was 711,649.08 Dutch florins; in 1923, 745,990.54 Dutch florins; in 1924, 580,127.35 Dutch florins.¹¹⁵ Chapter IX contains an excellent and very complete bibliography, and in Chapter X is published a third addendum to Series D, No. 4, containing extracts from international agreements affecting the jurisdiction of the court. The volume will prove indispensable to students and lawyers following the work of the court, and it deserves the cordial hospitality of the profession.

¹¹⁴ An extract from this report was presented to the Sixth Assembly on August 20, 1925, by the Secretary General. See League of Nations Document, A. 7 (b), 1925.

¹¹⁵ The 1926 estimates of the court, as approved by the Sixth Assembly on September 26, 1925, total 915,838.32 Dutch florins. See League of Nations Document, C. 619. M. 201. 1925. X.

AMERICAN PARTICIPATION IN INTERNATIONAL CONFERENCES

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The participation of the United States in the Opium Conference, and in the London and Paris conferences with reference to the operation of the Dawes plan, has brought forward the question of the right of the executive to participate in such conferences. Sharp criticism has been levelled at the executive on the ground that the President is without right to send representatives, either official or unofficial, to such gatherings without the prior authorization of Congress. This question has now been in the foreground of discussion intermittently for twelve years and is worthy of some analysis.

The grant of power for the control of foreign affairs in the Constitution is both brief and bare. The instrument as it stands furnishes no description of the respective powers and duties of the President, the Senate and the House. Constitutional practice has developed in the course of a long contest between the executive and the legislative branches for the dominant position with reference to foreign affairs. The development has not been wholly consistent or in one direction. Though it is usually assumed that the President has gained most in the struggle, in some important respects Congress has gained power at the expense of the executive.

The field in which the legislative branch of the government has made greatest headway is in the matter of appointments. At the outset of the government the initiative of the President was complete. It was for him to determine where diplomatic representatives should be sent and what their grades should be.¹ Jefferson advised Washington that the Senate could not "negative the grade" of a diplomatic appointee. A lump sum was even put at the disposal of the President from which he could determine the salaries of American diplomatic officers. It was held that diplomatic offices were derived from international law and were simply recognized by the Constitution.² Consequently, there was no statute defining the duties of a consul, for example, for some years after the government was established. Nor was there a statute defining the duties of a minister. The powers and functions of American foreign representatives were defined by the law of nations as interpreted by the executive department.

The President steadily lost power in this matter. Congress soon abandoned the practice of lump sum appropriations, and the use of specific ap-

¹ Washington made clear his point of view in a message to the Senate, Feb. 18, 1791, with reference to sending a minister to Portugal (Am. State Papers, For. Rel. I, 127-128); for a still earlier opinion of Jefferson on the matter see Ford, ed., Writings of Jefferson, V, 161.

² James Madison, Writings, ed. by G. Hunt, IX, 91-93; Opin. Att'y. Gen. XXII, 186.

propositions gave to Congress a certain authority in the matter of appointments. In 1792 an act was passed defining the duties and functions of consuls. In 1855 and 1856 Congress passed comprehensive legislation dealing with the diplomatic and consular service, defining the functions of the officers, stating where representatives were to be sent, and the grade which was to be employed. These acts were not perfectly effective because an opinion of the Attorney General,³ Caleb Cushing, declared that the President was not bound to send persons to all the places named, nor was he prohibited from sending representatives to places not named. He even went to the extent of saying that the President might send persons of different grades to places which were named in the law. Thus this legislation did not immediately result in crippling presidential initiative. Congress persisted in that type of legislation, however, and ultimately gained complete control. The law of 1893, which provided for the creation of the rank of ambassador and defined the circumstances under which an ambassador might be sent, originated in Congress and was not desired by the President or the Secretary of State.⁴ When a legation is to be raised to the rank of an embassy, it now requires specific statutory approval to make the alteration, and the President does not send regular diplomatic officers to places not provided for in legislation, nor does he send officers of a grade other than that authorized by Congress.⁵

The laws by which the President's power of appointment was limited did not deal with temporary appointments or the appointment of delegates to international conferences. One reason was that for many years after the organization of the government the United States did not participate in international conferences. Most of the temporary appointments were not of a formal or important character. Where they were, as for example in the case of Jay's famous mission to Great Britain, nominations were sent to the Senate.⁶ When Madison appointed commissioners during a recess to negotiate for peace at the close of the War of 1812, a teapot tempest broke out in the Senate because he had "initiated" a mission without the consent of the Senate.⁷

The first important invitation to an international conference was that for

³ Opin. Att'y. Gen. VII, 186 ff., 247 ff.

⁴ Foster, *Practice of Diplomacy*, 20-26; Moore, *Digest of International Law*, IV, 737-739.

⁵ See, for statement of the principal acts in this connection, Q. Wright, *The Control of American Foreign Relations*, 325. There has been important legislation subsequent to its publication, including provision for an embassy at Havana (Public, No. 385, 67th Congress), and an Act for the Reorganization and Improvement of the Foreign Service of the United States (the Rogers Bill—Public, No. 135, 68th Congress).

⁶ Senate Executive Journal, I, 95-96, 99, 150, 152, 163, 164, 241-242, 244, 245, 265, 310, 311, 318-319, 326-327, 431, 438, 471; II, 25, 35, 156-158; III, 32, 35, 45, 46; Randolph to Bayard, MS. Inst. U. S. Mins., Dept. of State, II, 348-352; Pickering to Bayard, *ibid.*, III, 208-211.

⁷ Senate Executive Journal, II, 348-354, 451-454, 470-471.

the Panama Congress of 1825. When the invitation arrived, the President, John Quincy Adams, though he wished to accept it, did not feel that he had power to appoint plenipotentiaries without the approval of the Senate. An unfortunate phrase in a message to Congress was interpreted as an assertion that he could accept an invitation to participate in such a conference upon his own responsibility. A bitter debate ensued. It brought a denial from Adams that he had ever asserted such authority; and a hostile Senate Committee grudgingly admitted that he had made "an express reference . . . to the concurrence of the Senate as the indispensable preliminary to the acceptance of this invitation." Having amply demonstrated that they must be consulted, the Senators ultimately approved the nominations and Congress made an appropriation. Matters had been delayed so long by the dispute that the Panama Congress had adjourned before the American delegates arrived.⁸

After the Panama fiasco there ensued another period of many years when the United States did not participate in international conferences. The notion of a true Pan American conference was in eclipse, and the United States would not consider attending European political conferences even if European nations would have considered issuing invitations to the United States.

When the United States began to accept invitations, it was to conferences of a technical and scientific character, without political or diplomatic significance. In 1863, for example, the Government of Prussia invited the United States to participate in the International Statistical Congress. The invitation was received after the Senate had adjourned, and the meeting was to be held and its work completed before the Senate reconvened. Under those circumstances the President appointed a commission to represent the United States, acting without any appropriation, special authority from Congress to make the appointment, or nomination to the Senate at the close of the recess. It may well have seemed that no precedent was being set, for the Statistical Congress was not wholly official in character, delegates from learned societies, as well as from cities and states, being admitted along with national delegates.⁹ Nevertheless, in 1869, an official delegate was sent to another session of the Statistical Congress without being nominated to the Senate.¹⁰ Even when, in 1872, Congress made a special appropriation to pay the costs of participation in still another session, the Senate was not asked for its approval of the three delegates.¹¹

The precedents thus established went unchallenged. It is true that practice was not perfectly uniform. Sometimes, as in the case of the first Pan American Conference, in 1889, the President sent the names of proposed

⁸ *Ibid.*, III, 457-459, 473, 554, 567.

⁹ H. Ex. Doc. 289, Serial 1615, 43 Cong. 1 sess.

¹⁰ *Ibid.*

¹¹ *Ibid.*, Statutes at Large, XVII, 368.

delegates to the Senate for approval.¹² Occasionally, as in the law of August 5, 1892, the President was specifically "authorized to appoint five commissioners," in that instance to a monetary conference.¹³ But in no case did the President ask permission of Congress to send or to accept an invitation, and in most instances he appointed official delegates without reference to the Senate. That procedure was followed, not only in the cases of technical and scientific conferences, but also when plenipotentiaries were sent to the second, third, and fourth Pan American Conferences, and to the two conferences at The Hague. In none of these cases was the President "authorized" to make the appointments;¹⁴ he made them under his broad powers as the negotiator of treaties. As time went on, the practice of occasionally sending the names of delegates to the Senate for approval was dropped altogether. President Roosevelt was quite free from the trammels which hampered John Quincy Adams. The initiative of the President with reference to international conferences was complete, and the appointing power was entirely in his hands.

The President was dependent upon the legislative branch only for the funds required to pay the costs of participation in conferences. Two presidents sought in some measure to free the executive from even so much legislative control as arose from the necessity of seeking specific appropriations. President Arthur, in his second annual message of December 4, 1882,¹⁵ said, "In view of the frequent occurrence of conferences for the consideration of important matters of common interest to civilized nations, I respectfully suggest that the Executive be invested by Congress with discretionary powers to send delegates to such conventions, and that provision be made to defray the expenses incident thereto." The hoped-for lump sum appropriation was not forthcoming, and the request was renewed the next year.¹⁶ Again no attention was paid to the President's recommendation, and the matter rested until President Harrison, in his second annual message of December 1, 1890,¹⁷ referred to Arthur's message and asked that "standing provision be made for accepting, whenever deemed advisable, the frequent invitations of foreign governments to share in conferences looking to the advancement of international reforms in regard to science, sanitation, commercial laws and procedure, and other matters affecting the intercourse and progress of modern communities." This, in like fashion, brought no response, and Congress continued to make individual appropriations in all cases where money was needed to allow the President to participate in such gatherings. Thus, while Congress showed no disposition to give the Pres-

¹² Senate Executive Journal, XXVII, 52.

¹³ Stat. at Large, XXVII, 349.

¹⁴ Stat. at Large, XXXI, 637, 1179; XXXIV, 118; Sen. Ex. Doc. 744, 61 Cong. 3 sess., p. 3.

¹⁵ Richardson, Messages and Papers, VIII, 127.

¹⁶ *Ibid.*, 176.

¹⁷ *Ibid.*, IX, 111.

ident greater freedom than he already enjoyed, it showed as little disposition to restrict his judgment within its legitimate scope.

Suddenly, with no warning, an assault was made upon the President's power by Congress. After the General Deficiency Appropriation Bill of 1913 had been passed by the House of Representatives, the Senate Committee on Appropriations offered an amendment to the effect that, "hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so." The amendment appeared on the floor on March 1st, in the midst of the legislative jam at the close of an expiring Congress, and during a parliamentary wrangle over the order of business before the Senate. It had not an instant of consideration, and was agreed to without a word of comment either by way of explanation or criticism.¹⁸ When the bill was sent back to the House, the amendment was not mentioned, and in accepting the conference report, no reference was made to it even by way of inquiry.¹⁹ The bill was one of the last signed by President Taft, at the Capitol, just before the inauguration of his successor.²⁰

Such was the extraordinary manner in which an important precedent was overthrown. After refraining from legislative efforts to control the appointing power in matters of this character for many years, a new policy was adopted without a word of discussion upon the floor of either house. No satisfactory explanation has ever been offered. Discussion has occasionally turned to this statute in both Senate and House; but no one has been able to state authoritatively what was its real purpose or the fundamental motive.²¹

It is altogether likely that the law did not seem so revolutionary a move as it actually was. Congress had, as we have seen, long since gained the power to determine the grade of American diplomatic officers and where they should be sent, matters which had originally been left entirely to the discretion of the President. However similar such laws may have seemed to the new legislation respecting international conferences, there was an important difference. Acts of Congress fixing the grade or rank of permanent diplomatic officers were defensible as growing out of the power of Congress to originate and control appropriations. It could be argued that grade affects salary,²² and a regular appropriation becomes necessary thereby. Congress, it was held, has a right to a voice in whatever requires a regular appropria-

¹⁸ Congressional Record, 62 Cong. 3 sess., XLIX, 4411.

¹⁹ March 4, 1913, *ibid.*, 4835-4836, 4847.

²⁰ *Ibid.*, 4855.

²¹ Congressional Record, 63 Cong. 1 sess., L, 1611-1612; 67 Cong. 4 sess., LXIV, 929, 990, 1058.

²² This was not true of the Act of March 1, 1893, which provided for the grade of ambassador, for the law specifically said, "This provision shall in no wise affect the duties, powers, or salary of such representative." Stat. at Large, XXVII, 497. It is interesting and pertinent that this departure from a tradition as old as the government, like the one under discussion, was made without a word of comment, explanation, or criticism.

tion. But in the matter of international conferences, the argument does not have the same force. Appointments to such gatherings are temporary in character. They may involve no cost; or the cost may properly be met from funds already at the disposal of the President or the Department of State. If Congress desired to legislate merely to preserve the independence of its appropriating power, the act should have been phrased in different terms. Congress could properly prohibit sending or accepting any invitation which would involve expenditure of funds not previously appropriated. A law requiring the President to secure an appropriation from Congress before entering upon a course of action that would entail expenditure beyond the amount of his "secret fund" would have involved no invasion of executive power.

The law of 1913 was not so limited. It made no reference to the appropriating power, but only to the legislative power. It should be borne in mind that the process of "authorization" is legislative in character, and is to be distinguished from the process of "appropriation." The rules of Congress recognize this distinction, so that the objection of a single member rules out legislative provisions from an appropriation bill. An appropriation does not constitute an "authorization"; it merely facilitates the exercise of a power derived from the Constitution or from prior legislative authorization. In default of any verbal explanation of the purpose of the act, the intent was made clear by subsequent authorizations under the act; many of these contained the proviso "that no appropriation shall be granted at any time for expenses by delegates or any other expenses incurred in connection with said conference."²³ The intent, in such instances, is manifestly to secure legislative control of the executive management of foreign relations. In attempting thus to curtail the President's power, a new departure was made, for which the statutes with reference to the foreign service offer no true analogy.

From another point of view it may have appeared to the framers of the law that no great or significant variation from established custom was involved. Upon a number of occasions Congress had requested the President to issue invitations to international congresses or conferences to be held in this country.²⁴ Occasionally the language was made to read, "that the President be authorized and requested" or simply "authorized" to extend invitations.²⁵ The meaning of such resolutions is clear when viewed in the light of legislative practice; they meant that if invitations to an "authorized" conference were accepted, and an appropriation became necessary to provide for its sessions, the money would be forthcoming.²⁶ Such resolutions were intended as advice or encouragement for the President. They did not compel him to call the conference. Neither did the absence of such a reso-

²³ See, for example, Stat. at Large, XXXVIII, 237, 768, 773, etc.

²⁴ See, for example, Stat. at Large, XXXVII, 642.

²⁵ *Ibid.*, 636, 637, etc.

²⁶ For "authorization," see *ibid.*, XXXIV, 1422, and for the appropriation, XXXV, 680.

lution prevent him from making plans for a conference. The President did not need to wait for such authorizations in issuing invitations. In no case did the executive request "authority" to invite other nations. So far as the acceptance of invitations from other nations to conferences to be held abroad was concerned, the President never requested authority to accept; and Congress did not volunteer to give it. The procedure was simply to ask, where necessary, an appropriation to pay the costs of American participation, which Congress, in its discretion, could grant or withhold. Congress did not always have a perfectly free hand, for sometimes the prior acceptance of the invitation had, in a sense, committed the whole government; and sometimes, but less frequently, the request did not come until participation was a fact. Approaching the matter from the point of view of executive practice or from that of Congressional procedure, it is perfectly clear that these earlier legislative "authorizations" involved no element of control over the executive beyond that arising from the normal exercise of the appropriating power. In that respect, as in others, the law of 1913 made a radical departure from earlier practice.

The conclusion must be that the law of 1913 represented an attempt to control the judgment of the President on a matter committed to his especial care. In so far it appears to be unconstitutional. It has never been construed by the Attorney General and it has not come before any court. President Wilson did not know of its existence until he had been in office more than three years. As soon as his attention was drawn to it, he declared it to be an "utterly futile" statute, because it did not come within the recognized powers of Congress. It was not an act limiting the power of the Secretary of State, whose powers, being the creature of legislation, may be altered by act of Congress. It was levelled at the President himself,²⁷ and sought to limit his discretion in the conduct of one type of negotiation, an increasingly common type. If Congress may deny the President the right to negotiate in a conference, it may limit his power to negotiate through other channels. This has not been contemplated in our constitutional law. Congress may partially cripple a power which it is not competent to destroy by refusing appropriations. But Congress has no power whatever to limit the President in his choice of negotiators. In contemplation of law, the President is the negotiator of all treaties. The actual discussion is usually committed by the President to an agent, but there are no limitations upon

²⁷ It is to be contrasted with laws giving directions or powers, or limiting the authority of federal bureaus. A joint resolution approved Aug. 17, 1912, provided "That the several Federal bureaus doing hygienic and demographic work are hereby authorized to prepare and install exhibits at the exhibition to be held in connection with the Fifteenth International Congress on Hygiene and Demography. . . . *Provided*, That such exhibits . . . can be prepared and installed without requiring any special appropriation for this purpose." Stat. at Large, XXXVII, 642. Such an authorization is proper when directed to a bureau, but to require the President to get such authorization to engage in a discussion, for such is the work of a conference, is an entirely different matter.

his choice of a representative. He may select a diplomatic or other official, a private citizen, or even a foreigner. That has long been the admitted theory and practice. It is only the question whether his agents, be they called commissioners or delegates or by some other title, shall receive compensation, which must be decided by Congress, and then only in the absence of money available from contingent or other funds. Yet this statute seeks, in explicit terms, to prevent the President from appointing delegates to conferences, and makes no reference to the matter of appropriations at all.

In view of these considerations, it is not surprising that the law has not been uniformly interpreted or consistently observed. In many cases, it is true, attention has been paid to its terms. Shortly after the passage of the act, for example, authorization was secured before the President accepted an invitation from the Government of the Netherlands to be represented at an international conference on education held at The Hague, in 1913. On that occasion the Acting Secretary of State called the attention of the Secretary of the Interior to the law.²⁸ A joint resolution authorizing participation was drafted in the office of the Commissioner of Education. This was considered by committees of the House of Representatives and the Senate, and finally reported favorably and passed.²⁹

It is exceedingly significant, however, that there is not a single case where the President secured from Congress authorization to accept an invitation to a conference of a political or diplomatic character, such, for example, as the Fifth Pan American Conference. The illustration, moreover, is one of peculiar interest, because an appropriation was necessary.³⁰ The policy in this respect was of the greatest importance, because it released the President from leading strings in the matter of war diplomacy. There was no legislative authorization for him to attend the Paris Peace Conference, nor for American participation in the Supreme Economic Council, the London Conference or any of the other numerous bodies charged with the liquidation of the political and other problems of the World War.

Not only has the executive acted in accepting invitations to participate in political conferences without congressional authorization, but it appears that since 1917 the whole practice of requesting Congress for authority to accept invitations to any sort of international conference has virtually fallen into disuse. The last specific statutory authorization of that character occurred with the approval, March 3, 1917, of a joint resolution for participation in the Tenth International Congress of the World's Purity Federation.³¹ There appears to have been only one request for authority to accept an invitation since that time.³² Yet it is well known that the United

²⁸ Congressional Record, 63 Cong. 1 sess., I, 1466.

²⁹ *Ibid.*, 1611-1612; Stat. at Large, XXXVIII, 236-237.

³⁰ Stat. at Large, XXXVIII, 450, 1126; *ibid.*, XXXIX, 259, 1055.

³¹ Stat. at Large, XXXIX, 1134.

³² Congressional Record, 67 Cong. 4 sess., LXIV, 1520; Sen. Ex. Doc. 287, 67 Cong. 4 sess.

States has participated in many conferences in the years between 1917 and 1925. Moreover, Congress has in several instances appropriated money for participation, despite the fact that the provisions of the law had been neglected.³³

In the matter of issuing invitations to conferences in this country, the provisions of the statute have been somewhat more carefully observed. There is one exception of the first magnitude. The so-called Borah resolution, approved July 12, 1921, "authorized and requested" the President "to invite the Governments of Great Britain and Japan to send representatives to a conference" for the purpose of reaching an agreement for the reduction of naval expenditures and building programs "during the next five years."³⁴ The executive took no notice of this in preparing for the Washington Conference, either in sending invitations to foreign nations or in asking appropriations from Congress. The President acted as though the two had no connection whatever. Senator Borah himself said in the Senate a year after the conference, that "it has been stated time and time again authoritatively that he [the President] did not call the disarmament conference as a result of that resolution. It originated in another way, we are told, and it was not the disarmament conference for which the resolution provided. It included subject matters which the resolution did not cover. It included countries which the resolution did not cover, and it included subject matters which even disarmament did not cover."³⁵

The Washington Conference stands as an exception. It is very significant that the exception occurred in the case of a conference diplomatic and political in character. It indicates that the executive is more willing to make a stand for the independent exercise of power in matters of that character. The general custom of the executive is to ask authorization from Congress before issuing invitations for conferences to meet in this country. That practice has been followed even when no appropriation was required.³⁶

Congress, on its part, has not hesitated to attach restrictions when it gave legislative approval to executive proposals for participation in international conferences. An important instance occurred in connection with the International Communications Conference. It was agreed during the negotiation of the Treaty of Peace at Paris that "the Principal Allied and Associated Powers shall as soon as possible arrange for the convoking of an international congress to consider all international aspects of communication by land telegraphs, cables, and wireless telegraphy, and to make recommendations to the Powers concerned with a view to providing the entire world with adequate facilities of this nature on a fair and equitable basis." The

³³ See, for example, Stat. at Large, XLII, 1548.

³⁴ *Ibid.*, 141.

³⁵ Congressional Record, 67 Cong. 4 sess., LXIV, 929.

³⁶ See, for examples, Stat. at Large, XXXVIII, 1222; XXXIX, 475, 618, 894, 1168; XLI, 271, 279, 367.

conference was to meet in Washington. Secretary of State Lansing wrote President Wilson, September 4, 1919, calling his attention to the law of March 4, 1913, and suggesting that the matter "be laid before Congress for its decision as to whether it will authorize the extension of the formal invitation and will provide the appropriation of \$75,000 which it is thought will be required for United States participation in this international conference."³⁷ The President, thereupon, without referring to the opinion of this act which he had expressed with such vigor and promptness on first hearing of it, sent a message to Congress asking the authorization, mentioning the Act of 1913 as the reason for his action. The chairman of the Committee on Foreign Relations, Senator Lodge, requested the Secretary of State to draft a bill.³⁸ As drafted in the Department of State, it provided that the President be "requested and authorized" to call the conference "and to appoint representatives to participate therein."³⁹ The inclusion of the last clause proved to be an error in judgment. The President had full power to make the appointments without any special authorization upon that point. The appearance of the phrase served only to draw attention to the fact that the appointments were to be made by the President alone. The Committee on Foreign Affairs of the House of Representatives considered the clause, and the majority determined upon an amendment providing that the delegates should be appointed only "by and with the advice and consent of the Senate."⁴⁰ The acting chairman communicated their purpose to the Secretary of State, who replied, "I would suggest that it is not customary to stipulate that delegates to the conference shall be appointed with the advice and consent of the Senate, and I think it would be wise to omit that stipulation."⁴¹ A struggle over precedents ensued in the committee; but the majority persisted, and two reports, one for the majority and one for the minority, were laid before the House. In the partisan debate which followed, the majority admitted that precedents were against them,⁴² that no such limitation had ever been put upon the President in any previous act of the character of the one under discussion.⁴³ Majority spokesmen stated boldly and frankly that the amendment was designed to establish a new precedent.⁴⁴ It was contended that by sending a message requesting authorization, the President had "recognized the authority of Congress to place this restriction on the calling of these conventions," and that having "the right to vote to grant or deny the President's request," Congress has "the right to put conditions on the granting of that request, whether it has ever been done

³⁷ Congressional Record, 66 Cong. 2 sess., LIX, 270.

³⁸ *Ibid.*, 267.

³⁹ *Ibid.*, 66 Cong. 1 sess., LVIII, 7329.

⁴⁰ Congressional Record, 66 Cong. 1 sess., LVIII, 7329.

⁴¹ *Ibid.*, LIX, 271.

⁴² *Ibid.*, LVIII, 7331, 7333, 7339, etc.

⁴³ *Ibid.*, 7332, 7335, etc.

⁴⁴ *Ibid.*, 7331, 7335.

before or not." The provision was inserted in the bill,⁴⁵ and while it has not been uniformly made a part of subsequent enactments of the same character, it has appeared upon one or two occasions.⁴⁶

Another instance of attaching restrictions to legislative authorization of conferences occurred in connection with the International Labor Conference. The Treaty of Versailles provided that such a meeting should be held, and Washington was named as the place of meeting.⁴⁷ When the time came for issuing the invitations, the Senate was in the midst of its bitter debate over the proposal to approve the ratification of that treaty. There were, naturally enough, fears that the proposal for the International Labor Conference would get tangled up in the general treaty discussion. Apparently in an effort to avoid that result, the Secretary of Labor prepared a joint resolution authorizing the President to convene and make arrangements for the conference, "provided, however, that nothing herein shall be held to authorize the President to appoint any delegates to represent the United States of America at the said meeting of such conference, or to authorize the United States of America to participate therein unless and until the Senate shall have ratified the provisions of the said proposed treaty of peace with reference to such general International Labor Conference."⁴⁸ The proviso had the desired effect, and the authorization was voted without serious opposition.⁴⁹ But there was loss as well as gain. For the sake of expediency, a very damaging principle, so far as the executive conduct of foreign relations is concerned, was admitted. In this case it was virtually conceded that Congress has a right to attach conditions to a proposed line of action by the President within the sphere of his control of foreign relations.

In seeking to exercise control beyond its historic province Congress tends to dictate the instructions which the American delegate is to bear, or to drive the President to unofficial diplomacy. Former Secretary of State Hughes in an address referred to the danger that if Congress undertook to authorize representation in the League of Nations, "the Congress itself most probably would reserve the authority to give instructions." In appropriating money for representation in the Opium Conference, Congress stipulated that "the representatives of the United States shall sign no agreement which does not fulfill the conditions necessary for the suppression of the habit forming drug traffic."⁵⁰ Certainly there is no logical stopping place between giving the

⁴⁵ Congressional Record, 7346, 7348; and for Senate action, LIX, 267.

⁴⁶ See, for example, Stat. at Large, XLII, 363.

⁴⁷ Congressional Record, 66 Cong. 1 sess., LVIII, 3503.

⁴⁸ *Ibid.*, 3390, 3502.

⁴⁹ *Ibid.*, 3504, 3584, 3921.

⁵⁰ House Joint Resolution, 195, 68th Cong. (Public Resolution 20, approved May 15, 1924). It is significant to observe that one of the reasons publicly stated for the retirement of the American delegation from the Opium Conference was that an agreement could not be reached which would accord with the limitation set by Congress in this act. (See letter of the Hon. Stephen G. Porter, announcing the withdrawal of the American Delegation, printed in the JOURNAL for April, 1925, p. 380.)

President authority to act only upon conditions which affect the content or tenor of his instructions, and making the main points of the instructions part of the authorization.

The Act of March 4, 1913, has brought confusion into the practice of the government. It has never achieved its apparent aim, yet it has not been overthrown. Neither branch of the government has pursued a consistent course with reference to it. While the President regarded it, as has been said, "utterly futile," he proceeded to say he would not disregard it entirely, but would use his judgment as to what the circumstances of each occasion required. In the exercise of that judgment he authorized members of his administration to seek legislative authorization; on at least one occasion he signed a message to Congress which appeared to recognize the act as a bar to his independence of action; yet there are enough cases where the President has acted independently to make it clear that when sufficiently determined he can override the provisions of the law, if funds are available to meet the expenses. It is difficult, from a study of the cases, to make a categorical declaration as to factors which influenced his judgment in the several cases. Apparently the most important was whether it would make an unpleasant issue with Congress. Where the conference was to be manifestly diplomatic and political in character the executive has acted with considerable boldness. When Congress has discussed such cases the more able constitutional lawyers in the Senate have admitted that the Act of 1913 probably went beyond the power of Congress. With regard to conferences of less important character, there appears to have been a desire on the part of the executive to avoid making an issue of it. This would partly explain the difference in practice with reference to the issuance and the acceptance of invitations. Both are equally covered in the act. But invitations can more frequently be accepted without attracting undue attention and without the necessity of securing appropriations. Often, too, the United States can be represented abroad by an unofficial observer, who serves to express the point of view of the American Government and to report proceedings and views, thus avoiding, in the case of conferences where question might otherwise be raised, the necessity of Congressional authorization. Issuance of invitations, on the other hand, is a more public act, almost inevitably involves a larger appropriation, and would challenge Congress more openly.

If the executive has not been perfectly consistent, Congress has been no more so. While upon some occasions it has given only conditional consent, upon others it has failed to protest when the law was disregarded. It has made special appropriations for attendance upon conferences despite the fact that the President had not been authorized to accept the invitation. On some occasions, too, Congress appears to have recognized the initiative of the President by "requesting" him to act, instead of "authorizing" him to do so, reverting to the phraseology common before the Act of 1913.⁵¹

⁵¹ See, for example, Stat. at Large, XLII, 822.

From any point of view the act is unfortunate. It is an interference with the historical balance of power between the executive and the legislative. Without it there was already ample provision for preventing the President from entering upon binding commitments at conferences. If money were required for participation, the executive was bound to seek it of Congress. That body could exercise its unquestioned right to grant or refuse an appropriation. If any formal instrument were signed it would have to go before the Senate for approval before the President could ratify it. If informal engagements were entered upon, there would be need, not infrequently, for legislation to carry into effect contemplated action, and Congress was free, in such cases, to exercise its discretion.

The act has also affected the method of our diplomacy. One of the motives for the informal methods which have become so common is to avoid legislative interference. As executive agreements avoided the necessity of going to the Senate for approval, so "unofficial observers" and "personal representatives of the President" may be sent to conferences and to some of the commissions without Congressional authorization. There are of course other reasons for the use of observers, arising out of the nature of the subject, the character of the conference, or the membership of the group; but when all is said and done, one of the principal motives for informal and unofficial representation is to keep for the executive a free hand as against the legislature.

The Senate and Congress as a whole have been restive in the face of executive agreements which seemed designed to rob the legislative branch of its opportunity to advise and consent to international commitments, and it is not surprising that the executive has been restive under the restrictions imposed by this law, which appears to be legislative trespass on historic executive functions.

EXTRATERRITORIALITY IN CHINA

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1. THE WASHINGTON CONFERENCE

Among the subjects tentatively suggested by the Government of the United States in September, 1921, to the governments invited to participate in a conference on "Limitation of Armament" and on "Pacific and Far Eastern Questions" was that of the application of the principles that might be decided upon in questions relating to China to the territorial and administrative integrity of that state.¹ When the Committee on Pacific and Far Eastern Questions took up the general discussion of matters within its purview, the expressions of high intention toward China on the part of the different interested Powers were so unanimous that it was deemed advisable to draw up immediately a statement of principle embodying these sentiments. At the first meeting of the committee the Chinese delegation had presented a group of statements of principle, of which the first reads: "The Powers engage to respect and observe the territorial integrity and political and administrative independence of the Chinese Republic," and the fifth as follows: "Immediately or as soon as circumstances will permit, existing limitations upon China's political, jurisdictional and administrative freedom of action are to be removed."² The statement drawn up by Mr. Root, accepted in essentials by the committee and adopted by the conference, is a re-phrasing of these Chinese formulas, so worded, to use the words of Mr. Root, as "to follow the terms of the various steps and declarations made in a scattering way by this country and that at various times . . . nothing new" but "rather a résumé drawn to form a united expression on points already covered."³ The first two clauses as adopted read:

It is the firm intention of the Powers attending this conference. . . .

(1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China;

(2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government.⁴

They subsequently became the first two clauses of the Treaty relating to Principles and Policies concerning China.⁵

¹ Conference on the Limitation of Armament (Washington, 1922), p. 10.

² Same, pp. 866-868.

³ Same, pp. 889-890.

⁴ Conference on the Limitation of Armament, p. 148.

⁵ Same, p. 1624.

The delegates of the Powers, though some of them had exhibited apprehension regarding the date at which their "respect" should be considered to have taken effect, recognized that, as Mr. Hughes put it: "It would be unfortunate if it were said that the countries represented at the conference professed to respect the integrity of China, and yet at the same time intended to retain their extraterritorial rights."⁶ They found difficulty, however, in arriving at an understanding of the factors involved in a decision upon the request of the Chinese delegation, presented by Dr. Wang Chung-hui, that extraterritorial rights be relinquished within a designated period, during which a régime agreed upon, enabling a gradual change to complete abolition, might be applied.⁷ Consequently the resolutions of the subcommittee on extraterritoriality, read to the committee by Senator Lodge, were accepted without debate and subsequently were adopted by the conference as Resolution No. 4.⁸

The significant features of the resolution are:

(1) The notice taken of the fact that Great Britain in 1902 and the United States and Japan in 1903 had by treaty with China agreed "to give every assistance towards the attainment by the Chinese Government of its expressed desire to reform its judicial system" and "to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant them in so doing."⁹

(2) The provision for an inquiry having within its scope: (a) the "present practice of extraterritorial jurisdiction in China;" (b) the "laws and judicial system and the methods of judicial administration of China."

(3) The provision for a report with findings of fact.

(4) The provision for recommendations to the Powers represented, the scope of which would include suitable means: (a) to improve judicial administration in China; (b) to assist the Chinese Government "to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality."

(5) The requirement that the report should be submitted to the Powers concerned within one year after the first meeting of the commission of inquiry.

⁶ Same, p. 938.

⁷ Same, pp. 932-6.

⁸ Same, pp. 1642-1646. The text of the resolution is printed in the Supplement to this JOURNAL, Vol. 16, pp. 76-77.

⁹ In the treaty of Friendship, Amity and Commerce between China and Sweden, of July 2, 1908, occurs the article: "However, as China is now engaged in reforming her judicial system it is hereby agreed that as soon as all other treaty Powers have agreed to relinquish their extraterritorial rights, Sweden will also be prepared to do so." MacMurray, J. V. A., *Treaties and Agreements with and concerning China, 1894-1919* (New York, 1921), I, p. 745. In the Treaty of Amity between China and Switzerland, dated June 13, 1918, an attached declaration provides: "When China shall have improved her judicial system, Switzerland shall be ready with the other treaty Powers to give up the right of consular jurisdiction in China." MacMurray's *Treaties*, II, p. 1430.

(6) The stipulation that each Power, including China, remains free to accept or reject the commission's recommendations; acceptance, however, may not be conditioned upon grant of favor of any sort by China.

(7) The agreement by China to appoint a representative upon the commission and to coöperate with it fully.

It is upon the basis of this document that a consideration of the existing status of the extraterritoriality problem in China must proceed. It is proposed to deal with the two aspects of the commission's problem so far as may be in advance of the investigation, with a view to estimating the justification of relinquishment, progressive or immediate, of the rights of extraterritoriality respectively enjoyed by the Powers. As above noted these two aspects are: (a) The "present practice of extraterritorial jurisdiction in China," and (b) The "laws and the judicial system and the methods of judicial administration of China."

2. THE ISSUE AS TO JURISDICTION

The extraterritorial rights of the Powers in China rest upon no principle of international law, but constitute exceptions to the general principle of sovereign jurisdiction. Such exceptions had been acquiesced in by China prior to the treaty era. She permitted the Arabs, who resided at Canfu (Canton or Haiyen) for the purpose of trade in the ninth and subsequent centuries, to govern themselves under their own laws, and later allowed the Portuguese at Macao to exercise civil jurisdiction over their own countrymen. In Canton also the foreign consuls tried and settled civil cases in which the nationals of their respective countries were defendants.¹⁰ In 1689 the Treaty of Nerchinsk between China and Russia stipulated reciprocal extradition of each other's nationals accused of committing crime within the territory of the extraditing country, which amounts to a limited extraterritoriality.¹¹ Sino-Russian treaties of 1727 and 1768 continued this reciprocal arrangement by which each tried the criminals of its own nationality but had no extraterritorial courts.¹²

Mr. Jernigan wrote with knowledge that: "The truth is, China wanted as little intercourse as possible with foreigners, and seeing that it was very difficult to keep them out of her territory, she was willing to let them manage their own household affairs, as best suited themselves, when they took up their abode therein."¹³ Her attitude regarding the settlement of civil disputes between foreigners was a logical corollary of her acquiescence in the customary Chinese practice of settling civil disputes among them-

¹⁰ Jernigan, T. R., *China in Law and Commerce* (N. Y. 1905), p. 194. See Liu Shih-Shun, *Extraterritoriality, its Rise and its Decline* (New York, 1925), pp. 49-50.

¹¹ Article VI. Cited in Morse, H. B., *The Trade and Administration of China*, 3rd ed. (Shanghai, 1921), p. 201.

¹² Morse, H. B., *Trade and Administration*, p. 201.

¹³ Work cited, p. 194.

selves by arbitration or through the guilds. Where the state had no concern in the matter the individual litigant took as few risks as possible. Another factor was the complacency with which the Chinese regarded themselves and their empire. China was indifferent to foreigners to the verge of hostility, but once having admitted them she was not troubled by the fear that to accord them exemption from Chinese law would be interpreted as a derogation from her world-circling authority.

While customarily the Chinese have dealt with their own civil disputes in private, criminal matters have gone before the district magistrates and have passed, if sufficiently important, through a lengthy series of courts of appeal. This distinction in their own legal practice the Chinese carried over into their early relations with foreign merchants. All cases in which a Chinese appeared either as plaintiff or as defendant were justiciable in a Chinese court.¹⁴ The first trade agreement between the English East India Company and the Hoppo at Canton recognized the jurisdiction of the company's agents over their own English servants only. These arrangements indicate the recognition of a juridical distinction between cases involving foreigners only and cases in which both Chinese and foreigners were involved.¹⁵ But in practice civil disputes between Chinese and foreigners, as well as between foreigners only, were handled privately. The advantage held by the Chinese merchants in their ability to cut off the profitable trade, was so considerable as to preclude the necessity of recourse to the courts. On the other hand, the Chinese at Macao and Canton retained a jealous control over criminal cases, even those in which all the parties were foreigners.¹⁶ Not until the second decade of the nineteenth century did the Portuguese perfect the right of applying their own law to their own subjects. It is to be noted that the Chinese attitude as to the southern ports, where foreigners were comparatively numerous, was the reverse of that respecting the Russian border, where reciprocity prevailed.

The issue of jurisdiction arose out of offenses committed by foreign sailors against Chinese nationals, as the result of which, in four instances, foreigners were condemned to death by strangulation. In three of these cases there was no doubt at all, in the fourth very little doubt, that the men put to death had caused the death of the Chinese; the issue in all cases was the

¹⁴ Morse, H. B., *International Relations of the Chinese Empire* (Shanghai, 1910), I, pp. 44-45.

¹⁵ Morse, H. B., *International Relations*, I, p. 64.

¹⁶ Latourette cites an exception of 1687, in which a Chinese official suggested that an English sailor accused of injuring a Chinese should be punished by his own countrymen. In *The History of Early Relations between the United States and China* (New Haven, 1917), p. 142, n. 161. Following Sir George Staunton, some writers have stated that the rule followed in China was that of sending foreigners accused of crimes not capitally punishable to their own countries for punishment. But Dr. Koo has shown that Staunton's own translation of the criminal code (*Ta Tsing Lu Li*), taken as a whole, does not support the conclusion drawn from an isolated paragraph. *Status of Aliens in China* (New York, 1912), pp. 123-6.

justification of the penalty, since the foreign claim was that the deaths were caused by accident or in self-defense. In a number of other instances, in all but one of which the foreigners involved were British, demands for the surrender of accused persons were refused.

In 1834 an Order in Council, which was in accordance with a British statute though contrary to international law, provided for the establishment of a court with criminal jurisdiction at Canton, but the "Instructions" to the newly appointed Superintendent of Trade advised him to postpone the institution of the court and to impress British subjects with the duty of obedience to Chinese law. The only occasion upon which the court was convened was that of August, 1839, for the trial by jury of a number of seamen who had been concerned with a riot in which Chinese life and property had been destroyed. This instance may be taken as the first formal evidence of the determination to assume extraterritorial jurisdiction in criminal matters.

Surveying the record, one notes the following facts on the foreign side: (1) the incidents of a serious nature were remarkably few and the foreigners implicated were not merchants but sailors; (2) the only foreigners who ventured to deny Chinese jurisdiction were the British, who could rely upon the East India Company until its monopoly was abolished in 1833, and even the company did not refuse flatly to surrender persons charged with capital offenses until after 1784; (3) the principal objections to Chinese jurisdiction were (a) that the law of homicide was not sufficiently discriminating, (b) that in dealing with foreigners the existent discriminations in the law were not observed, (c) that the penalties provided by law were too severe and that torture was used to obtain confessions of guilt, (d) that the principle of vicarious responsibility was applied, (e) that the courts were corrupt.¹⁷

On the Chinese side it appears: (1) that a large proportion of the foreigners misunderstood Chinese law and procedure; (2) that in general the penalties were no more severe than in European countries; (3) that torture was not applied to foreign litigants; (4) that decisions involving foreigners were given in accordance with Chinese law.¹⁸

From foreign charges and Chinese defense it emerges that the essential point of disagreement, from which foreigners actually had suffered, was the Chinese law of homicide, which made it possible to inflict the death penalty for killing in an affray though intent could not be proved. With this factor was associated the rule of vicarious responsibility, to be applied personally, which the Chinese had sought to apply to foreigners without success. The foreign feeling that the Chinese officials were likely to discriminate in favor of their own people and that their judgments were subject to purchase was general. Consequently it was a natural act for foreign governments to seek rights of extraterritoriality which were of long standing in European history

¹⁷ Koo, *Status of Aliens*, Ch. IX; Morse, H. B., *International Relations*, I, Ch. V.

¹⁸ Koo, *Status of Aliens*, Ch. IX.

and were being exercised in Mohammedan countries, when China's military weakness had been demonstrated by the Opium War.

3. THE ESTABLISHMENT OF EXTRATERRITORIALITY

Evidence has been presented by Dr. Wellington Koo, that an understanding was reached between the British and Chinese plenipotentiaries at Nanking for the recognition of British jurisdiction.¹⁹ This understanding was formulated in the "General Regulations" of 1843, between Great Britain and China, by which the persons of each, accused of crime, were to be tried by judges and in accordance with the law of their respective countries.²⁰ The American treaty of Wanghia, drafted by Caleb Cushing, elaborated the terms of the rights and the French treaty of Whampoa stated them succinctly. The restriction of foreign jurisdiction to criminal cases was due to the lack of concern regarding civil matters, which had caused no difficulties up to that time. However, jurisdiction was provided over civil cases between foreigners, while the consuls were authorized to deal jointly with the Chinese authorities in mixed civil cases which the parties were unable to settle between themselves or through consular mediation. In practice, civil matters in which British or American nationals were defendants had come to be heard by the consuls when in 1876 the Chefoo convention gave formal basis for the widened jurisdiction to the British, and in 1880 the treaty of Peking recognized it for Americans.

Extraterritorial jurisdiction in China was secured by nineteen states, sixteen of which continue to exercise it. In the chronological order of treaty establishment these states were: Russia, Great Britain, the United States, France, Sweden and Norway, German Customs Union, Denmark, The Netherlands, Spain, Belgium, Italy, Austria-Hungary, Peru, Brazil, Portugal, Japan, Mexico and Switzerland.²¹ The right has not been granted anew since 1899, save in the one instance of Switzerland.

4. RELINQUISHMENT BY CERTAIN POWERS

The Chinese Government, in declaring war upon Germany and Austria-Hungary in 1917, abrogated the extraterritorial rights of those states.²² It is noteworthy that the Treaties of Versailles, St. Germain and Trianon, while

¹⁹ Koo, *Status of Aliens*, pp. 133-7.

²⁰ Great Britain simply acted under the Order in Council of 1834, establishing a court at Hongkong in 1843. See Koo, pp. 135-145.

²¹ The dates were: Russia, 1689, revised in 1858 and 1860; Great Britain, 1843, revised in 1858 and 1876; United States, 1844, reaffirmed in 1858 and revised in 1880; France, 1844, reaffirmed in 1858; Sweden and Norway, 1847, revised as to Sweden in 1908; German Customs Union, 1861; Denmark, 1863; The Netherlands, 1863; Spain, 1864; Belgium, 1865; Italy, 1866; Austria-Hungary, 1869; Peru, 1874; Brazil, 1881; Portugal, 1887; Japan, 1896; Mexico, 1899; Switzerland, 1918. Hertslet's *China Treaties* (London, 1908), I, *passim*. For Sweden and Switzerland, MacMurray, J. V. A., *Treaties*, I, pp. 744-5; II, p. 1430.

²² *China Year Book*, 1921-2, p. 699.

specifically renouncing a number of rights in China, make no mention of extraterritoriality. However, the Sino-German agreement of May 30, 1921, provides for Germany's surrender of the right.²³ Russia lost her extraterritorial jurisdiction in China in consequence of the revolution, although China continued to recognize the authority of Russian consuls until 1920. The Soviet Government itself announced, in 1920, its intention of surrendering extraterritorial and other rights in China.²⁴ On September 23, 1920, President Hsü Shih-chang suspended the extraterritorial rights of Russia²⁵ and on May 31, 1924, China and Russia entered into a treaty whereby the Soviet Government consented to relinquish the rights.²⁶

5. CLASSIFICATION OF EXTRATERRITORIALITY PROVISIONS

The sixteen states which still retain extraterritorial jurisdiction in China may be divided into three classes, in accordance with the extent of the rights conferred in their respective treaties. In all cases, of course, the rule regarding suits between aliens and criminal trials between Chinese and aliens is that the court of the defendant's nationality shall have jurisdiction. The variations arise regarding the use of assessors in mixed cases and the treatment of mixed civil cases. One group may be constituted of Brazil, Mexico and Japan. The treaties of these countries place the nationals of the contracting parties exclusively under the jurisdiction of their own courts.²⁷ The rule of exclusive jurisdiction is fully applied, so that no foreign assessor or arbiter is entitled to appear in a Chinese court before which a Brazilian, Mexican or Japanese is a plaintiff, or *vice versa*. All three of these countries have made their treaties with China subsequently to those of Great Britain and the United States; consequently it may be assumed that they do not regard the most-favored-nation clause as applicable in the matter of extraterritoriality.²⁸

The second group is composed of two states, Great Britain and the United States, which alone possess by specific treaty clauses and as the result of common practice the right of being represented by assessors at trials in

²³ China Year Book, 1925, p. 783.

²⁴ China Year Book, 1921-2, p. 625.

²⁵ China Year Book, 1921-2, p. 626.

²⁶ China Year Book, 1924, p. 1194.

²⁷ Hertslet's China Treaties, I, pp. 237-8; 380-1; 404-5.

²⁸ The clause is applicable, apparently to the extent of conferring the right. This was attested by the treaty of 1919 between China and Bolivia which contained a most-favored-nation clause. It was necessary for Bolivia to waive extraterritorial rights in a subsequent exchange of notes. China Year Book, 1925, p. 608. But the most-favored-nation clause does not carry a definition of extraterritorial procedure. And the case of the Sino-Chilean treaty furnishes rather weak evidence against the first statement in this note. The treaty, entered into in 1915, contained a most-favored-nation clause but no grant of extraterritorial rights. The honorary Chilean consul in Shanghai attempted to take jurisdiction over a Chinese claiming Chilean citizenship, but his right to do so was denied by the Chinese Government and failed to be sustained by the diplomatic body, whence his failure.

Chinese courts in which their nationals are plaintiffs.²⁹ This right is reciprocal, but has not been exercised by the Chinese.

The last group is the largest, as it includes all the other states enjoying extraterritorial rights. The provisions followed by these countries are those copied from the Treaty of Wanghia and subsequently discarded or, rather, separately interpreted by the United States and Great Britain. According to them, criminal cases are heard without assessors, while civil matters are dealt with according to justice and equity by the foreign consul and the Chinese official jointly.³⁰ The settlement is one by mediation or arbitration, a method more in line with Chinese practice than that of the strict application of law by a regularly constituted court. Regarding the practice of the fourteen states which have entered into this type of arrangement, M. G. Padoux recently has written:

The erroneous view about the existence of a uniform extraterritoriality system comes from the fact that many persons imagine that the provisions of the Chefoo treaty have superseded all former provisions, because they are said to be an interpretation of the words "joint jurisdiction" used in the treaties of the Powers of the third group. But the Powers of the third group have never concurred in that interpretation. Since the signature of the Chefoo treaty they have continued to apply the procedure of joint jurisdiction by the consul and the competent Chinese authority, and the Chinese authorities have concurred in the application of that procedure. It is true that under the clause of the most favored nation some Powers might have requested China to apply the provision of the Chefoo convention to their own nationals, but it is doubtful whether their request would have been justified, and the fact is that they never made such a request.³¹

6. ABSENCE OF PROTÉGÉS

The protégé fiction, by which a national of a state not enjoying extraterritorial rights was enabled in some countries to invoke as defendant the jurisdiction of another state's consuls, never has obtained in China. Nationals of such states have been rare in that country and the necessity of protection has been met through the tender of good offices.³² Russia and

²⁹ Hertslet's *China Treaties*, I, pp. 76, 562.

³⁰ Article XXV of the Treaty of Whampoa.

³¹ This statement of M. Padoux, Adviser for a number of years to the Bureau of Audit of the Chinese Government and an authoritative publicist on Chinese affairs, was contained in a letter to the Peking Leader, published in that paper on Aug. 20, 1925, pp. 6, 8. Obviously, opinions have differed as to what constitutes most-favored-nation treatment in the matter of extraterritorial jurisdiction. M. Padoux's statement directly contradicts that of Dr. Koo (Status of Aliens, pp. 176-7) as far as the latter applies to civil cases: "It may, therefore, be stated as a rule that mixed cases between Chinese and foreign subjects in China are heard and determined by the authorities of the defendant's nation, an officer of the plaintiff's nation being entitled to watch the proceedings, and examine and cross-examine witnesses, and, if dissatisfied with the judgment rendered, protest against it in detail."

³² The foreign population in China in 1923 was 324,947, of which 201,704 were Japanese, 85,856 Russians, 14,775 British, 9,356 Americans, 3,424 Portuguese, 3,361 French and 2,233

certain Latin countries have shown reluctance to abide by these principles. A mandate was issued in 1909 in which the claims of non-treaty foreigners to extraterritorial privileges were denied.³³ However, as Jernigan states: "The spirit and letter of the treaties and regulations mean, that all who reside in the settlement at [Shanghai], whether foreigners or natives, shall be exempt from the interference of the Chinese Government, that over a foreigner that government shall have no control whatever, and that over a native its control shall be primarily exercised under the supervision of a foreign official."³⁴ From which it would follow necessarily that within a settlement or concession non-treaty foreigners when defendants would be under the jurisdiction of the mixed court.

7. CONSULAR AND OTHER COURTS

In consonance with their treaty authorization, the various foreign states have provided for the conduct of judicial functions by their consuls, creating a "multiplicity of courts" which "may be fairly said to constitute the most cumbersome system of judicature known to exist in any considerable commercial center in the world."³⁵ And, incidentally, overlooking, for the sake of economy, the well-established principle of separation of powers; not only that, but constituting the already over-burdened consul advocate in mixed cases in Chinese courts. In Shanghai there still exist eleven foreign courts, and in addition the "Mixed Court." Each court applies the law of its own state and prescribes the penalties which that state has determined to be proper. Japan has the largest number of consular courts in China, 44; Great Britain has 25, the United States 18, and France 16. The total number of consular courts in China is 82.³⁶

In addition to the consular courts, there have been established two courts of a strictly judicial character, the British "Supreme Court for China," set up in 1904, and the "United States Court for China," established in 1906. The former has exclusive jurisdiction within the Shanghai consular district and concurrent jurisdiction with the British consular courts in other districts. It may order the transfer of cases to itself from such courts. Appeals lie to it in all criminal matters and in civil matters involving the sum of twenty-five dollars or its equivalent.³⁷ The United States court has exclusive jurisdiction in criminal cases except "where the punishment of the offense charged cannot exceed by law one hundred dollars fine or sixty days' imprisonment,

Germans. The total population in China of the states which in 1918 did not possess extraterritorial rights was, in 1923, 443. Of these 400 were Swiss, who secured the rights in 1918. China Year Book, 1925, p. 30.

³³ Koo, Status of Aliens, pp. 205-211; China Year Book, 1921-2, pp. 621-2.

³⁴ China in Law and Commerce, pp. 200-201.

³⁵ Consul Bailey to Secretary Seward, Sept. 15, 1879, Foreign Relations, 1879, p. 229.

³⁶ Portugal has 8, Belgium 6, Italy 5, Denmark 1, The Netherlands 1, Spain 1, Switzerland 1.

³⁷ Koo, V. K. W., Status of Aliens, pp. 181-2.

or both," and in civil suits except where "the sum or value of the property involved in the controversy does not exceed five hundred dollars United States money," in which cases, criminal and civil respectively, the consular courts continue to exercise jurisdiction. Appeals may be taken to the United States Court from the consular courts.³⁸ Appeals in important cases may be taken from the consular courts of all countries to the courts designated by the law of the respective states. Appeals also may be taken from the British and the American Courts for China, in the former case to the Privy Council, if that body permits, in the latter to the Circuit Court of Appeals of the Ninth Circuit.

8. THE LAW APPLIED

The law applied in the foreign courts is for the most part that portion of the law of the country to which the court belongs which its own authority has declared to be applicable. In the case of disputes involving real property, the fundamental principle of all systems of jurisprudence, that of *lex situs*, has, however, been applied. As Justice Bourne pointed out, this action by British courts is indeed an application of a principle of British law, and it is to be noted that in many instances, outside the law of immovable property, the application of foreign law amounts simply to pointing out the obligations of foreigners under Chinese law and to prescribing penalties for breaking it. Extraterritoriality has not authorized foreigners to infringe Chinese laws, but has provided the foreign method of dealing with such infringements where they are regarded as of a type which would be dealt with in foreign courts. Professor Willoughby lists four sources of the law of American courts in China: (1) acts of Congress, (2) common law, (3) special decrees and regulations, and (4) Chinese law.³⁹ Nevertheless an examination of the cases tried in the United States Court for China reveals slight application of Chinese law beyond the law affecting immovables.⁴⁰

9. MIXED COURTS

Although the "mixed courts" have been in theory Chinese courts, the degree of foreign control over them renders it logical to deal with them as a part of the extraterritorial régime. The title given them is the recognition of a development in the status of the foreign assessor by which his treaty rights to attend the court, to "watch the proceedings in the interests of justice," to "examine and to cross-examine witnesses," and "to protest against [the proceedings] in detail," have been transformed into the direction of judgments. It has not been customary for Chinese assessors to act

³⁸ Act of June 30, 1906, in Hinckley, Frank E., *American Consular Jurisdiction in the Orient* (Washington, 1906), pp. 219-223.

³⁹ Willoughby, W. W., *Foreign Rights and Interests in China* (Baltimore, 1920), pp. 44-51.

⁴⁰ Lobingier, C. S., *Extraterritorial Cases* (Manila, 1920).

under the clauses granting them the same status in foreign courts, though if application is made for leave for a Chinese observer to sit, permission usually is granted.

Statements vary as to the number of mixed courts in China, but there is good authority for stating that they have existed at Shanghai, Amoy and Hankow. In other places the treaty provisions have been followed more exactly. For example, at Tientsin a Chinese accused by a British citizen would be tried before a Chinese magistrate in the presence of a foreign assessor.

In Shanghai the mixed court has had a unique development which brought it gradually under British, later under joint foreign control, even in the trial of purely Chinese cases. Many things happened during the T'ai P'ing Rebellion (1851-1865). The foreign municipality at Shanghai was established, the foreign customs inspectorate was created, and the mixed court was set up in Shanghai. Subsequently these foreign acts received the compliance of the Chinese Government. Respecting the mixed court, the latter indicated its acquiescence by appointing a deputy of the local magistrate.⁴¹ At first he sat alone for the trial of purely native cases, but "in the lapse of time, it has come to pass that no case is now heard by the [Chinese judge] alone."⁴² In the years prior to the World War, the British assessor served three days a week, the American two and the German one. This process of change was completed in 1911, again during a period of revolution, when the municipality assumed the power to appoint the Chinese magistrate, which it continues to usurp to this day, declining to return the court to Chinese control until a number of conditions, amounting to the retention by the municipality of a very considerable degree of authority, are accepted.⁴³ The jurisdiction of the Shanghai Mixed Court is wide; it

is in fact the police court or court of summary jurisdiction for all offences committed by Chinese or non-treaty-power foreigners within the area policed by the police of the international settlement. It is also what would be called in the English system an "assize" court which deals with the more serious cases of crime. On the civil side it deals also with all civil suits brought by foreigners against Chinese and also with all civil suits between Chinese in Shanghai in which the defendant is a resident of the settlement. . . . The law administered by the court

⁴¹ In August, 1925, the Chinese Minister of Justice declared that the Shanghai Mixed Court had no legal foundation. *Peking Leader*, Aug. 20, 1925, p. 1.

⁴² Morse, *International Relations*, II, p. 134. He says further: "The consular assessor is a party to the judgment in every case—in police cases because of the interest of the foreign community, and in suits between Chinese because the Chinese official, with his traditional methods of enforcing judgments, must not be admitted to an unfettered jurisdiction within the 'area reserved for foreign trade and residence.'" See also Couling, S., *Encycl. Sin.* (Shanghai, 1917), p. 378. Mayers, *Treaties, etc.*, gives the rules for the mixed court, as revised in 1869, on pp. 236-7. Barton, Sydney, "The Shanghai Mixed Court," in *Chinese Social and Political Science Review*, Vol. V, pp. 31-41.

⁴³ Willoughby, *Foreign Rights and Interests*, pp. 62-4.

may be briefly described as the law of China in so far as it is ascertained or ascertainable, administered subject to the customs and to the procedure which have grown up in the past.⁴⁴

Of the value of the Shanghai Mixed Court, Mr. Sydney Barton, British Consul-General at Shanghai, has written:

Now, whatever the shortcomings of the Mixed Court may be, and there are many, the fact remains that it has functioned all these years and still functions today, as the indispensable court of justice to which seven-tenths of the ever-increasing population of Shanghai is amenable, and in the course of these years it has afforded a concrete example of the application of Western ideas of civil and criminal procedure to the conditions prevailing in China.⁴⁵

A different emphasis appears in the following statement by Gustavus Ohlinger, LL.B., Michigan, who was born in China and practiced law in Shanghai from 1903 to 1905:

Whether from indifference, or because of a tacit understanding that their presence was not required, Chinese officials have seldom, if ever, attended the proceedings of foreign tribunals when the interests of their countrymen were involved in suits against foreigners. But foreign representatives have always asserted and exercised the right of attending the trial of cases against Chinese when the interests of their nationals were involved. This has led to one of the gravest abuses connected with foreign intercourse in China. Little by little these representatives have arrogated to themselves the right to sit in judgment on mixed cases, and by threats and intimidation to bring the Chinese magistrate who, theoretically, has the sole decision, to the view of the controversy that they favor. Justice under such circumstances is impossible, for to the weakness and native dishonesty of the magistrate is added the aggressive partiality of the foreign representative, who, in the majority of cases does not profess to be a judge at all, but an active advocate on the bench of the cause of his nationals.⁴⁶

Hinckley's treatment of the general question of mixed versus truly Chinese courts indicates that because of grave difficulties, amounting in practice to impossibility, in obtaining judgments against Chinese debtors, "the consul was almost unavoidably obliged to undertake to prescribe to the Chinese magistrate what judgment to pronounce."⁴⁷

10. CRITICISM OF EXTRATERRITORIALITY

The examination of "the present practice of extraterritorial jurisdiction" involves a consideration of the criticisms which have been directed against it.

⁴⁴ Barton, Sydney, article cited, pp. 36, 37.

⁴⁵ Same, pp. 38-39.

⁴⁶ "Extraterritorial Jurisdiction in China," 4 Mich. Law Rev., pp. 345-6.

⁴⁷ Hinckley, F. E., *American Consular Jurisdiction in the Orient*, pp. 159-160. Mr. Hinckley appears not to take note of the differentiation in procedure pointed out by Padoux and previously dealt with in this article.

No one, Chinese or foreign, has regarded it as other than a makeshift, a choice of evils.⁴⁸

The principal objections to extraterritoriality in China may be said to be:

(1) That it constitutes an infringement of sovereignty and is inconsistent with the legal principle of the equality of states.

(2) That it places Chinese litigants at a disadvantage because: (a) the variety of foreign laws and legal arrangements is confusing and conducive to distrust; (b) consular courts are centered in the cities and are practically inaccessible for the trial of cases originating inland,—appeals may lie thousands of miles away in a foreign state; (c) litigants are often ignorant of the language of the court; (d) the penalties imposed by Chinese law are the more severe.

(3) That it interferes with the local courts: (a) by taking jurisdiction over resident Chinese born or naturalized abroad, and thus protecting them in illegalities for which their neighbors are penalized by the Chinese courts; (b) by taking jurisdiction over and giving protection to Chinese persons or firms fictitiously registered under foreign names, thus affording the protégés a decided advantage over their unregistered competitors.

(4) That it is slow and expensive: (a) it may involve application to several different courts; (b) counter-claims are not permissible, consequently a separate suit must be instituted to accomplish the purpose they serve.

(5) That the foreign consuls are incompetent by training to act as judges.

(6) That the foreign consuls exhibit prejudice: (a) in their judgments, (b) in their association with Chinese courts.

(7) That it impedes the development of China's foreign trade since that country considers it unwise to permit foreigners to go in considerable numbers into the interior so long as they continue to possess the right.

Of much significance is the frequent note of nationalism, the assertion of the sacred right of territorial sovereignty, which the Chinese recognize as unanswerable in itself. It is no longer true that the practical problems alone give them concern. Nor would it be wise to overlook the appeal to sentiment, which can be made as powerful an agency of revolt in the East as it has been in the West. It is by no means true, however, that the argument against extraterritoriality is mainly one of sentiment. Rather is it a

⁴⁸ Authoritative statements of the defects in extraterritoriality in China are plentiful. Among them may be suggested: Hart, Sir Robert, "Proposals for the better Regulation of Commercial Relations," found as Appendix D in Morse, *International Relations*, II, pp. 458-461; Willoughby, W. W., *Foreign Rights and Interests*, pp. 67-87; Willoughby, W. W., *China at the Conference* (Baltimore, 1922), pp. 114-120; A. Nachbaur, Ed., *L'Extraterritorialité en Chine* (Peking, 1925), *passim* (also presents an argument by G. Padoux favorable to extraterritoriality); Tan, S. H. and others, "Extraterritoriality in China," reprinted from *Chinese Students' Monthly*, Sept., 1925; Tyau, M. T. Z., "Extraterritoriality in China and the Question of its Abolition," *British Year Book of International Law*, 1921-23, pp. 133-149; statement of "Questions for Readjustment submitted by China to the Peace Conference," in *China Year Book*, 1921-2, pp. 726-9.

careful, well-supported statement of actual defects and abuses under the categories above outlined. It is instructive to notice that the criticisms of the system as it has worked out in China generally coincide with those that were directed against it in Japan and in Turkey. The items set down appear not to require elaboration, but it may be of interest to quote briefly from statements that embody certain of them.

One of China's best-informed and most astute young publicists, Dr. M. T. Z. Tyau, said in 1920:

At present the Chinese merchants who are anxious to do business with foreigners do not know where they stand legally. They may have a law-suit with a British firm and the case is tried in the British court. The decision may be given in their favor. In the future they may have another law-suit with an Italian or French firm and the second case is tried in the Italian or French court and the decision is diametrically opposite. The Chinese merchants are confounded.⁴⁹

Mr. C. M. Bishop, a former American assessor of the Mixed Court at Shanghai, has written:

The strongest plea for the abolition of extraterritoriality lies in the abuse of this privilege on the part of subjects of foreign Powers who use it as a cloak for illegal acts. The continued smuggling of opium and morphine into China is but a single example, although the most striking, of the wrong that is being done to China under the cloak of a foreign extraterritorial jurisdiction.⁵⁰

Another statement by an American lawyer, formerly resident in Shanghai, illustrates the difficulty of apprehending foreign offenders when the consular courts, as is usually the case, are acting in good faith:

A man need only conceal his nationality to be immune from prosecution. This fact was amusingly illustrated not long ago in Shanghai in the case of the proprietor of a notorious gambling resort. This gentleman exhibited a protean skill in acquiring and shedding his national status. Haled before the American consular court he pleaded that he was a German subject, whereupon the prosecution ended. Taken into the German court, he pleaded American citizenship, and again justice failed. When brought a second time before the American consul he professed to be an Argentinian under Spanish protection. In this way he kept up an interesting game of hide and seek with the servants of the law, and when he had exhausted his changes, quietly slipped away to parts unknown.⁵¹

In a number of instances foreign courts have imposed comparatively light sentences upon criminals, greatly to the resentment of the injured Chinese or their survivors and townspeople.⁵² The evidence of Chinese witnesses

⁴⁹ Quoted by Bishop: "Extraterritoriality in China," *Chinese Social and Political Science Review*, Vol. V (a), Sept., 1920, p. 175.

⁵⁰ Article cited, p. 177.

⁵¹ Ohlinger, G. "Extraterritorial Jurisdiction in China," 4 *Mich. Law Rev.*, p. 348.

⁵² Williams, B. H. "The Protection of American Citizens in China: Extraterritoriality," this *JOURNAL*, Vol. 16, Jan. 1922, pp. 48-52.

has been heavily discounted in the absence of any certain gauge to separate the true from the false. It is doubtful whether a Chinese litigant or witness has any greater tendency to lie than a foreigner. But it is undoubted that it takes a Chinese to tell when another Chinese is giving way to that universal tendency. There appears to be considerable justification for alleging that the extraterritorial courts have been on occasion indifferent to justice, while illustrations are many that the nature of the courts and the anomaly of their situation have tended to place Chinese parties at a disadvantage.

11. CHINESE LAW AND COURTS PRIOR TO THE REPUBLIC

The second of the two subjects of inquiry before the international commission on extraterritoriality is "the laws and the judicial system and the methods of judicial administration of China."

China must be regarded as essentially a country of law,—of the genuine application of moral precepts inculcated by Confucius and other classical teachers. These precepts composed her constitution, impregnated her institutes, motivated the judgments of her officials from the emperor to the village council of elders. In the sense of the principles underlying it, all Chinese law was and is universal. That dominant fact is the assurance of her continued unity today, in spite of *tuchün* and regional civil strife. And the principles of Confucian ethics closely coincide with those of Christianity.⁵³

The point previously was noted that civil cases have as a rule been left to private intermediaries. A good deal of capital has been made out of this fact as supporting the contention that there is no civil law in China. This assumption overlooks the practice of ultimate reference of civil disputes to the courts and of carrying appeals from the district magistrate to the board of revenue at the national capital, which constituted the final court in all civil matters.⁵⁴ No formal distinction was recognized between civil and criminal cases, but in practice a distinction was made. There was always in action the process of checking general against local interpretations of principles. The first rule enunciated by the new Supreme Court of China was: "Civil cases are decided first according to express provisions of law; in the absence of express provisions according to custom; and in the absence of custom according to legal principles."⁵⁵

The Chinese state recognized its interest in criminal cases, which were dealt with regularly by the courts, of which there was an elaborate hierarchy culminating in the emperor.⁵⁶ Reference has already been made to the de-

⁵³ Mr. Y. K. Kuo quotes James Lorimer's quotation from Professor Flint: "There is probably not a single moral precept in the Christian Scriptures which is not substantially also in the Chinese classics." Article on "Some Observations on Chinese Legal History," in Chinese Social and Political Science Review, Vol. V (a), Dec. 1920, p. 258.

⁵⁴ Chang, Y. C., "The Chinese Judiciary," in Chinese Social and Political Science Review, Vol. II, Dec. 1917, p. 82.

⁵⁵ Chinese Supreme Court Decisions (Peking, 1920), p. 1.

⁵⁶ Chang, Y. C., "The Chinese Judiciary," p. 78.

veloped character of criminal law in the eighteenth century and to the positive attitude of the Chinese Government toward its prerogative in criminal cases. The criminal law was codified in that century and was translated by Sir George Staunton in 1810.⁵⁷ It was applied by the officials, who were, as was usual in Europe prior to Montesquieu's work, all-embracing legislators, judges and administrators. Save in Shanghai, Amoy and Hankow, it has been the practice for the regular Chinese courts to hear cases involving foreigners in which Chinese were defendants. In those cities, as above explained, "mixed courts" have handled such cases.

12. LEGAL REFORM

The concept of the relativity of values has begun to creep over from its psychological cradle into other intellectual fields. It gives pause to the ruthless exponent of Western civilization as the pattern for reform in the East. But it has made little headway, as yet, in governmental and business circles. Hence the unvarying condition which the Powers have imposed upon states seeking release from extraterritorial jurisdiction has been the reform of their governmental and legal systems along Western lines. To a degree such lines of reform are the logical consequences of the adoption of Western principles of business, industry, commerce and government. The problem lies in the question of how far Western principles will require modification in adaptation to China and of the ultimate value of principles accepted without full understanding in the effort to meet the terms laid down as conditional to freedom.

Law reform began in China in the later years of the Manchus. Deportation, torture and the use of the "cangue" were abolished. A "Bureau for Law Reform" was created. This bureau completed the first draft of a new criminal code in 1907 and a revised draft in 1910, which was promulgated in 1912 as a provisional code and is still in force. It has been characterized as an adaptation of Japanese law to local conditions and needs. Chinese conditions, like the Japanese, led to the imitation of European rather than Anglo-American law. European law emphasizes the family, Anglo-American the individual; the laws of European countries are codified, those of England and the United States exist in statutes and court and administrative decisions.⁵⁸ A Draft Code of Criminal Procedure also was completed in 1910 and was promulgated in 1912.⁵⁹ A draft civil code was framed but not promulgated.

⁵⁷ *Ta Tsing Lu Li* (Laws of the Tsing Dynasty). Largely but not wholly penal law.

⁵⁸ Wang, Chung-hui, "Revision of the Chinese Criminal Code," 13 *Ill. Law Rev.*, 219-33. The Provisional Criminal Code was published in English in 1919. It may be found in the *China Year Book*, 1921-2, pp. 372-420. The Second Revised Draft of 1919, published in English in the *Chinese Social and Political Science Review*, Vol. V (1919), pp. 144-168, and 220-295, has not been placed in effect.

⁵⁹ Published in English at Peking in 1919.

Since 1914 the business of legal reform has been continuous. In this work some of China's ablest jurists have participated, as members of the Law Codification Commission, among them Tung Kang, the last living authority on ancient Chinese law; Wang Chung-hui, graduate of Yale and of the Inns of Court, who performed the marvelous feat of translating the German civil code into English and is now a deputy-judge of the Permanent Court of International Justice; and Lo Wen-kan, an Oxford M.A. They have been advised by French and Japanese legal authorities. They have investigated local customs in their search for common legal principles. Naturally the most difficult portion of their work has been the preparation of a civil code, and that task has not been completed. They have, however, drafted a considerable body of new law, much of which has been promulgated by the executive, in the absence of a working parliament, and is being applied by the courts. A large part of this law deals with procedure. Another group of laws is supplementary to the criminal code. A third concerns trade and commerce. An effective mining law has been promulgated, also laws regulating copyrights and trademarks and the administration of prisons. A number of laws have to do with the special problems involved in cases affecting foreigners.⁶⁰

In the revision of the criminal law Chinese jurists do not appear to have eliminated all the features of the old law of homicide which led foreigners to insist upon extraterritoriality. The code recognizes the crime of homicide in Article 311: "Whoever commits the offence of homicide shall be punished with death or imprisonment for life or for a period in the first degree," the last-named involving not less than ten or more than fifteen years. It does not divide homicide into classes and degrees. The mitigations of this harsh principle are not sufficiently numerous or definite, and they appear in articles widely removed from those dealing specifically with homicide. By Article 13 criminal intent is made an essential element of every offence, except where negligence specifically is made punishable by law. And Articles 15 and 16 declare that acts in self-defence are not offences unless the means employed in defence were excessive or caused disproportionate injury. The principal change from the old law is the incorporation of the principle of individualization of responsibility and punishment. The second revised draft, which remains unpromulgated, is more lenient than the first. What is termed manslaughter in American law, therein is distinguished from murder and is made punishable by imprisonment of from one to seven years.⁶¹ Causing the death of another person through negligence also is made a separate crime.⁶²

On August 5, 1918, a body of Rules for the Application of Foreign Laws was promulgated.⁶³ This declares, *inter alia*, that "the capacity of a person

⁶⁰ China Year Book, 1925, pp. 596-8.

⁶¹ Art. 283.

⁶² Art. 286.

⁶³ China Year Book, 1921-2, pp. 654-7.

is governed by his national law, that the essentials of a marriage are governed by the respective national laws of the parties," that divorces may be granted under "the national law of the husband and the law of China," that "succession is governed by the national law of the deceased," that "real rights are governed by the law of the place where the things are situate," and that "the proper law governing the essentials and effect of juristic acts giving rise to obligations is determined by the intention of the parties. When the intention of the parties is uncertain, their national law governs if they are of the same nationality, but the law of the place of transaction governs if they are of different nationalities."

13. ADMINISTRATION OF THE LAW

Mr. Balfour said at the Washington Conference that he "understood that the difficulty lay not so much in Chinese law itself, as in the administration of this law."⁶⁴ Here, without doubt, is the crux of the problem, from the foreign point of view. It involves not only the judiciary but the whole governmental organization. China has been a republic since 1911. Her constitutions have been of two types, "provisional" and "permanent," and at present no constitution exists. They have contained bills of rights but the rights contained in them were those of Chinese citizens. Her presidents have been military men of the clique dominant at the time. Her parliament has been a romantic one, a series of clashes between the "politicians" and the clique-representing presidents. Her provinces have been disjointed units ruling themselves. Their governors have been mandarins turned militarists because force meant power. No one would assert that China has yet found herself as a republic, but that is not remarkable. If there is a natural right of revolution, it would seem to follow that there is also a right to work out the new order of things.⁶⁵

The courts of the republic are national and are of three grades, district, high and supreme.⁶⁶ The judges are appointive upon bases of training and experience or of ability shown by examination. Up to date the district courts have been differentiated in only a few localities from the old office of the district magistrate.⁶⁷ The high courts are established in the provincial capitals, and in some provinces there are branch high courts. Their jurisdiction is almost wholly appellate. The supreme court sits at Peking in six divisions, four civil and two criminal, and is made up of thirty judges. Its jurisdiction is principally appellate, but it deals originally with offences

⁶⁴ Conference, etc., p. 938.

⁶⁵ Quigley, H. S., "Some Aspects of China's Constitutional Problem," in *Political Science Quarterly*, Vol. 39, Jan. 1924, pp. 189-200; also "The New Break-up of China," in *North American Review*, Vol. 222, Sept.-Nov. 1925, pp. 102-112.

⁶⁶ The Law of the Organization of the Judiciary was published in English in Peking, and is available in *China Year Book*, 1912, pp. 326-344. It was promulgated in 1910. It provided for four grades of courts, the lowest of which was abolished in 1914.

⁶⁷ The number given in the *China Year Book*, 1925, is 58 (p. 602).

against the state and the international relations of the state concerning which the offence charged is punishable by imprisonment for three or more years or by more severe penalties. Between 1912 and 1918 this court handled 16,244 cases and gave 819 opinions to lower courts and administrative departments.⁶⁸ During 1924 it decided 5,961 cases, 3,095 of them civil, 1,637 criminal and 229 mixed cases.⁶⁹ In 1923 Judge W. Y. Hu, a member of the court of long standing, informed the writer that the court was receiving appeals from every province in China except Kuangtung. Distinct from the ordinary courts is the administrative court, the duties of which "are to try all illegal acts of public officials," with certain exceptions.⁷⁰

In connection with the abolition of the extraterritorial rights of Russians and Germans special arrangements were entered into respecting the treatment of cases in which they might be concerned. In 1920 regulations were issued establishing Chinese district and high courts in the Chinese Eastern Railway zone and authorizing the employment of foreign advisers and investigators by such courts in a consultative capacity, except in cases between Russians, where they might be employed as assistants.⁷¹ The sixth declaration attached to the Sino-Soviet treaty of May 31, 1924, stipulated the future creation of "equitable provisions for the regulation of the situation created" by the relinquishment of extraterritoriality.⁷² The Sino-German exchange of notes of May 20, 1921, goes further, providing that German nationals shall be subject to the jurisdiction of "the modern courts, according to the modern codes, with the right of appeal, and in accordance with the regular legal procedure," and shall be entitled to "the assistance of German lawyers and interpreters."⁷³ The nationals of all other states not possessing extraterritorial jurisdiction are subject to whatever Chinese courts the law of China may determine.

Respecting the feasibility of Chinese administration of the new legal and judicial system, some facts are available from the experience of the Russians and the Germans under it. The most remarkable of these facts is that there has been no special protest against ill-treatment by the government of either, a fact which may be interpreted in more than one way. The Russians have fared worse than the Germans, which has been due largely to the congestion of dockets in the new courts of the railway zone. Five thousand cases were pending in the Russian courts in that area at the date their functions were taken over. Inexperience with the new codes and laws, which even the more skeptical foreign observers admit the majority of the Chinese judges sought

⁶⁸ Chang, Y. W. "The Chinese Supreme Court," *Chinese Social and Political Science Review*, Vol. VIII, Jan., 1924, pp. 59-60.

⁶⁹ *China Year Book*, 1925, p. 600.

⁷⁰ For the laws of its organization, jurisdiction and procedure, see *China Year Book*, 1925, pp. 609-614.

⁷¹ *Chinese Social and Political Science Review*, Vol. V, (a), Dec., 1920, pp. 309-313.

⁷² *China Year Book*, 1924, pp. 880-883.

⁷³ *China Year Book*, 1921-2, pp. 740-741.

faithfully to apply, lack of competent men for judgeships, and lack of funds to secure a sufficient number of good interpreters, were responsible for delay and confusion.⁷⁴

On the other hand, the legal adviser of the Soviet Embassy at Peking has stated to the writer that on the whole "The fact of the Union's (S. S. R.) lack of extraterritorial jurisdiction has not been a disadvantage from the standpoint of the legal protection of her nationals in China," that "the new codes for criminal law and procedure" have been applied "and the old civil law," that "It is understood that the 'Rules for the Application of Foreign Law' have been applied in practice," that citizens of the U. S. S. R. have been confined in new prisons where they have not received preferential treatment nor "suffered very much," that lawyers of the U. S. S. R. have been granted admission to practice in the Chinese courts, that the courts taking jurisdiction "have been in the great majority of cases new courts" and that "the results of appeal to the Supreme Court at Peking . . . are satisfactory in most cases."⁷⁵ There is some evidence to suggest that Chinese courts outside the zone of the Chinese Eastern Railway have been too lenient with Russian offenders turned over to them by police in foreign residence areas.⁷⁶

The official attitude of the German Legation at Peking is that German nationals have in the majority of cases received substantial justice in Chinese courts. The testimony is not wholly favorable, nor is the satisfaction expressed by the majority complete. One investigator quotes the German sentiment thus: "It is a case of appendicitis. We have all had it. We Germans have had our operation and we are feeling very nicely after it. We hope the others will feel equally well when they have had theirs." Another quotation is evidently from an official representative of Germany, who said: "There have been no serious complaints. Certainly you can find strange things in the Chinese judicial procedure, but not in the judgments. There has not been any case of unjust treatment. The Chinese judges have given the greatest care to the consideration of all cases. In that regard they have acted as fairly as the judges in any other country."⁷⁷ German objections have been raised effectively, however, against the trial of cases between Germans and either Chinese or foreigners in the Shanghai Mixed Court, in which a non-German foreign assessor decides the issue. The views expressed by Germans indicate a realization in the Chinese courts that they are under observation and that good administration in the treatment of German cases will ensure a less apprehensive attitude from other Powers.

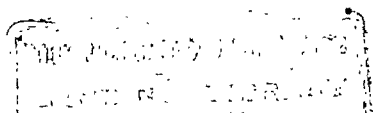
A necessary feature of any judicial system is a proper number of decent jails and penitentiaries. Chinese jails until recently have been filthy, un-

⁷⁴ China Year Book, 1921-2, pp. 638-644.

⁷⁵ Letter of M. Pergament, professor of civil law at the University of Leningrad, temporary legal adviser to the Soviet Embassy, Oct. 7, 1925.

⁷⁶ Peking Leader, May 12, 1925, p. 2.

⁷⁷ Japan Weekly Chronicle, Aug. 20, 1925, p. 230.



lighted wallows, and many of them still are, even where a hopeful magistrate has had the characters for "model prison" written or chiseled over the entrance. There are, however, a number of modern prisons now available, assuredly more than enough for the foreign criminals that will require them. The Peking model prison well deserves its title, since in addition to being well-lighted and clean and providing excellent food and opportunities for exercise, it employs the convicts in a variety of trades.⁷⁸

An important change that is necessitated by the reform of China's law and courts is the development of a very considerable body of able judges. It will take many years to train a competent corps for the hundreds of district judgeships that are contemplated by the law. Not that the older type magistrates are always unacquainted with the new legislation, but their tradition is that of the old law. From the Chinese point of view, it is essential that such men should be retained in the great majority of communities, where Western ideas and agencies have not yet found an influence. That means that the provincial high courts and the supreme court, which no doubt would deal with cases involving foreigners, should extraterritoriality be abolished, will not find keen competition in obtaining men of modern training but will have difficulty in employing men of experience and mature judgment who are well-versed in the new laws. China also lacks a strong bar. Lawyers have been unknown in China until the last two decades and a tradition of their usefulness and worthiness of hire is still in embryo, so that there exists no reservoir of able lawyers from which to staff the courts. Some would say that this would not be wholly unfortunate as a permanent situation. At any rate it does not affect the foreigner except to increase the business of foreign lawyers.

A great deal less is said today than formerly regarding corruption in the courts. Twenty years ago the view was common, as expressed by one writer, that: "The Chinese are a people who for centuries have become impregnated with chicanery, the practice of deception and dishonesty,"⁷⁹ but today they are better understood as a people, and their judges of the modern type have proved themselves to be honest, with exceptions, as in all countries. No system of courts could stand wholly upright under the intimidating influence of the military governors and their subordinates, but such causes of malfeasance are not regarded as other than temporary. Adjustments there will have to be, on the part of judges as well as lawyers, to such new temptations as are presented by the corporate form of business concern, but they will be made because, otherwise, as many Chinese already have discovered, the whole economic structure will fall to pieces.

It has been suggested above that the present political condition of China is temporary. That appears to be a fair statement as applying to civil

⁷⁸ The Chinese delegation to the Versailles Conference gave the number of modern prisons then in operation as 41, distributed throughout all the provinces.

⁷⁹ Ohlinger, G., article cited, p. 348.

strife and militarism. But in a sense that is more important to the question of extraterritoriality the present situation is the continuance of what has been and it is likely to be permanent. China lacks a strong central government. That is obvious. But she never has had a strong central government, if by that is meant a government able to declare and enforce its will in provincial and local affairs. And she is prospering today under a weak one. Federalism of a very loose type has distinguished Chinese political organization throughout its history. China's governmental institutions have been national in name and her people have thought of the "Son of Heaven" as their common father. But the provinces, the districts and the villages have governed themselves. Wherefore their ability at present to carry on, not simply social and economic, but also political, functions quite as effectively as though the Peking Government did not exist. In the presence of this fundamental fact, any country whose policy it is to assist China in attaining release from extraterritoriality would do well not to set up as the inevitable condition the establishment of a strong central government. Foreigners will have to depend upon the goodwill of the people in the provinces for the effectuation of judicial decisions and the impartial administration of the laws. And it may be anticipated that in no very distant future a recognized constitutional system on a federal basis will have disposed of the issue of national and provincial powers.

CONCLUSION

The important change in the Chinese situation between the eighteenth and twentieth centuries is that in the attitude of the government and the people toward foreigners. From an earlier tolerance the Chinese had turned, under the insults and arbitrary interferences of foreign sailors and foreign priests, to an intense suspicion and dislike of foreigners and a desire to be rid of them. It was this attitude rather than the law and its administrators against which foreigners wished protection. At present the Chinese attitude is one of tolerance mixed with the hope that foreigners will soon take to minding their own business. It is true that there is a great deal of rancorous sentiment being distributed for the benefit of the "imperialistic powers," but it is not directed against individuals, and its purpose is not to "drive the foreigner into the sea," but to obtain from him a continuance of mutually profitable relations upon an equalitarian basis.

Along with the change of attitude has come a sincere, possibly too sincere, effort to reorganize the Chinese Government and reform Chinese law in accordance with the standards which the West has set up for the world and which the West itself is still somewhat below in practice. There is too great a tendency to think of China as a battle-ground of military factions and nothing more. For a generation there has been in process a genuine democratic movement, which has left its mark upon the whole structure of the government, but upon no other portion of it so permanently as upon the

judiciary. In view of the special regard enjoyed by the courts in the West, this parallel development in China is not unnatural. The record of the courts in dealing with German, Russian and other cases has been satisfactory, considering all the circumstances. And the judicial system has functioned as a single organization throughout practically all China, as the mass of appeals entertained by the Supreme Court testifies, in spite of *tuchunism*. Moreover, not all *tuchuns* are as bad as some. But regarding them all as rascals, they have no importance in the matter now under consideration, since if they wished to play mah jong with a foreigner's property they would not be deterred by his consuls. Their eyes would be upon his country's gunboats.

Considering these factors, and apart from the political influences urging such a step, it is submitted that there is good ground for the relinquishment of extraterritorial jurisdiction. Not only that, but for going the whole way and making no hard conditions. With such a civilization as the Chinese to assure the elaboration of regular legal principles, with such a problem of adaptation as will have to be met, it would seem to be essential that as early as possible the development of Chinese jurisprudence and of practical rules for its application should be allowed unlimited scope. On the other hand, in view of the comparative growth of republican institutions in China, of the complexity of the newly-adopted Western business methods and of the inexperience and scarcity of judicial timber, it would seem that China would be making a mistake if she failed to employ in her courts eminent legal minds from Western countries, such as might be appointed by her, having no relationship to a foreign government and simply serving as highly qualified advisers without authority other than that which the government might think it advisable to confer. Such a mistake it seems unlikely, from the utterances of her statesmen, that China will make.

Finally, it may well be asked, what is the real issue in the matter of the relinquishment of extraterritorial rights. Is it the apprehension of foreigners that they will be mulcted by Chinese judges and refused the execution of judgments by officials? Is it mistrust of Chinese law and the fear of Chinese prisons? Or is it the vision of losing a very much larger body of privileges which have indeed developed as parasites upon extraterritoriality but which are not essential parts of it, *viz.*, the special position occupied by foreigners in the occupation and government of settlements and concessions, the freedom from taxation, etc.? The question of the relinquishment of extraterritoriality is entitled to be considered on its own merits, unclouded by considerations of a non-judicial character.

OPINIONS OF THE MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY (PART II)

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The Mixed Claims Commission, United States and Germany, is nearing the completion of its labors. It has considered about 12,000 claims, of which about 7,000 have been entirely disallowed. The claims as originally instituted amounted to some \$1,480,000,000, including the government claim for reimbursement of Rhine Army costs, a claim not pressed. The awards to American citizens and corporations will amount, it is estimated, to about \$125,000,000 principal and about \$50,000,000 interest (to January, 1926), a total of about \$175,000,000; the government's claims for subrogation as an insurer on maritime losses, for lost Shipping Board vessels, and in the Veterans' Bureau, will amount, with interest, to about \$60,000,000. Considering that the treaty under which these awards were made established rules of liability and damages widely exceeding the rules of international law, the ratio between awards and claims is probably not far in excess of the average, which is comparatively small.¹ It may also be said that the commission, dealing with 12,000 claims in approximately three years, has established a record for speedy adjudications never before achieved. A critique of the decisions and opinions of the commission down to January, 1925, was essayed in an editorial comment published in this JOURNAL, Volume XIX, p. 133. The present article will undertake to consider the decisions and opinions rendered during 1925. These practically conclude the decisive judicial work of the commission.

The principal opinions and rules of decision were rendered before 1925; those rendered in 1925 involved mostly minor jurisdictional questions and certain supplementary decisions, including the liability of Germany for loss of profits. From the point of view of international law and the law of claims, these questions are important and deserve some extended analysis.

The "Opinions dealing with claims of American nationals for damages growing out of the deaths of aliens"² involve several claims of American dependents of British nationals, killed in the *Lusitania* disaster. The question was whether such American citizens had an independent standing before the commission as entitled claimants, and whether such claims were American in

¹ Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 857-858.

² Opinions, p. 195; this JOURNAL, Vol. 19, p. 630. These opinions are now published by the Mixed Claims Commission in a consolidated edition, with the same page numbering as the individual opinions.

origin, within the meaning of earlier decisions. In its Opinion in the *Lusitania* Cases, page 19, the commission, by Umpire Parker, had held that

In death cases the right of action is for the loss sustained by the *claimants*, not by the estate. The basis of damage is, not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death.

The question then was, who were properly the *claimants* thus designated. In the Life Insurance Cases³ it had been held that insurance companies, though sustaining damage through the premature death of the insured, were too remotely affected to be entitled claimants, and were not "surviving dependents," who alone were protected by the treaty. In the present cases, dependents of the deceased sued for loss of support and mental suffering. The Umpire, Judge Parker, held that inasmuch as, under the categories of liability established in the Treaties of Versailles and Berlin, Germany was obligated to pay for damages suffered by the nationals of the Allied and Associated Powers resulting from the deaths of civilians caused by war, Germany was liable to compensate American dependents for the loss sustained by them through the death of a British subject. Their claims were held to be original, not derivative, to have arisen at the moment of the alien's death, and to have been instituted on their behalf by the United States for the "economic loss" sustained by the United States in their persons.

The decision gives rise to grave doubts, in matters of principle. While it is true that surviving dependents have a right of action, especially preserved to them in the Treaty of Versailles, it is a question whether international law does not imply the condition that the decedent must have had the nationality of the claimant country. Both precedent and theory sustain the belief that citizenship of the decedent in the claimant country is always required as a condition of an international claim.⁴ Where heirs have been admitted to the jurisdiction of international claims commissions, doubts have arisen whether the heirs as well as the decedent must have the nationality of the claimant country, some commissions dispensing with this necessity in the case of the *heir* but not in the case of the decedent.⁵ To be sure, practically none of these cases were actions for wrongful death of the decedent, but involved inherited claims. Yet it is not believed that this modifies the principle. In these *Lusitania* cases, the Department of State appears to have entertained considerable doubt whether it could press claims of American dependents arising out of the wrongful deaths of aliens.⁶ Theory justifies the doubt. When a state espouses the claim of its citizen, it is not merely

³ Opinions, p. 103; this JOURNAL, Vol. 19, p. 593.

⁴ Borchard, *op. cit.*, sec. 284.

⁵ *Ibid.* sec. 285, and particularly Umpire Ralston's remarks in *Corvaia (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 782, 809.

⁶ In the report of the Secretary of State to the Senate, March 2, 1921, the Secretary suggested that "these cases do not possess the element of continuous American nationality."

prosecuting for its "economic loss," but for the loss of prestige and moral injury it has sustained and would sustain if it permitted its citizens to be injured without redress. Diplomatic protection is the sanction which insures a standard of treatment commensurate with international law. If states permitted their citizens to be killed abroad promiscuously or without redress by other states or their officials, the "injured" state would soon lose prestige and its citizens that security which diplomatic protection is designed to afford. Rules of municipal law as to the survivorship of causes of action are likely here to confuse rather than aid. It has not heretofore been deemed a cause of international complaint, if national dependents sustain injury through the killing of an alien. Other nationals may also sustain "economic loss" through such wrongful act, and if dependents, why not creditors, partners, and even insurers? Indeed, a state might thus have to pay damages to foreign countries for injuries inflicted upon its *own* citizens. Surely this could not be good law. The reason for the rule that the killed or injured person must be a citizen of the claimant state is that the prestige of only one state has been deemed impaired by a wrongful assault, and that is the national state of the killed or injured person. As that state alone could have interposed to prevent the injury, how can another state, whose citizen merely suffers a resultant pecuniary loss, claim damages for an "original" wrong?

The question then arises whether the Treaties of Versailles and Berlin change these rules, which I respectfully venture to believe are rules of international law in this matter. Clauses 2 and 3 of Annex I following Article 244 of the Treaty of Versailles deal with "damage . . . to civilian victims . . . and to the *surviving dependents* of such victims." Does this mean "surviving dependents," regardless of the nationality of victims or dependents? Does it establish new rules of substantive liability or rules governing the measure of damages? Injuries to the *person* or *property* are to be redressed. Is the dependent's "economic loss" an injury to his "property"? The question is not answered by the opinion. But the Umpire evidently believed that the fact that the treaty gave [American] "surviving dependents" a right of action, made the nationality of the decedent immaterial. I regret my inability to reach the same conclusion, notwithstanding the fact that the defendant country might thus escape liability where decedent and surviving dependent have different nationalities. Claims commissions are tribunals of very limited jurisdiction, limited notably by the requirements of nationality; and even considerations of abstract justice cannot, it is believed, enlarge a jurisdiction limited by treaty and international law. Before the Reparation Commission, each nation adopted its own rules for measuring the damages due to wrongful deaths, but it is believed that they were interested only when the *deceased* was a national. The measure of damages varied considerably and might well include, as did the rules of the Mixed Claims Commission sitting in Washington, the loss of support and mental suffering of the surviving dependents, especially as the beneficiaries of

any award were the surviving dependents. Although Great Britain rejected the claims of American citizens, surviving dependents of deceased British subjects, and although the Mixed Claims Commission rejected the claims of British dependents of deceased American citizens, this is hardly believed to sustain a rule that American citizens may claim for their "economic loss" due to a wrongful act committed against an alien. The death of one person might thus cause numerous international claims. It is not believed that the Treaty of Versailles in this respect purported to or did change the ordinary rules of international law.

In the case of Maud Thompson de Gennes, Docket No. 2262,⁷ the claimant was born in the United States and, in 1904, married an American citizen, who was lost on the *Lusitania* in 1915. In 1917, she married a French citizen and thus became French. The American Commissioner appears to have believed that because the claimant in 1915 notified her claim to the Department of State, and because the negotiations conducted between the German and American Governments led up to an admission of liability by Germany in 1916, therefore this claim had been "espoused" by the United States and retained its American character, regardless of the nationality of the claimant. This professed distinction between the nationality of a claim and of the claimant was not sustained by the Umpire, who held that the inter-governmental negotiations had no reference to any specific claim, that these negotiations were merged in the Treaty of Berlin which alone established the bases of liability, that in fact the claim had not been formally "espoused" and, more specifically, that the claim had, by the claimant's marriage in 1917 to a Frenchman, lost its American nationality prior to November 11, 1921, and thus the continuity as an American claim which was essential to its admissibility.

The claim of Mary Barchard Williams⁸ presented the following facts. The claimant, a native American, married in 1909 a British subject, who was lost on the *Lusitania* in 1915. At the time, she resided and was domiciled in the United States and had uninterruptedly thereafter resided in the United States. Under section 3 of the Act of March 2, 1907, American women marrying foreigners and who thereby lose their American citizenship, may resume their American citizenship on the termination of the marriage if, residing in the United States, they continue to reside therein. It was thus contended that on the instant of the death of her British husband she, residing in the United States, resumed her American citizenship and, as a dependent survivor, was vested at that instant with the right to make claim. The German Commissioner argued that she had, at the time of her husband's death, a privilege of election whether she would remain a British subject or resume her American citizenship and that some interval must elapse before her election can be established; hence that the claim could not be said to have

⁷ Opinions, p. 213; this JOURNAL, Vol. 19, p. 803.

⁸ Opinions, p. 221; this JOURNAL, Vol. 19, p. 806.

vested in an American citizen on May 7, 1915. The Umpire held that she resumed her American citizenship, by virtue of American law, *eo instanti* on the death of her husband and was therefore an entitled claimant; but that even if, under British law, she also had a certain privilege of and interval for election, this at most affected her with temporary dual nationality, which would not weaken her rights as against Germany. On the question of citizenship the case is one of first impression. The Department of State has heretofore, it is believed, considered that the termination of the marriage did not automatically produce a change of citizenship, and it might be argued that some mental action is essential to effect the change. If so, that mental effort could hardly have been exerted until knowledge of the death. As knowledge did not occur until after the death, this theory would leave the claim not American in origin. The case is close and difficult, and probably deserves further study. Innumerable judges unfortunately have perpetuated Justice Field's inaccuracy in *Carlisle v. United States*⁹ by characterizing the duty of obedience which the alien owes to the local law by the term "temporary allegiance."¹⁰ The Mixed Claims Commission followed suit.

A question was incidentally raised by the position of the American Commissioner that the transfer of the claim by the Department of State to the American Agency for eventual submission to the commission constituted an "espousal" of the claim by the United States. It is not believed that this is necessarily the legal consequence of the presentation of a claim to a mixed claims commission for decision under a claims convention. Before a claims commission, every doubtful case is usually submitted; in this respect, a difference may be noted from the practice in diplomatic protection through negotiation, where the Department's presentation of the claim does presuppose a conviction of its entire validity. It is not believed that such a consequence is necessarily to be drawn from the submission of a claim to an arbitral tribunal.¹¹

One element of the distinction between diplomatic protection and arbitral procedure under treaty was presented by the claim of Edward A. Hilson against Germany.¹² The claimant, a British subject, was employed as a radio operator on the American steamship *Columbian* when she was sunk by a submarine in November, 1916. He was put aboard another ship, but was later forced to row 25 miles to shore and suffered from exposure and lost some personal effects. In December, 1915, he had declared his intention to become a citizen of the United States and on July 5, 1918, after the loss, became naturalized. The question was, whether the claimant was an American national at the time of the loss giving rise to the claim. Alien

⁹ 16 Wallace, 147, at 154.

¹⁰ See Webster's remark in Thrasher's case, Works, Boston, 1851, VI, p. 518 at p. 526.

¹¹ See also Opinions, p. 613.

¹² Opinions, p. 231; this JOURNAL, Vol. 19, p. 810.

seamen on American vessels enjoy a peculiar position. By section 2174 of the Revised Statutes, since repealed though in part revived in the Act of May 9, 1918 (40 Stat. 542), an alien seaman declarant who has served three years on an American vessel may become naturalized, and "for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention as an American citizen." The Department's circular instruction of 1920 expressly provides for American protection for such alien seamen; and it is a fact that the United States has on many occasions extended protection to them and in one case successfully prosecuted against Chile a diplomatic claim for damages.¹³ The Umpire, Judge Parker, differing from the American Commissioner, held that the treaty limited the jurisdiction of the commission to claimants who owed "permanent allegiance to the United States" at the inception of the claim, and inasmuch as the claimant at that time owed "permanent allegiance" not to the United States but to Great Britain, his claim was deemed not within the jurisdiction of the commission.

An interesting *Lusitania* opinion was rendered by the Umpire on October 30, 1925, Docket No. 3482. The claimants were the successors in interest and children of Mrs. Mary A. Mackenzie, who was lost on the *Lusitania*. The question was whether the claim was American in origin. Mrs. Mackenzie, at her death, was the widow of Robert A. Mackenzie, who was born in the United States of English parents in 1858. While still a minor, his parents and their children returned to England. He married there in 1879. Soon thereafter, he went to Canada with his family. There was no direct evidence of his election to adopt the British nationality of his parents or to renounce his native American citizenship. In 1894, he removed with his family to Massachusetts, where he lived until his death in 1901. He appears to have always considered and conducted himself as an American citizen. By the operation of British and American law upon him, he appears to have had at birth dual nationality, *jure sanguinis* and *jure soli*. The Umpire held that inasmuch as he was American by birth, and had never expatriated himself, he remained an American citizen; that his continued residence in England and Canada after attaining majority did not amount to an election either to retain British nationality or renounce his American citizenship. The inference of the German Agent to this effect was ascribed to the ambiguity of numerous instructions of the Department of State between 1875 and 1888, which confounded the loss of diplomatic protection with the loss of citizenship. It was therefore held that the widow was an American citizen, as were also two of the sons of these American parents who had been born abroad and who, on attaining their own majority, were residing in the United States and continued to reside therein. The survivors

¹³ Shields' case, May 24, 1897, Malloy's Treaties, I, 190. Shields, a British subject, died during the negotiations, yet the prosecution of the claim was continued on behalf of his heirs. \$3500 was paid to the United States. Foreign Relations, 1900, p. 67.

of the deceased were not dependents, hence nothing was allowed them for the death of their mother. The loss of \$300 in personal property, however, made it necessary to examine the question of Mrs. Mackenzie's nationality.

In the *Lusitania* case of Richards, Docket No. 5590, decided November 11, 1925, the claimants were the parents and brothers of a baby of 19 months, lost on the *Lusitania*. The entire family was apparently on the ship, returning to England, where the father had been born. He had been naturalized in the United States in 1906. Since May, 1915, he and his family had resided in England. The question in the case was whether, under section 2 of the Act of March 2, 1907, the presumption of expatriation had not arisen against him. The question disclosed a novel case. It was held that the two years residence in the native country, which raises the presumption, ran from May, 1915, to April 6, 1917, but, because of the provision that no American citizen can expatriate himself in time of war, the expatriation itself could not take place until July 2, 1921,¹⁴ the date when peace was declared. As on that date, he had resided in England more than two years and had done nothing to overcome the presumption, the claimant father and hence the family were deemed not to be American citizens on November 11, 1921, as required by the rules of the commission.

In the claim of Christian Damson,¹⁵ it became necessary to define more fully the excepted class of "naval and military works or materials" and "civilian population." The claimant, an American citizen, was employed in the Army Transport Service and was assigned to duty as the master of the Army Cargo Transport *Joseph Cudahy*, an oil tanker requisitioned by the Shipping Board and delivered to the War Department. She was engaged in transporting oil supplies for the American military forces in Europe and at the time of her destruction by a submarine she was on her return from France in ballast, intending to take another cargo. Over the dissent of the American Commissioner, she had been held to be within the class of "naval and military . . . materials," from liability for the destruction of which the Treaty of Versailles exempted Germany. The master, Damson, at the time of the destruction, was forced to take to the small boats, suffered from exposure, and lost personal effects. He claimed that he was a "civilian" and that his personal effects were not "naval . . . materials."

The American Commissioner, by an analysis of American statutes, reached the conclusion that the claimant was a "civilian." The Umpire, however, in his opinion, pointed out that the municipal laws of any one country may not afford the proper criteria to determine the distinction between "civilian population" and military persons, for the former term is incorporated in a treaty subscribed by twenty-six nations and hence requires a certain uniformity of construction. He concluded that the true

¹⁴ Department of State Instruction No. 919, November 24, 1923, Circulars Relating to Citizenship, 1925, pp. 118, 120.

¹⁵ Opinions, p. 243; this JOURNAL, Vol. 19, p. 815.

criterion for the distinction lies in the activity or occupation of the person in question. "If the activities of such nationals were at the time aimed at the direct furtherance of a military operation against Germany or her allies, then they can not be held to have been 'civilians' or a part of the 'civilian population' of their respective nations within the meaning of the treaty." As master of a "public" vessel used directly in furtherance of military operations, and subject to military orders and discipline, he was held not to have been a "civilian" within the meaning of the treaty. It was also held that his personal property and effects designed for immediate personal use and for use in the navigation of a ship "engaged directly in furtherance of a military operation, were impressed with the military character of the ship and of the claimant," and hence were not the subject of a claim under the treaty. The decision is undoubtedly correct.

In the case of *Eisenbach Brothers & Co. v. Germany*,¹⁶ a shipment of furs belonging to the claimants, American nationals, was lost on an American vessel destroyed by a mine in the North Sea on December 1, 1919, over a year after the armistice. It was unknown who planted the mine. During the period of belligerency, which was deemed to have lasted until July 2, 1921, Germany assumed the liability practically of an insurer for all damages suffered by American nationals "directly in consequence of hostilities or of any operations of war." The German Agent contended that in view of the Armistice Agreement of November 11, 1918, which provided for the "immediate cessation of all hostilities at sea," no act occurring thereafter could be considered an act of hostility or operation of war; and that the immediate and proximate cause of the sinking of the vessel was the failure of the Allies, who alone had the opportunity and responsibility, to sweep the mine fields.

The Umpire held that the planting of the mine during belligerency was an act impressed with a hostile and belligerent character, and that, while remote in time from the destruction wrought, it was nevertheless the natural and proximate cause of that destruction, a causal relation which was not broken or interrupted by any proved act or omission of any Allied Power in failing to sweep the mine field in question.

One of the most exhaustive opinions rendered by the commission deals with "Claims for loss of earnings or profits and for loss or damage in respect of intangible property."¹⁷ The test cases included the American charterer of the Norwegian steamer *Vinland*, which was sunk in 1918 by a German submarine while carrying a cargo of American-owned sugar from Cuba to New York. At the time, the charterer had entered into further contracts for carriage of coal. He claimed for the loss of profits on the sugar cargo and the loss of profit which he was prevented from earning on the prospective coal contracts. Other claims dealt with damages for the loss of fishing ves-

¹⁶ Opinions, p. 267; this JOURNAL, Vol. 19, p. 821.

¹⁷ Opinions, p. 273; reprinted in this JOURNAL, p. 171, *infra*. It also has an added title, Administrative Decision No. VII.

sels, including the value of the prospective "probable catch" had the vessel not been destroyed, the claims of individual seamen of a destroyed ship for prospective personal earnings lost by them following the sinking, and other claims for loss of tangible property presently to be mentioned.

The American Commissioner believed that all these losses constituted a valid basis of claim, partly on the expressed belief that the Knox-Porter resolution, incorporated in the Treaty of Berlin, went further than the Treaty of Versailles in determining Germany's substantive liability. The German Commissioner denied this, asserting that under the Treaty of Versailles, Part VIII, damages to tangible property only could be recovered, and that loss of profits had been excluded by the Allies in their reparation bill and by the Reparation Commission. The Umpire, Judge Parker, in a carefully reasoned opinion concluded that the German Commissioner's view was substantially correct. He reached this conclusion by showing the essential differences between Parts VIII and X of the Treaty of Versailles. The former, so far as it related to property damage, dealt with damage to property due to military action outside German territory, and embraced "direct physical damage to property of a non-military character" only, under paragraph 9 of the Annex following Article 232. The test cases fell under this article. Part X, on the other hand, dealt with "property, rights and interests," but embraced only "property, rights and interests" in German territory, affected harmfully by "exceptional war measures or measures of transfer." The test cases were not concerned with these provisions, though they did apply to the case of the *Seaham Harbour*,¹⁸ a vessel detained and used in Germany, in which the Anglo-German Mixed Arbitral Tribunal had allowed damages for loss of profits, wages paid to the crew, and other expenses occasioned by the detention of the vessel in Germany. This case evidently was erroneously believed to sustain the American contention that loss of profits were recoverable under Part VIII, though they had been excluded by the Reparation Commission as indirect and consequential damages. The Umpire found, after a detailed chronological and analytical examination, that the Treaty of Berlin did not purport to enlarge Germany's substantive liability over that provided for in the Treaty of Versailles and that the difference lay only in the method of enforcement of the American claims. With respect to the loss of tangible property, the Umpire had already announced the rule (Administrative Decision No. III, December 11, 1923) that the measure of damages was the reasonable market value at the time and place of loss or taking, or if it had no market value, then its "intrinsic" value. While earning capacity was an element in determining market value, the rule was designed to exclude speculative factors, like prospective earnings or profits.

With respect to the interest of charterers, a useful rule was established. It had been contended that the charterer was the temporary "owner," and

¹⁸ Anglo-German Mixed Arbitral Tribunal, *Recueil des Decisions*, I, p. 550; IV, p. 27.

as "property . . . belonging to . . ." the charterer, he was entitled to the amount which he would have earned, had the charter not been terminated by the sinking, less insurance moneys received. The Umpire held that a charterer's claim to damages depended upon his interest *in the ship*, and this in turn depended upon whether the charter, as a good bargain to the charterer, was an encumbrance or liability to the owner, thus reducing the market value of a "free ship," or whether, as a bad bargain to the charterer, it was an asset to the owner, enhancing the market value. In no event, could more than the market value be recovered by all the parties in interest for the loss of any ship. If the owner's charter involved rates or terms below the market price, he had a good bargain, and his interest in the ship was therefore measured by the difference between the value of a thus encumbered ship and a free unencumbered ship. If he had made a bad bargain, measured by the charter market, he suffered no loss by the termination of the charter. These rules left out of consideration the legality or illegality of the sinking or destruction of the ship, for under the treaty, that was immaterial to Germany's liability. Incidentally, the novel conclusion appears to have been reached that a charterer who has no demise nevertheless had an interest *in rem* in the vessel. These rules were to be applied to the claims of charterers, but loss of profits as such which might have been earned during the life of the charter had the ship not been destroyed, were excluded. The Umpire also disallowed claims for the value of the "probable catch" of destroyed fishing vessels; the amounts paid by the owner of a destroyed ship as wages to master and crew from the time of destruction to their return to the United States; the amounts the owner would have earned under pending contracts of affreightment and existing charter parties; war risk premiums paid; expenses incurred in establishing his claim; and personal earnings lost by individual members of the crew following the sinking. On the other hand, the Umpire allowed claims for tangible property, including the value of fish, provisions, consumable stores, gear and equipment, etc., lost with the vessel; the value of fuel on board; the reasonable market value, but not exceeding the amount actually paid by the owner to the lessor of wireless apparatus under a contract of indemnity; the amount actually paid to master and crew for loss of personal effects and nautical instruments, not exceeding their reasonable market value; and compensation paid them for personal injuries sustained by them and for hospital and medical expenses incurred, with the very appropriate condition and limitation that master and members of the crew affected shall have been American citizens at the time of loss or injury and at the time of the payments made to them by the owner.

Incidentally to the decision of these cases, the Umpire undertook to explain the meaning of that part of section 5 of the Knox-Porter Resolution dealing with the claims of American nationals for "loss, damage or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American or other

corporations." It was evidently desired by the resolution to protect American nationals for their pro-rata losses as stockholders in corporations. But why mention American stockholders in *American* corporations? Can not American corporations, as such, claim as American "nationals," as in most claims protocols? The Umpire suggests that American stockholders in *American* corporations were especially named, "so as to include American minority stockholding interests in corporations American in name only and foreign in majority stock ownership and control, because of which the United States . . . may, acting within its undoubted discretion, well decline to espouse the claims of the corporations as such."¹⁹ Possibly so; but a more plausible explanation, it is believed, is that the draftsmen of the section, in the laudable desire to make it as comprehensive and to include as many categories as possible, inadvertently inserted an extra adjective American, thus giving rise to the superficial inference that perhaps not American corporations, but only American stockholders therein—no distinction is made between majority and minority—were to be protected as claimants. This in fact is assumed as a legal conclusion by the German Agent in resisting the claims of American corporations as such, if large foreign stock-ownership is shown. Nothing in the history of the section or of the diplomatic correspondence seems to sustain the inference that it was intended to exclude from the jurisdiction of the commission American corporations, claiming as such, regardless of the nationality of the stockholders. The section seems merely to have been carelessly drafted, in the desire to make it as comprehensive as possible; it was unnecessarily and, as it proves, ambiguously cautious in seeking to make special provision for American stockholders, not only in foreign, but in domestic, corporations.

Administrative Decision No. VIII²⁰ dealing with "Claims of the Association of American Holders of Foreign Securities, Incorporated, and its Members" presented a novel case. This Association was evidently organized by a Washington attorney, Mr. Lewis A. McGowan, for the purpose of getting before the commission the claims of the many persons who had purchased German mark securities and had lost through the unprecedented depreciation of the mark. The time for filing notice of claim before the commission expired on April 9, 1923. The time was admittedly short. Mr. McGowan appears to have conceived the idea of organizing his association, securing from brokerage houses the names of their American purchasers of German securities, and electing them to membership in the association. A blanket notice of claim was thus filed with the commission on April 9, 1923, without specifying the nature of the claims or the names of the "members" of the association. These "members" for the most part were not apparently "elected" until some time after April 9, 1923, and often did not know of their election. They were requested by the organizer, however, to ratify their

¹⁹ Opinions, p. 325; this JOURNAL, p. 185, *infra*.

²⁰ Opinions, p. 347; reprinted in this JOURNAL, p. 202, *infra*.

election, and several hundred of them did so. The question was, whether the claims of these "members" could be deemed within the jurisdiction of the commission. The association relied on the municipal law doctrine of ratification and relation back. The commission held that, under the rules, the association and its members had no standing. They held that the circular letter of the Department of State requiring notice of claims before April 9, 1923, "so that they may be examined and prepared for notification to the commission," implied that the claims had to be identified, and that a blanket notice on behalf of unknown claimants did not satisfy this requirement. The "ratification" subsequent to April 9, 1923, of an earlier "election" was ineffective to cure this defect. In fact, even had the commission assumed jurisdiction, practically all of the claims would have been disallowed on the merits, because bonds and other market securities are only valorizable if it can be shown that they were subjected to an "exceptional war measure," such as preventing their removal from Germany before January 11, 1920, after a special demand or effort of the claimant to take them out, as a result of which damages can be proved. This difficult test, adopted by the Anglo-German Mixed Arbitral Tribunal, was almost impossible of fulfillment in most cases, so that few bond claims have been allowed by the commission.

In closing this examination of the work of the commission, it is appropriate to call attention to the high degree of conscientiousness, impartiality and learning displayed by Judge Parker as Umpire of the commission. As an American citizen, passing upon the claims of his fellow-citizens against a foreign country, under a treaty imposing obligations on the defendant government "far beyond those for which she would have been held liable under the rules of international law,"²¹ the Umpire's position was one of peculiar delicacy. The skill with which his judicial duties have been performed commands respect and admiration and reflects credit upon the United States and upon the institution of international arbitration.

²¹ Opinions, p. 241; this JOURNAL, Vol. 19, p. 813.

AMERICAN TREATY PROVISIONS RELATING TO CONSULAR PRIVILEGES AND IMMUNITIES

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Apparently no consistent effort has been made to secure a uniform schedule of consular privileges and immunities applicable to all of the states with which the United States has entered into treaty relations. In the entire history of the United States up to the present time there have been only sixteen consular conventions. Some 109 other treaties, however, have secured consular exemptions in varying degrees from many different nations; and the popular most-favored-nation clause has extended the schedule still further. One of the first treaties the United States entered into was a consular convention, that of 1788 with France, but the second consular convention did not come until over sixty years later.¹ During the interval many provisions in commercial treaties had extended exemptions in various countries, so that by 1853 every one of the privileges which are in effect today had been inserted in at least one treaty, and some of them had been repeated many times.

The more important of the specific privileges and immunities developed in treaties are of two kinds: those dealing chiefly with the consulate, and those relating to the consul himself. The former class includes the inviolability of the archives and of the consular offices, the use of the offices as an asylum, and the display of the national insignia. The latter group is composed of the exemptions from military service (with its complement the exemption from military billeting), public service, taxation, and appearance as witness in the local courts, the privilege of communication with the receiving government, immunity from arrest, and certain provisions regarding the punishment of consuls. In addition to these, there are a few miscellaneous provisions discussed separately.

GENERAL PROVISIONS

Three broad provisions supplement those specifically enumerated: the most-favored-nation clause, certain general expressions, and a statement of residual liability. The most important of these in point of frequency of occurrence as well as in extent, is the most-favored-nation clause; and it must be considered in connection with any particular treaty. As it has been inserted in sixty-five treaties² with fifty different nations, it is quite possible

¹ The reason for this was the dissatisfaction incident to the first convention. See Wharton, *Digest of the International Law of the United States*, I: 777.

² Morocco (1787 and 1836), France (1788 and 1853), Spain (1795 and 1902), Tripoli (1805), Algiers (1815 and 1816), Colombia (1824 and 1846), Central America (1825), Denmark

that a consideration of those exemptions granted in treaties to which the United States is a party may not reveal all of those which a consul of the United States stationed at a particular post may enjoy by virtue of some treaty provision.³ It is very likely, however, that somewhere among the many provisions on the subject of consular privileges all of the more important exemptions have been put into operation by an American treaty; and it is believed that every such provision is quoted or cited in this study.

In addition to the most-favored-nation clause, it is necessary to examine the various general provisions which, appearing from time to time, might be construed to add privileges in some cases. The earliest of these general provisions was contained in the treaty of amity, commerce, and navigation with Great Britain in 1794. No attempt was made to define consular privileges other than this: ". . . the said consuls shall enjoy those liberties and rights which belong to them by reason of their function." (Art. XVI).

Three years later a similar treaty with Tunis secured to the consul, his family, and his suite, the protection of the government (Art. XVII). This was expanded in 1805 in a treaty of peace and amity with Tripoli to:

The consuls shall have liberty and personal security both by land and sea, and shall not be prevented from going on board any vessel that they may think proper to visit. They shall have likewise the liberty to appoint their own dragoman and broker (Art. XIV).

Commercial treaties in 1816 and 1827 with Sweden and Norway provided that the consular officer should enjoy all the protection and assistance necessary for the due discharge of his functions (Arts. V and XIII, respectively). Practically the same provision is to be found in Article XII of a treaty of commerce and navigation with Greece in 1837. To this grant of protection and assistance, a treaty of commerce and navigation with the Ottoman Empire in 1830 added, for the only time in the history of American treaties, "suitable distinction," a phrase of doubtful meaning (Art. XII).

(1826), Brazil (1828), Prussia (1828), Austria-Hungary (1829, 1848, and 1870), Mexico (1831), Russia (1832), Chile (1832), Venezuela (1836 and 1860), Peru-Bolivia (1836), Sardinia (1838), Ecuador (1839), Portugal (1840), Hanover (1840 and 1846), Two Sicilies (1845 and 1855), Mecklenburg-Schwerin (1847), Guatemala (1849), Hawaiian Islands (1849), Switzerland (1850), Salvador (1850), Peru (1851, 1870, and 1887), Costa Rica (1851), Argentine Republic (1853), Netherlands (1855 and 1878), Persia (1856), Bolivia (1858), Paraguay (1859), Honduras (1864), Haiti (1864), Madagascar (1867 and 1881), Nicaragua (1867), Orange Free State (1871), German Empire (1871), Belgium (1880), Serbia (1881), Roumania (1881), Corea (1882), Zanzibar (1886), Tonga (1886), Congo (1891), Japan (1894 and 1911), Greece (1902), China (1903), and Sweden (1910).

³ The meaning of the term "most-favored-nation" is explained in articles by S. K. Hornbeck, "The most-favored-nation clause" in this JOURNAL, Vol. 3, pp. 395, 619, 797; and S. B. Crandall, "American construction of the most-favored-nation clause," *id.*, Vol. 7, p. 707; and with special reference to consular treaties in *In re Fattiosini's Estate* (1900), 67 N. Y. S. 119, and in Ernest Ludwig, *Consular Treaty Rights*, pp. 119-179. See also the article by Wallace McClure, "German-American Commercial Relations," in this JOURNAL, Vol. 19, p. 689.

This general provision was followed in the main but was qualified by commercial treaties with the Netherlands, 1839 (Art. III), and with Belgium, 1845 (Art. XVII), and 1858 (Art. XV), the effective statement in these treaties permitting consular officers to enjoy all the privileges, protection, and assistance which usually appertained to their offices and which were necessary for the proper discharge of their functions; while the French consular convention of 1853 prefaced the immunities set forth by the statement that they were such as were usually accorded to the consular office (Art. II).

At least twice has there been expressed in American treaties the idea which American officials and text-writers have steadily declared, that consuls are not entitled to diplomatic immunities. In statements introducing the prerogatives enumerated in consular conventions with Colombia, 1850 (Art. V) and Salvador, 1870 (Art. XXXV), the contracting nations in each instance declined to recognize any diplomatic character of consuls and specifically denied to them the privileges and immunities attaching to diplomatic offices; but to enable consuls to expedite their business, certain prerogatives were granted in the treaties.

The treaty of amity, commerce, and consular privileges with Salvador in 1870 contained the unusual provision that in everything that exclusively concerned the exercise of their functions, consular officers should be independent of the state in whose territory they were residing (Art. XXXV). This was the same expression found in the consular convention of 1850 with Colombia (Art. V); otherwise the nearest approach to the position is to be found in a statement in the consular convention of 1871 with the German Empire to the effect that consular officers should not be interfered with in the exercise of their official functions any further than was necessary for the administration of the laws of the country (Art. III). This latter provision was invoked by the German consul at Cincinnati when in 1887 a certain person in that city used misleading advertisements and displayed the German flag in such a manner as to leave the impression that he was a German consul. The Attorney-General was of opinion that the case was not covered by any law of the United States; but when the matter was called to the attention of the local authorities, it was amicably settled.⁴

On the other hand, in many cases it has been specifically provided that the immunities enumerated by treaty are the only ones which the consular officer may claim. The ordinary expression of this idea came in 1824, though it had previously found a place in the French consular convention of 1788 (Art. II). The provision "being in everything else subject to the laws of the respective states" was included in commercial treaties with Colombia, 1824 (Art. XXVIII), 1846 (Art. XXXII), 1850 (Art. VI); Central America, 1825 (Art. XXX); Denmark, 1826 (Art. X); Brazil, 1828 (Art. XXX); Mexico, 1831 (Art. XXVIII); Chile, 1832 (Art. XXVIII); Venezuela,

⁴ Moore, *Int. Law Digest*, V: 42.

1836 (Art. XXXI); Peru-Bolivia, 1836 (Art. XXVII); Ecuador, 1839 (Art. XXXI); Guatemala, 1849 (Art. XXX); Salvador, 1850 (Art. XXXII); Peru, 1851 (Art. XXXVI), 1870 (Art. XXXIII), 1887 (Art. XXXI); Netherlands, 1855 (Art. II); Bolivia, 1858 (Art. XXXIII); and Haiti, 1864 (Art. XXXV). In many instances, however, this must be read in connection with the most-favored-nation clause. Although these treaties have a common residual clause, it is not to be understood that the residuum is the same in all cases; for the exemptions granted in each case, reference should be made to the particular treaty.

ARCHIVES

As might be expected, one of the earliest specific exemptions appearing in treaties was that given to archives; and it is one which has appeared in a great majority of the treaties according exemptions. The reasons for this are obvious; the consular business is such that its records must always be at the disposal of the consul; and the relations of the consul to his home government are essentially confidential. This first found expression in the French consular convention of 1788, in a statement that:

The consuls and vice consuls, and persons attached to their functions; that is to say, their chancellors and secretaries, shall enjoy a full and entire immunity for their chancery, and the papers which shall be therein contained (Art. II).

The next statement of this immunity came in a treaty of amity and commerce with Sweden and Norway in 1816. That treaty provided for the punishment of consuls guilty of illegal acts, and then stated that this would not subject the archives to examination, as all of the official records should be carefully preserved under the seal of the consul and of the authorities of the place of his residence (Art. V). Practically the same expression found a place in the treaty of commerce and navigation with the same country in 1827, the only important difference being that the word "search" appeared for the "examinations" found in the earlier treaty (Art. XIII). The Greek treaty of commerce and navigation of 1837 (Art. XII) followed the treaty of 1827.

The year 1824 saw the standardization of the exemption, a commercial treaty with Colombia in that year containing the following provision: "The archives and papers of the consulates shall be respected inviolably, and under no pretext whatever shall any magistrate seize or interfere with them" (Art. XXVIII). The identical wording was followed in commercial treaties with Central America, 1825 (Art. XXX); Denmark, 1826 (Art. X); Brazil, 1828 (Art. XXX); Mexico, 1831 (Art. XXIX); Chile, 1832 (Art. XXVIII); Peru-Bolivia, 1836 (Art. XXVII); Venezuela, 1836 (Art. XXXI); Ecuador, 1839 (Art. XXXI); Portugal, 1840 (Art. X); Colombia, 1846 (Art. XXXII); Guatemala, 1849 (Art. XXX); Salvador, 1850 (Art. XXXII); and Bolivia, 1858 (Art. XXXIII).

A slight change in the phraseology was made in 1850 in the consular convention with Colombia (Art. V), when the word "functionary" was substituted for the word "magistrate" of the treaty of 1824. A treaty of friendship, commerce and extradition with Switzerland⁵ of that same year (Art. VII) introduced two other changes. The first of these was the addition of the term "functionary" to "magistrate" in place of the substitution of the Colombian treaty. The second enlarged the scope of the exemption by denying to the "magistrates or other functionary" the right to "visit, seize, or in any way interfere with" the consular archives and papers. The following year witnessed a further enlargement in the number of persons affected; so that in the Peruvian treaty of friendship, commerce, and navigation of 1851 the list of those forbidden to disturb the consular archives comprised all persons, magistrates, and other public authorities (Art. XXXVI). In general this same expression was used in commercial treaties with Haiti, 1864 (Art. XXXV), and Peru, 1870 (Art. XXXIII), 1887 (Art. XXXI);⁶ while the treaty of friendship, commerce and navigation entered into between the Argentine Republic and the United States in 1853 stated the prohibition to be against "any magistrate or any of the local authorities" (Art. XI).

A complete change in the phraseology of the provision was effected in the consular convention with France in 1853. Speaking of the relation of the local authorities to the consulate, Article III provided that "in no case shall they examine or seize the papers there deposited." Identical language was employed in consular conventions with Belgium, 1868 (Art. VI) and 1880 (Art. VI); Italy, 1868 (Art. VI); Salvador, 1870 (Art. XXXV); German Empire, 1871 (Art. V);⁷ Serbia, 1881 (Art. VI); Roumania, 1881 (Art. VI); Congo, 1891 (Art. V); and Greece, 1902 (Art. VI); and almost the same in a treaty of friendship and general relations with Spain, 1902 (Art. XVIII).

The latest important change in the exemption was made in a consular convention with Sweden in 1910, in which it was specifically stated that the consul should never be required to produce the consular papers in court or to testify as to their contents (Art. VI). This position had been maintained previously on at least one occasion when its only basis was the provision declaring archives to be at all times inviolable. The account of the incident as given in Moore's *International Law Digest* is as follows:

The information regarding which your testimony is desired was communicated by Mr. Nickel to you in your capacity of consul general of the United States, and as such officer you took action and communicated the statements to the Department, thereby making them a part of the records of your consulate.

⁵ To the same effect is the treaty of friendship, commerce, and extradition with the Orange Free State entered into in 1871 (Art. V).

⁶ The last named treaty provision was applied in 1897. See Moore, *Digest*, V: 52.

⁷ Applied in *Kessler v. Best* (1903), 121 Fed. 439.

It is provided in Article V of the treaty of 1871 with Germany that the consular archives shall be at all times inviolable and where communications are from their nature confidential, for the cognizance of the consul's government only, it is clear that consular officers should not be called upon to testify regarding them.

The Department, therefore, can not authorize you to testify in the case, on the ground that whatever knowledge you may have is official and privileged; because concerning only your relation to your own government.⁸

While these treaties indicate the general development of the archives provision, there have been several minor variances. Thus the Dutch consular convention of 1855 provided with reference to the Dutch colonies that consular archives situated therein should be protected from all search and that no authority or magistrate should have power to visit, seize, or examine them (Art. V). Treaties with the Two Sicilies in 1855 (Art. XVIII) and with Venezuela in 1860 (Art. XXVI) stated that where a consul was a citizen of the country in which he was performing his functions, he should be subject to its laws as any other citizen, but that this should not be so construed as to affect the inviolability of the consular archives.

In the consular convention with Austria-Hungary (1870), the local authorities were forbidden to examine or seize the papers of the archives, which were to be inviolable at all times (Art. V). To the same effect was Article VI of the consular convention with the Netherlands (1878); while that of the same year with Italy (Art. VI) provided that the local authorities should not "examine or sequester" the papers of the archives.

Up to the present time, provisions especially designed to protect the consular archives have appeared in forty-four treaties with thirty-two different states. Although the wording has varied from time to time, the general effect has been at all times to protect the archives from all interference of any kind. It must be understood, however, that the exemption applies only to those papers which relate to the consular business; in many cases it is specifically stated, and in the others it is implied, that these documents must be kept separate from unofficial papers of the consulate. This distinction has been applied in the *Consular Regulations* in the absence of treaty provisions.

INSIGNIA, INVIOABILITY OF CONSULATE, ASYLUM

The right to display the national coat-of-arms and to hoist the national flag, inviolability of the consular offices and of the consular dwelling, and the use of the consulate as an asylum, are so closely related as to merit a joint consideration. The privilege of displaying the national insignia has been accorded regularly, and the denial of the right to use the consulate as

⁸ Rockhill, third Asst. Sec. of State, to Mr. Mason, July 31, 1894 (Moore, Digest, V: 83). This position was again maintained in 1899. Hay, Sec. of State, to Mr. White, March 6, 1899 (Moore, Digest, V: 82).

an asylum has been equally uniform; but the broader question of the inviolability of the consulate has received more varied treatment. The French consular convention of 1788 carried the first expression of the last named exemption when it stated that consular officers should enjoy a full and entire immunity for their chancery (Art. II). At the same time "they shall place over the outward door of their house the arms of their sovereign; but this mark of indication shall not give to the said house any privilege of asylum for any person or property whatever."

The next instance of this concession (1833) was the brief statement in a treaty of amity and commerce with Muscat that the consuls' houses should be inviolate (Art. IX)⁹ and a fuller consideration was not given until 1850. The consular convention with Colombia concluded in that year provided:

In order that the dwellings of consuls may be easily and generally known, for the convenience of those who may have to resort to them, they shall be allowed to hoist on them the flag, and to place over their doors the coat-of-arms of the nation in whose service the consul may be, with an inscription expressing the functions discharged by him; but those insignia shall not be considered as importing a right of asylum, nor as placing the house or its inhabitants beyond the authority of the magistrates who may think proper to search them, and who shall have that right in regard to them in the same manner as with regard to the houses of the other inhabitants in cases prescribed by the laws.

The . . . dwellings of consuls shall be subject to the laws and authorities of the country in all cases in which they have not received a special exemption by this convention and in the same manner as other inhabitants (Arts. V, VI).

The consular convention with France in 1853 made provision for the display of the national arms and flag and of an inscription either on the consular office or dwelling (Art. II). Article III declared that the consular offices and dwellings, which were inviolable, should not be invaded under any pretext; but in no case could those offices or dwellings be used as places of asylum. This expression would seem to leave the local authorities incapable of taking direct action in case the consulate should be used as an asylum, though the dismissal of the consul would probably follow any attempt so to use his office or dwellings. Apparently, however, it is customary to permit the local authorities to enter the consulate when this is necessary for the capture of a refugee.¹⁰

The consular convention applying to the Dutch colonies (1855) extended the privilege of utilizing the national arms and the proper inscription, but

⁹ This provision was adopted by Zanzibar in the treaty of amity, commerce and navigation of 1886 (Art. II).

¹⁰ Marcy, Sec. of State, to Mr. Clay, Jan. 24, 1854 (Wharton, Digest, I: 676); same to Mr. Wheeler, May 11, 1855 (*ibid.*); Hunter, Acting Sec. of State, to Mr. Peck, Oct. 4, 1865 (*ibid.*, p. 678). But this does not mean that the consulate can be invaded at will on the suspicion that it is being used as an asylum. Hay, Sec. of State, to Mr. Powell, April 25 and Nov. 27, 1899 (Moore, Digest, V: 55-57).

made no mention of the national flag; and the use of the arms and inscription was restricted to the consulate. Here, again, it was provided specifically that such outward mark should never be considered as conferring the right of asylum, nor as exempting the house and its occupants from the prosecution of the local justice (Art. IV).

Two consular conventions in 1868, one with Belgium and the other with Italy, were almost identical in this respect. The French consular convention of 1853 was followed with reference to the inviolability of the consulate¹¹ and its use as an asylum; and the only difference in the matter of display of national insignia was that the later conventions restricted the use of the national flag to consulates outside of the capital where a legation of the consul's government was situated (Arts. V, VI). A convention with Austria-Hungary two years later extended the use of the flag to include the vessel which the consul might use in port for the discharge of his functions (Art. IV);¹² while a similar treaty with Salvador in the same year followed the French model except for the restriction of the use of insignia to "dwellings" (Art. XXXV).

The Austro-Hungarian provision was followed in the consular convention with Germany in 1871; but one important variation appeared in the specific provision that the local authorities might invade the consulate when in pursuit of an offender against the criminal law, though this was the only case in which such invasion could be justified (Art. V).¹³

The general pattern laid down in the preceding conventions governed the statements in Articles V and VI of the consular conventions with Italy,

¹¹ The Italian Government in denouncing the consular convention on September 14, 1877, referred to the provision under consideration as follows:

"It is not necessary for me to use words to explain to you how such a state of things is in little harmony with the modern principles of international law, which principles have to take into consideration the progress of civilization and of the greatly extended guarantees sanctioned by modern laws for the protection of individual liberty and of the inviolability of domicile, and have then to leave open the way for the common law, reserving the privilege of exemption only to dwellings of diplomatic agents, the true representatives of foreign sovereignty.

"On the other hand, once that the principle is admitted to consular officers being liable, to summons before the tribunals of the kingdom, to there answer for responsibilities contracted by them, it does not seem logical that to them should be granted, by means of this exemption, the way of evading for themselves and their effects the execution of the sentence." Foreign Relations, 1878, 462-463.

A new consular convention entered into in the following year omitted the objectionable clause.

¹² Applying the provisions of this treaty, Secretary of State Frelinghuysen held in 1884 that where the right to display the national flag had been secured by treaty, it could not be interfered with by municipal ordinance. Moore, Digest, V: 58; For. Rel. 1884, pp. 18, 19.

¹³ Action of the German Government which would result in the virtual imprisonment of an American consul within the consulate, while not within the letter of this article, will be protested against as violating its meaning. Hay, Sec. of State, to Mr. White, March 6, 1899. Moore, Digest, V: 82.

1878; Netherlands, 1878; Belgium, 1880; Serbia, 1881; Roumania, 1881; Greece, 1902; Sweden, 1910; in the treaty of amity, commerce and navigation with the Congo, 1891 (Art. V), and in the treaty of friendship and general relations with Spain, 1902 (Arts. XVII and XVIII). The only other provision on the subject was that in the convention as to protection entered into in 1880 between the United States and Morocco, in which it was stated (Art. VI) that the consul's dwelling should be respected.

Interpreting a provision of the treaty of amity, commerce and navigation of 1831 with Mexico (Art. XXIX), Secretary of State Evarts was of the opinion that the exemption of consular archives from seizure and examination did not afford any protection to the consular office, and that there was no just ground for complaint against the local authorities for an entry of the consulate so long as the archives were left untouched.¹⁴

The Department of State was called upon in 1890 to apply the provision,—“The consular offices and dwellings shall be at all times inviolable. The local authorities shall not under any pretext invade them. In no case shall they examine or seize the archives or papers there deposited.” In July, 1890, forces of the provisional government had torn down the consular flag at San Salvador, destroyed or carried away the archives, property of the United States, and personal property of the consul, and subjected the consul to personal indignities. The United States immediately called the treaty provision to the attention of the Salvadorean Government; and after some negotiation, satisfactory reparation was made.¹⁵

The provision of the French consular convention of 1853 that “the consular offices and dwellings shall be inviolable. The local authorities shall not invade them under any pretext” was the subject of some correspondence between the two countries in 1899. The American consul at Bordeaux moved his residence to Archachon in order to undergo medical treatment. The routine work of the office was done at Bordeaux, but the consular correspondence was conducted from Archachon. Local authorities invaded the dwelling at the latter place under the authority of a writ issuing from a local court in a suit in which the consul was defendant. This action was protested by the United States as being a violation of its treaty rights. In the course of the correspondence arising from the incident, the respective positions of the two governments were set out as follows:

The French Government, on the other hand, held that the treaty accorded inviolability to the consular dwelling only because it might be sometimes difficult to distinguish the office from the residence; that the designation in the exequatur of the seat of the consulate determined the place of official residence, the mention of the wider area of jurisdiction referring only to the right to perform consular acts; and that, as consuls do not enjoy the exemptions of public ministers, the privileges of the

¹⁴ Evarts, Sec. of State, to Mr. Foster, Feb. 20, 1880. Moore, Digest, V: 34.

¹⁵ Moore, Digest, V: 51. The article in question was Art. XXXV of the treaty of amity, commerce, and consular privileges (1870) with Salvador.

treaty should not be extended beyond the offices and residences of the consuls at their several posts.

The United States, while maintaining that this view was not consistent with the letter or intent of the treaty, intimated that it would be adopted, should occasion arise, as a reciprocal construction thereof.¹⁶

In a second case involving the same clause, the Department of State disapproved the action of an American consul in receiving into the consulate the property of an American citizen in order that it might escape attachment by a French court. While the French authorities might not invade the consulate to secure the restitution of the property, the consul was required to notify the proper officials of the time and place at which the restoration was to be made.

MILITARY BILLETING AND SERVICE

Immunity from military billeting and service was accorded in the consular convention with France in 1788, and it has been inserted in practically every consular convention entered into since that time. Although military billeting and military service are not necessarily inseparable, in only two cases have provisions been made for military billeting without similar provision for military service,¹⁷ and never has there occurred the exemption from service without that from billeting.

The French consular convention of 1788 (Art. II) stated the immunity to be from all personal service, from soldiers' billets, militia, watch and guard; and the convention of 1853 (Art. II) from "military billetings, from service in the militia or the national guard, and from other duties of similar nature." The latter expression was followed in the consular convention with Austria-Hungary in 1870 (Art. II); and the same idea predominated in the convention of 1871 with Germany, where the immunity was from military service of every sort (Art. III).

Conventions with Belgium and Italy in 1868 enumerated (Art. III) the branches of service as militia, national guard, and regular army; and it was ten years later that the sea forces were mentioned. This statement occurring in the consular convention of 1878 with the Netherlands (Art. III), was followed in substance by all the later conventions. According to that instrument, the immunity was from "military billeting and contributions and from all military service by land and sea, whether in the regular army, in the national or civic guard, or in the militia." The conventions following this principle were those with Italy, 1878 (Art. III); Belgium, 1880 (Art.

¹⁶ Moore, Digest, V: 54. The action of the local authorities in Italy in entering, to levy upon property therein, a consular dwelling protected by a clause identical with the one quoted, caused a protest by the United States. Fish, Sec. of State, to Mr. Marsh, Dec. 6, 1876. Moore, Digest, V: 37.

¹⁷ Netherlands, Consular convention of 1855, Art. XIII; Spain, Treaty of friendship and general relations, 1902, Art. XV.

III); Serbia, 1881 (Art. III); Roumania, 1881 (Art. III); Congo, 1891 (Art. V); Greece, 1902 (Art. III); and Sweden, 1910 (Art. III).

The exemption from military service was extended to all public service by commercial treaties or consular conventions with France, 1788 (Art. II);¹⁸ Colombia, 1824 (Art. XXVIII), 1846 (Art. XXXII), 1850 (Art. V); Central America, 1825 (Art. XXX); Brazil, 1826 (Art. X); Mexico, 1831 (Art. XXIX); Denmark, 1826 (Art. X); Chile, 1832 (Art. XXVIII); Peru-Bolivia, 1836 (Art. XXVII); Guatemala, 1849 (Art. XXX); Salvador, 1850 (Art. XXXII), 1870 (Art. XXXV); Peru, 1851 (Art. XXXVI), 1870 (Art. XXXIII), 1887 (Art. XXXI), and the German Empire, 1871 (Art. III).

TAXATION

One of the most widely distributed of the consular exemptions is the immunity from certain types of taxation. While there has been considerable variation in the expression of this exemption, in the majority of instances the statements have followed the same general outline. On five occasions the United States has specified immunity from tariff duties only, and in each case this was in a treaty with a Mohammedan country.¹⁹ The usual expression has been decidedly different from this. According to the French consular convention of 1788, consular officers were to be exempt from all duties, taxes, impositions, and charges except such as might be levied on the estate real and personal of which they were the proprietors or possessors, which property was to be subject to the taxes imposed on the estates of all other individuals (Art. II).

This was standardized for commercial treaties in the treaty of amity, commerce, and navigation with Colombia in 1824. Consular officers,

they not being citizens of the country in which the consul resides, shall be exempt from . . . all kinds of taxes, imposts, and contributions, except those which they shall be obliged to pay on account of commerce, or their property, to which citizens and inhabitants, native and foreign, of the country in which they reside are subject (Art. XXVIII).

Practically the same form was used in commercial treaties with Central America, 1825 (Art. XXX); Denmark, 1826 (Art. X); Brazil, 1828 (Art.

¹⁸ The expression is "all personal service."

¹⁹ Algiers, treaties of peace and amity, 1795, 1815, and 1816, Art. XXI: "The consul of the United States of America shall not be required to pay any customs or duties whatever on anything he imports from a foreign country for the use of his house and family." Tunis, treaty of amity, commerce and navigation, 1797, Art. XVII: "He may import for his own use all his provisions and furniture without paying any duty; and if he shall import merchandise (which it shall be lawful for him to do), he shall pay duty for it." Egypt, convention relating to commerce and customs, 1884, Art. X: "Articles and personal effects belonging to consuls general and consuls not engaged in other than consular business, not performing other duties, not engaged in commercial or manufacturing business, and not owning or controlling real estate in Egypt, shall be exempt from any examination, both when imported and exported, and likewise from the payment of dues."

XXX); Mexico, 1831 (Art. XXIX);²⁰ Chile, 1832 (Art. XXVIII); Venezuela, 1836 (Art. XXXI); Peru-Bolivia, 1836 (Art. XXVII);²¹ Ecuador, 1839 (Art. XXXI); Colombia, 1846 (Art. XXXII); Guatemala, 1849 (Art. XXX); Salvador, 1850 (Art. XXXII); Peru, 1851 (Art. XXXVI), 1870 (Art. XXXIII), 1887 (Art. XXXI); Bolivia, 1858 (Art. XXIII);²² and Haiti, 1864 (Art. XXXV).

The consular convention with France in 1853 gave a slightly different turn to the taxation immunity by its specification that the exemptions from the enumerated taxes should apply whether the levy was federal, state, or municipal (Art. II). This was followed in consular conventions with Italy in 1868 (Art. III), Belgium, 1868 (Art. III), and Austria-Hungary, 1870 (Art. II).²³

The consular convention with Germany in 1871 (Art. III) added one further tax to the list from which consular officers were exempt; and this exemption from sumptuary taxes was carried into the consular convention with the Netherlands in 1878 (Art. III). The German treaty also made the only direct reference to taxation of the consular salary to be found in any American treaty, by providing that under no circumstances should the official income be subject to any tax.²⁴

A further variance appeared in a consular convention with Italy in 1878 in the expression:

The aforesaid consular officers shall be exempt from all national, state or municipal taxes, imposed upon persons either in the nature of a capitation tax or in respect to their property unless such taxes become due on account of the possession of real estate or for interest on capital invested in trade, manufactures, or commerce (Art. III).

This served as a model for consular conventions with Belgium, 1880 (Art. III); Servia, 1881 (Art. III); Roumania, 1881 (Art. III); Greece, 1902 (Art. III); Spain, 1902 (treaty of friendship and general relations, Art. XV); and Sweden, 1910 (Art. III).

Consular conventions with Colombia, 1850 (Art. V), and Salvador, 1870 (Art. XXXV), extended the exemption only to "contributions, personal and

²⁰ This treaty makes the exemption from "taxes, imposts, and contributions levied especially on them."

²¹ This treaty places the consul on the same plane as a private citizen in similar circumstances with reference to taxes from which the consular officer is not exempt.

²² The word "taxes" was omitted from this treaty.

²³ This placed the consular officer on the same plane with "other private individuals" in the matter of taxation from which the consular officer is not exempt. An interpretation of the treaty by Secretary of State Sherman in 1898 is given in Moore, *Digest*, V: 88.

²⁴ The increasing popularity of income taxes as sources of revenue has caused the question of exemption therefrom to arise a number of times in communications between consuls abroad and the Department of State. While the official income of foreign consuls in the United States is exempt by statute and treasury rulings, the United States has not entered into any treaties, save the one under consideration, which makes a special reference to taxation of the consular income.

extraordinary, imposed in the country where they reside." The provision in the consular convention relating to the Dutch colonies (1855) was peculiar in that it was limited to personal taxation, and, by specific statement, was never to be extended to custom-house duties or other indirect or real taxes (Art. XIII).²⁵

There are many instances in the records of the Department of State of efforts by consuls to secure official support for the claim of exemption from certain taxes on the basis of one of the treaty provisions given. In addition to the matter of income taxes (both on official and private incomes), such requests include such items as dog and hunting licenses, poll taxes, personal property taxes on automobiles, automobile licenses, automobile transfer taxes, inheritance taxes, and luxury taxes. The almost invariable answer is that such contributions were not in the minds of the framers of the treaty stipulation. In a field where treaty provisions could be of substantial benefit to consular officers, the phraseology employed is that of an earlier time when many of the present problems of taxation were unknown, and present methods unused.²⁶ Such a situation is greatly to be regretted.

²⁵ A unique exception was contained in the Moroccan convention as to protection entered into in 1880, in which it was stated that consular officers were subject to no duties, imposts, or taxes except the tax on cultivated land and the gate-tax on beasts of burden.

²⁶ The following extract from an opinion of the *Fiscal* of the Supreme Court of Chile on a claim by a British consul for exemption from the use of stamped paper and from other judicial duties under number 5 of clause 4 of the Chile-Peruvian consular convention of 1870, invoked by virtue of the most-favored-nation clause of the treaty of 1854 between Great Britain and Chile, shows that the dissatisfaction with the usual phrases is more than local:

"Now, from what imposts is the consul of Peru exempt (that of England in his stead) by virtue of the clause which frees him from personal direct contributions, fiscal or municipal? From the *quinta militar* and *capitación*? Neither exists in Chile. From industrial and professional patents? Assuming that these are included in the classification of personal taxes, which is far from certain, he would owe them by virtue of the exception contained in the same number 5 of article 4 which establishes that the consul is liable for the taxes on his commercial or scientific profession or on his property in the country of his charge. From imposts, customs duties, consumption, and other local taxes (*sisa, puertas*)? But such tributes are not personal or direct, and for these reasons, as well as according to the principles and practices of international law, always fall on consular agents and even upon diplomatic ministers of the highest rank. From land taxes or from customs or import duties (*contribución territorial i de la aduana o internacional*)? These do not fall within the limited definition of article 4. The one is not direct, both are not personal; and still supposing that they had contrary characters, the consul would have to satisfy the *catastro* as proprietor of the land and that of *aduanas* as lacking a diplomatic character. Will he be exempt, finally, from the stamp tax or other duties of the administration of justice applied to every litigant and from which agents of the public ministry, charitable institutions and paupers are not exempted?

"... The tax of stamped paper is not personal, nor is it direct, nor is it extraordinary; far from belonging in the conditions specified in the consular pact with Peru, where the exemption is stipulated and classified, it presents the contrary characters of an indirect and casual tax, onerous only to those who demand or appear before justice." *Jurisdicción Consular—Dictamen del Fiscal de la Excelentísima Corte Suprema don Ambrosio Montt,*

Exemption from "all direct and personal taxation, whether federal, state, or municipal" does not extend an exemption from customs duties upon importation collected by the general government, nor from municipal duties on articles of consumption, commonly called *octroi* duties, nor to excise taxes, stamp charges, and the like. It includes "all kinds of assessments, forced loans, income and capitation taxes, and other charges levied by the general or local government upon the individual."²⁷ Likewise an immunity "from all direct or personal or sumptuary taxes, duties, and contributions" does not extend to customs duties on imported articles.²⁸

An interesting question involving the German provision extending the exemption to income taxes arose in 1901 in connection with the German insurance law. By the terms of that law, the employer was compelled to defray a certain part of the expense of insuring each of his employees. In nearly every case the American consuls submitted to this provision; but in 1901 the consul at Breslau claimed that he could not be compelled to pay. The Department of State concurred in this claim, but advised the consul voluntarily to submit to the law, thus following the example of his colleagues and giving the employees the benefit of the measure. The Department observed that he could undoubtedly so arrange that the servants should bear the payment of the quota of the contribution which he was asked to pay.²⁹

CONSULS AS WITNESSES

Provisions according consuls any immunity from the jurisdiction of courts were late in appearing; the first was that contained in the consular convention of 1850 with Colombia, and it was only that consuls should be summoned in writing whenever their presence was required in courts of justice (Art. V).³⁰ It was three years later in the consular convention with France that a real immunity of this kind was expressed; and then it was stated with a degree of positiveness which caused trouble for the United States. The statement was:

They shall never be compelled to appear as witnesses before the courts. When any declaration for judicial purposes, or deposition, is to be received from them in the administration of justice, they shall be

referente a prerogativas i exenciones de los cónsules extranjeros en Chile. Santiago, December 19, 1890. Contained in Venegas, *Legislación Consular de la República de Chile*.

²⁷ Bayard, Sec. of State, to Mr. Lee, Nov. 6, 1885, interpreting Art. II of the consular convention with Austria-Hungary (1870): Moore, Digest, V: 90. See also *ibid.*, p. 88, interpreting consular convention of 1878 with Italy.

²⁸ Rives, Asst. Sec. of State, to Mr. Smith, Jan. 3, 1889, interpreting Art. III of the consular convention with the German Empire (1871). Moore, Digest, V: 90.

²⁹ Hill, Acting Sec. of State, to Mr. White, April 30, 1901. Moore, Digest, V: 88.

³⁰ By virtue of the most-favored-nation provision, Colombian consuls became entitled to the immunity granted by the French consular convention of 1853. *U. S. v. Trumbull* (1891), 48 Fed. 94.

invited in writing, to appear in court, and if unable to do so, their testimony shall be requested in writing or taken orally at their dwelling (Art. II).³¹

In the April session, 1854, of the United States district court for the northern district of California, the French consul at San Francisco was served with a *subpoena duces tecum* in a criminal case in which the defense wished to secure him as a witness. When the consul failed to appear, he was brought into court under attachment; but the court released him after further consideration of the sixth amendment to the United States Constitution, coming to the conclusion that the object of the amendment was fulfilled if the defendant enjoyed equal rights with the government in compelling the attendance of witnesses.³² The French Government entered a vigorous protest against the treatment accorded its consul. Secretary of State Marcy contended that the constitutional provision nullified the treaty immunity so far as the two conflicted; but when the French Government persisted in its stand, the American Government officially expressed its regret at the court's action, and saluted a French national ship in accordance with the terms of a compromise reached by the two governments.³³ Dana says that the point was finally settled by instructions from the French Government to its consuls to obey the *subpoena* in similar cases which might arise in the future.³⁴ This incident led to a note by Secretary of State Fish in 1872 in which he commented on the necessity for avoiding any such inconsistency in future treaties.³⁵ He referred with approval to the provision in the Italian consular convention of 1868 which radically altered the previous statement to read as follows:

No consular officer . . . shall be compelled to appear as a witness before the courts of the country where he may reside. When the testimony of such a consular officer is needed, he shall be invited in writing to appear in court, and if unable to do so, his testimony shall be requested in writing, or be taken orally, at his dwelling or office.

It shall be the duty of said consular officer to comply with this request, without any delay which can be avoided.

In all criminal cases contemplated by the sixth article of the amendments to the Constitution of the United States, whereby the right is secured to persons charged with crimes to obtain witnesses in their favor, the appearance in court of said consular officer shall be demanded, with all possible regard to the consular dignity and to the duties of his office. A similar treatment shall also be extended to United States consuls in Italy in like cases (Art. IV).

³¹ The provision was invoked by the French ambassador in 1901. For. Rel. 1902, pp. 391-406.

³² In re Dillon (1854), Fed. Cas. 3,914.

³³ Marcy, Sec. of State, to Mr. Mason, 1854-1855. Moore, Digest, V: 78-80. One of the French claims was that the *duces tecum* clause was an attack on the inviolability of the archives, as the papers in question, if in existence, were a part of the consular archives.

³⁴ Dana's Wheaton, p. 325.

³⁵ Fish, Sec. of State, to Mr. Bassett, October 8, 1872. Wharton, Digest, I: 777.

This statement became the standard form and was followed in consular conventions with Belgium, 1868 (Art. IV), and 1880 (Art. IV); Netherlands, 1878 (Art. IV);³⁶ Italy, 1878 (Art. IV); Serbia, 1881 (Art. IV); Roumania, 1881 (Art. IV); Spain,³⁷ Greece, 1902 (Art. IV);³⁸ and Sweden, 1910 (Art. IV). It was departed from in only two instances, Austria-Hungary and Salvador, both in 1870. Treaties with these nations reciprocally extended compulsory process to all criminal cases in which testimony of a consular officer might be necessary for the defense of the accused.

It is to be noted that some of the provisions extend the rule of the Italian consular convention to criminal cases in State courts, while others do not. While there is no evidence that the difference has caused any difficulty, there seems to be no reason why the treaties should not cause the provision of the State constitutions to be respected and thus remove the danger of a conflict between the treaties and the State constitution.

Even where these exemptions are given, however,

it is the duty of the consul, when invited to appear in court to give his testimony, to comply with the request, unless *he is unable to do so*. This duty he violates, if he refuses without good and substantial excuse. Neither his official character, his disinclination, nor any slight personal inconvenience constitutes such an excuse. The pressure and importance of official duties requiring immediate performance may prevent his attendance in court, but such can rarely be the case where the court sits at the place of his residence. It is not claimed that the court can entertain the question of the competency of his excuse for declining to comply with its invitation; but, where the government of the United States has fair grounds to question the good faith with which the consul avails himself of the provisions of the convention which exempts him from compulsory process, it has two modes of redress and it can take either at its option. It can appeal to the consul's government to inquire into the case in this respect, and to deal with him as it shall find his conduct deserves, or it can revoke his *exequatur*.³⁹

COMMUNICATION WITH RECEIVING GOVERNMENT

The right to communicate with the local authorities is an incident to the consular office necessary for the proper discharge of the consular functions.⁴⁰

³⁶ The exception here was extended to cases falling within clauses in State constitutions similar to that of the sixth amendment to the Federal constitution. It was not made reciprocal.

³⁷ Treaty of friendship and general relations, 1902, Art. XVI. The statement is similar to that in the treaty with the Netherlands.

³⁸ Same as Netherlands.

³⁹ Marcy, Sec. of State, to Mr. Figniere, March 27, 1855. Moore, Digest, V: 81. The same idea is brought out in the Consular Regulations (1896), p. 32.

⁴⁰ "In countries with which the United States have treaty stipulations providing for assistance from the local authorities, consular officers are instructed that it is undesirable to invoke such interposition, unless it is necessary to do so. . . . If a request for assistance is refused, the consular officer should claim all the rights conferred on him by treaty or convention, and communicate at once with the diplomatic representative in the country, if there be

It is different in case of communication with the government of a State. Since the representative character of the consul has been lost, this privilege has been denied. By treaty it is sometimes accorded in specified cases, usually in the absence of diplomatic officers. Three such instances are to be found in a large number of treaties entered into by the United States, and all of these have come into existence since 1850. They are in case of (a) violation of a treaty provision, (b) abuse of a fellow countryman, and (c) extradition. The first two of these usually occur together; the last is found only in extradition treaties and has no relation to the others.

The usual expressions of these, after some slight changes had been made from the original forms, have stated that consular officers

shall have the right to complain to the authorities of the respective governments, whether federal or local, judicial or executive, throughout the extent of the consular district, of any infraction of the treaties or conventions existing between the United States and France, or for the purpose of protecting informally the rights and interests of their countrymen, especially in case of absence. Should there be no diplomatic agent of their nation, they shall be authorized in case of need, to have recourse to the general or federal government of the country in which they exercise their function.⁴¹

Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or, in the absence of these from the country or its seat of government, they may be made by superior consular officers.⁴²

The above typical statements show that not only is the privilege of communicating with the government limited in its field, but also that it can only be used in case of the absence of diplomatic agents,⁴³ and then only after satisfaction has been denied by the local authorities.⁴⁴

EXEMPTION FROM ARREST

Important as is the necessity for freedom of action on the part of the consul, whether it be the right to remain at his office or to travel to all parts one, and with the Department of State. When such requests are made in accordance with long-established usage, he should, when they are refused, make suitable representations to the proper local authority, and likewise advise the legation and the Department." Printed Personal Instructions to Diplomatic Agents, August, 1885. Wharton, Digest, p. 778. An explanation of this right and an indication of its importance is given in Heyking, Manual for Russian Consular Officers, 2d ed., p. 17.

⁴¹ France, Consular convention of 1853, Art. IV.

⁴² Belgium, Extradition treaty of 1874, Art. VI.

⁴³ In a few instances the privilege of communicating with the receiving government in the cases mentioned has been accorded to consular officers regardless of the presence of diplomatic agents. See, for instance, treaties of friendship, commerce and extradition with Orange Free State, 1871 (Art. X), and Switzerland, 1850 (Art. XIII).

⁴⁴ A fourth instance mentioned once—the consular convention with the German Empire, 1871, Art. VIII—is that of appeal to the government under the circumstances set out above, in case of a "violation of international law." Under such provisions there is no right on the part of the consul to request general information from the local authorities. For. Rel. 1903, pp. 444-446.

of his district when necessary, the first treaty provision covering this subject did not come until 1833 in the commercial treaty with Muscat. That treaty, adopted in 1886 by Zanzibar (Art. II), contained the stipulation that neither the consuls nor any of their household should be arrested (Art. IX). The latter part of this provision is without parallel in any other treaty entered into by the United States.

Twenty years later there was a second expression of the immunity; and from that time, it has been qualified. The treaty, a consular convention with France in 1853, stated that consular officers should enjoy personal immunity except in case of crime (Art. II).

As altered in the consular convention of 1868 with Belgium, this statement became the standard form for the expression of the immunity from arrest. The phraseology of that provision was that "consular officers, citizens of the state by which they are appointed, shall be exempt from arrest, except in case of offences which the local legislation qualifies as crimes and punishes as such" (Art. III). For the purposes of this analysis, the important differences between the two statements is that the first did not provide for a definition of the term "crime," while the latter specified that the offence must be so designated by local legislation. The same form was used in consular conventions with Italy, 1868 (Art. III); Salvador, 1870 (Art. XXXV); Austria-Hungary, 1870 (Art. II);⁴ and, with the addition of "imprisonment" the German Empire, 1871 (Art. III).

In the consular convention with the Netherlands in 1876 a second variation was introduced by the addition of misdemeanors to crimes, from arrest or imprisonment for which the consul should not be exempt (Art. III). The effect of this addition of the term "misdemeanor" is not immediately apparent; for all types of offences are embraced in some definitions of the word "crime."

A diminution of the scope of the immunity was the result of Article III of the consular convention of 1878 with Italy which provided that:

Consular officers, citizens of the state by which they were appointed, shall be exempt from arrest or imprisonment in civil cases and from preliminary arrest in penal cases, except in cases which the local legislation qualifies as crimes and punishes as such.

While this specifically mentioned exemption from arrest in civil cases, that had been included in each of the preceding articles; and the exemption from penal arrest except in case of crimes was confined to preliminary arrest only.

A further limitation came in 1880 in a consular convention with Belgium (Art. III), in which it was stated that the consular officers were "exempt from preliminary arrest except in the case of offences which the local legislation qualifies as crimes and punishes as such." Apparently the former state-

⁴ This clause did not exempt a consular officer from a civil suit for indebtedness. Adee, Second Asst. Sec. of State, to Messrs. Hensel, Bruckman, and Lorbacher, Oct. 29, 1897. Moore, Digest, V: 63.

ments had given complete immunity from civil arrest; this only granted immunity from preliminary civil arrest. Conventions with Roumania, 1881 (Art. III); Servia, 1881 (Art. III); Congo, 1891 (Art. V); and Greece, 1902 (Art. III), followed this model. There was a reversion to the older form in the Spanish treaty of friendship and general relations of 1902 (Art. XV), in which there was accorded personal immunity from arrest or imprisonment, except for acts qualified as crimes or misdemeanors by the laws of the country where the consul was stationed. In the latest expression of the immunity from arrest, that in the consular convention with Sweden, 1910 (Art. III), the form used in the Belgian treaty of 1868 was followed.

In 1899 the American consul general at Frankfort-on-the-Main was served with a *subpoena* to appear as a witness in a case then pending before the royal court. The *subpoena* contained the clause:

Witnesses who do not appear without sufficient excuse are to be sentenced, according to paragraph 50 of the Penal Code, to pay the costs occasioned by such non-appearance, also to a fine not to exceed 300 marks; and if this is not paid, to imprisonment not to exceed six weeks—producing them by arrest is also admissible.

The consul general protested vigorously against the threat of arrest, but notified the court that he was willing to appear if properly summoned. The matter was taken up by the Department of State, and in the course of the negotiations it was shown that, in spite of the fact that the consular offices were inviolable, the consul was threatened with arrest and imprisonment outside of his office in case he failed to obey the summons, the only other alternative being that the consul remain constantly in his office. A satisfactory conclusion of the affair was reached when the German officials apologized for their mistake in sending out the *subpoena* in the usual form, and politely requested the presence of the consul general in court.⁴⁶

PUNISHMENT OF CONSULS

A few treaties have expressly provided that consuls may be punished according to the laws of the accrediting state for offences against those laws. Thus the treaty of amity, commerce, and navigation with Great Britain in 1794 provided that when a consul committed an offence against the laws or government of the nation of his residence, he might be punished according to the laws of that nation, if there was a law applying to the case, or be dismissed, or sent back to the appointing state; the only condition being that the offended government should assign to the other the reasons for its action (Art. XVI).

Though the identical phraseology was not adopted, the same provision was made in commercial treaties with Great Britain in 1815 (Art. IV),⁴⁷ Sweden

⁴⁶ Moore, Digest, V: 81.

⁴⁷ This provision was applied in the case of the United States consul general at Montreal in 1863. Moore, Digest, V: 70.

and Norway in 1816 (Art. V), and 1827 (Art. XIII), Greece in 1837 (Art. XII), Portugal in 1840 (Art. X),⁴⁸ Switzerland in 1850 (Art. VII),⁴⁹ and Orange Free State in 1871 (Art. V).⁵⁰ The only other provision on this subject was contained in the treaty with Muscat (adopted in 1886 by Zanzibar, Art. II) in which it was stated that if a consul should commit any offense against the laws of that kingdom, complaint should be made to the president, who would immediately replace the offending officer (Art. IX).

It is interesting in this connection to note that this provision has never appeared in any consular convention; on the other hand, in many of these conventions, there has been substituted for it the consular exemption from arrest.

MISCELLANEOUS PROVISIONS

In addition to those familiar immunities which occur in several treaties, there are a few which have appeared in only one or two of the earlier treaties. These have disappeared, not, as a usual thing, because they were lost, but because their insertion had become unnecessary due to the development of a more liberal spirit in international relations. The first of these early provisions was contained in a treaty of peace and amity with Algiers in 1795, where the statement was:

The consul of the United States of North America shall have every personal security given him and his household. He shall have liberty to exercise his religion in his own house. All slaves of the same religion shall not be impeded in going to said consul's house at hours of prayer. The consul shall have liberty and personal security given him to travel, wherever he pleases, within the Regency. He shall have free license to go on board any vessel lying in our roads, whenever he shall think fit. The consul shall have leave to appoint his own dragoman and broker (Art. XVII).

Should a war break out between the two nations, the consuls of the United States of North America . . . shall have leave to embark themselves and property unmolested on board of what vessel or vessels they think proper (Art. XVIII).

These provisions were carried over into treaties of peace and amity between the same two countries in 1815 and 1816 (Arts. XV and XVI). They also appeared in a treaty of peace and amity with Tripoli in 1805 (Arts. XIV and XV).

Consular immunities as expressed in the treaty with Muscat in 1833 (adopted by Zanzibar in 1886) included the exemption of all property of the consul from seizure and the immunity of all the consular household from arrest (Art. IX).

According to Article IV of the treaty of peace, amity, and commerce

⁴⁸ This treaty omits mention of offences against the government.

⁴⁹ Same as Portugal.

⁵⁰ Same as Portugal.

entered into between the United States and China in 1844, consuls had the right to communicate with the local authorities

on terms of equality and reciprocal respect. If disrespectfully treated or aggrieved in any way by the local authorities, said officers on the one hand shall have the right to make representation of the same to the superior officers of the Chinese Government, who will see that full inquiry and strict justice be had in the premises; and on the other hand, the said consuls will carefully avoid all acts of unnecessary offence to, or collision with, the officers and people of China.⁵¹

The exemptions given in these few cases were of special application because of conditions peculiar to the contracting countries; they have had no influence on the development of immunities in general.

SUMMARY

Summing up the consular privileges and immunities granted by treaties, it seems that the more important of these are: Inviolability of the archives and sometimes of the consulate; privilege of displaying the national insignia; exemption from military service, military billeting, public service, and certain types of taxation; the privilege of communicating with the receiving government in certain cases; and a restricted immunity from arrest. To these privileges and immunities specifically mentioned, there must be added certain general grants of exemptions and the most-favored-nation provision.

Most of these privileges and immunities are secured to consuls under the practice of the United States even where no treaty provision can be produced in their support. By treaty provisions, however, two very important exemptions, whose existence in the absence of treaty stipulations may be regarded as doubtful, have been extended as well as made more secure. The exemptions referred to are those from civil arrest and from some forms of personal taxation. Three other of the enumerated privileges exist only on a treaty basis: those of declining to appear personally as a witness (except under the provisions of the sixth amendment to the Federal Constitution),⁵² of inviolability of the consulate, and of communication with the general government under certain circumstances.

⁵¹ This same idea was carried out in a treaty dealing with commercial relations between the two countries entered into in 1902 (Art. II).

⁵² Instructions by Mr. Hill, Sec. of State, to Mr. Hunter, Minister to Guatemala, in 1900, contain the following paragraph:

"The Department would suggest that it would be proper for you to investigate what conventional privileges Guatemala may have conceded in this respect to consuls of other countries. If there are such privileges, this government might reasonably expect, in the absence of a treaty, that they might be extended as an act of comity by Guatemala to our consular officers in that country." For. Rel. 1900, p. 705.

It is submitted that this view is not sound, being neither supported by the practice of other states, nor followed by the United States in its treatment of foreign consuls in the United States.

The service of treaties in the field of consular privileges and immunities has been twofold; for their primary utility in adding new privileges and immunities is rivalled by their secondary service in making secure those privileges and immunities which might have been claimed on the basis of international law and practice.

[The manuscript of this article was prepared before the ratification on October 14, 1925, of the treaty of friendship, commerce and consular rights between Germany and the United States, signed on December 8, 1923, and consequently does not consider that treaty.]

EDITORIAL COMMENT

COMMISSIONS OF CONCILIATION AND THE LOCARNO TREATIES

From the International Commissions of Inquiry contemplated by the Hague Conventions of 1899 and 1907, to the Permanent Conciliation Commissions to be established under the Locarno treaties of 1925, it is a long step. It is believed to be worth while to take note of the length of it.

Commissions of inquiry under the Hague Conventions and likewise under the treaties concluded by the United States for the advancement of peace when Mr. Bryan was Secretary of State were designed solely to investigate and report.¹ No burden was imposed upon the commission to endeavor to cause the states at variance to accept its report, and it was not authorized to exercise its good offices as a mediator, still less, to endeavor to check the conduct of the parties to a controversy during the period of investigation. While it was obviously inconsistent with the arrangement for those parties at such a time to resort to measures which might serve to render abortive the service of the commission, and while such an obligation was acknowledged in numerous treaties, the contracting states did not contemplate that the commission should be empowered to participate in the matter.²

It began to be felt by statesmen that a commission of inquiry comprised chiefly of nationals of states not parties to a controversy might well be clothed with a broader function, especially when the questions involved

¹ According to Article IX of the Hague Convention of 1907, the function of an International Commission of Inquiry was "to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation." Malloy's Treaties, II, 2230.

See also Article III of the treaty between the United States and Russia for the Advancement of Peace, concluded October 1, 1914, Treaty Series, No. 616, Treaty Volume III, 2816.

² Thus, in Article I of the treaty between the United States and Russia of October 1, 1914, the parties agreed "not to resort, with respect to each other, to any acts of force during the examination to be made by the Commission and before its report is handed in." See also Article I of treaty between Chile and Uruguay, February 27, 1915, Brit. and For. St. Pap., CIX, 885; Article I of treaty between Great Britain and Brazil, April 4, 1919, *id.*, CXII, 715; Article XI of treaty of conciliation between Austria and Switzerland, October 11, 1924, League of Nations Treaty Series, No. 862.

According to Article I of the treaty to avoid or to prevent conflicts between the American States, signed at Santiago, May 3, 1923, at the Fifth International Conference of American States, it was agreed: "In case of disputes, not to begin mobilisation or concentration of troops on the frontier of the other party, nor to engage in any hostile acts or preparations for hostilities, from the time steps are taken to convene the commission until the said commission has rendered its report or until the expiration of the time provided for in Article VII." *Id.*, No. 831, Vol. XXXIII, 36; *Boletín del Ministerio de Relaciones Exteriores, República del Ecuador, Diciembre de 1923*, 113, 114.

were of grave character or such as the states concerned might be unwilling to refer to a court of arbitration. In the treaty between Great Britain and Chile for the establishment of a peace commission, concluded March 28, 1919, it was provided in Article III that the international commission to be established for purposes of investigation and report might "spontaneously, by unanimous agreement, offer its services to that effect," and in such cases "notify both governments and request their coöperation in the investigation."⁵

In 1920 the Norwegian and Swedish Governments submitted proposals to the League of Nations contemplating the annexation to the Covenant of a draft designed to establish commissions of conciliation and arbitration. It is unnecessary here to comment on the arguments for or against the plan.⁶ It suffices to note that Norway suggested the use of a commission which should be empowered not only to report, but also to "put forward a proposal for a friendly settlement of the dispute, or if considered advisable, a proposal to submit the issue to a judicial settlement on the basis of the report."⁷ Sweden suggested that a commission should, in addition to reporting on disputes referred to it, "also, when necessary, draw up a proposal for a peaceful settlement of the dispute."⁷

In 1922, the Third Assembly of the League of Nations at its fourteenth plenary session, September 22nd, adopted a resolution encouraging the use of conciliation commissions subject, however, to the understandings and provisions of Articles XV and XVII of the Covenant.⁸ It was declared in the rules laid down for the establishment of such commissions that in proper cases the report of the commission should "include a proposal for the settlement of the dispute."⁹

In a treaty of conciliation between Italy and Switzerland of September 20, 1924, it was declared that the task of the commission should be to further the

⁵ British Treaty Series, No. 3 (1920), Brit. and For. St. Pap., CXII, 718.

See also Article 29 of a preliminary draft of a proposed annex to the Covenant of the League of Nations, dealing with commissions of arbitration and conciliation, proposed by the Norwegian Government in 1920; also Article 10 of an annex to the Covenant submitted by the Swedish Government, amendatory of the Norwegian draft. League of Nations, First Assembly, First Committee Minutes, 80 and 86, respectively.

⁶ *Id.*, 75 and 83, respectively.

⁷ Attention is called to the Swedish explanatory statement, *id.*, 82.

⁸ Article XXVIII of Norwegian draft proposal, *id.*, 80.

⁹ Article IX of Swedish draft proposal, *id.*, 86.

¹⁰ League of Nations, Records of the Third Assembly, Plenary Meetings, 1922, 199-200. See also report of M. Adatci, *Rapporteur* of the First Committee, *id.*, 196.

¹¹ Article VII, *id.*, 200. See also Article XIV of convention between Norway and Sweden, June 27, 1924, League of Nations Treaty Series, No. 717; Article XIV of convention between Finland and Sweden, June 27, 1924, *id.*, No. 731; Article XIV of convention between Denmark and Sweden, June 27, 1924, *id.*, No. 840; Article XIV of convention between Denmark and Norway, June 27, 1924, *id.*, No. 842; Article VI of treaty between Austria and Switzerland, October 11, 1924, *id.*, No. 862.

settlement of disputes by an impartial and conscientious examination of the facts and "by formulating proposals with a view to settling the case."¹⁰ The convention between the United States and the Central American Republics for the Establishment of International Commissions of Inquiry, concluded February 7, 1923, conferred upon a commission such as might be established the right not only to investigate and report, but also "to recommend any solutions or adjustments which, in its opinion, may be pertinent, just and advisable."¹¹ Again, according to Article XIX of Project No. 27 (for the Pacific Settlement of Differences between the American Republics) submitted by the American Institute of International Law to the Governing Board of the Pan American Union, March 2, 1925, the Governing Board of the Pan American Union was to exercise the functions of a "council of conciliation" when resort was had to it by a party to a serious dispute endangering the peace of any of the American Republics. That board was in such event "to consider what recommendation must be adopted." The interested republics were to refrain from all direct intercourse "until the Governing Board may have decided the nature and form of its recommendation."¹²

Another function to be exercised by a commission of conciliation was incorporated in various treaties. In a convention between the Swiss Confederation and the German Reich of December 3, 1921, it was provided that the so-called Permanent Board of Conciliation might formulate proposals for provisional measures to be taken in so far as the parties were in a position to secure their execution through administrative channels.¹³ Article XIII of the convention between the United States and the Central American Republics for the Establishment of International Commissions of Inquiry, signed at Washington, February 7, 1923, provided that the commission upon its organization should, at the request of any party to the dispute "have the right to fix the status in which the parties must remain, in order that the conditions may not be aggravated and matters may remain in the same state pending the rendering of the report by the commission."¹⁴

Thus it was that when the Locarno treaties were being negotiated in October, 1925, there were precedents which encouraged the use of commissions of conciliation for the purpose, not merely of investigating and reporting upon international controversies, but also of making affirmative proposals favorable to adjustment, and of initiating provisional measures

¹⁰ Article V, *id.*, No. 834.

¹¹ Article V, U. S. Treaty Series, No. 717.

¹² Codification of American International Law, Pan American Union, Washington, 1925, p. 104.

¹³ Article XVIII, League of Nations Treaty Series, No. 320.

¹⁴ U. S. Treaty Series, No. 717. This provision is substantially reproduced in Article XV of Project No. 27 submitted by the American Institute of International Law to the Governing Board of the Pan American Union, March 2, 1925. Codification of American International Law, Pan American Union, Washington, 1925, p. 103.

designed to preserve the *status quo*. Accordingly, the negotiators proceeded boldly on these not unfamiliar lines.

The so-called Mutual Guarantee Pact of Germany, Great Britain, France, Italy and Belgium, announced in Article III acceptance of the broad principles that any question with regard to which the parties were in conflict "as to their respective rights" should be submitted to judicial decision, with which there should be compliance; that all other questions should be submitted to a conciliation commission, and that if its proposals proved unacceptable, the issue should be brought before the Council of the League of Nations, which would deal with it in accordance with Article XV of the Covenant of the League. The detailed arrangements were the subject of special agreements between Germany and Belgium, Germany and France, Germany and Czechoslovakia, and Germany and Poland. These special agreements or treaties accordingly made obligatory the adjustment by judicial process of issues of every kind in which the parties were in conflict "as to their respective rights," and which it might not be possible to settle amicably by the normal methods of diplomacy.¹⁵ These were said to embrace in particular issues mentioned in Article XIII of the Covenant of the League. Before resort to judicial process the parties to a dispute might, however, if they so agreed, submit the issue to the so-called Permanent Conciliation Commission constituted in accordance with the particular convention.¹⁶ If no amicable agreement were reached before the commission, submission of the issue to a judicial settlement by means of a special agreement became obligatory.¹⁷ All questions which proved incapable of amicable solution by the normal methods of diplomacy, the settlement of which could not be obtained by means of a judicial decision (as provided in Article I) and for the adjustment of which no other procedure was laid down by other conventions in force between the parties, were to be submitted to the Permanent Conciliation Commission, whose duty was declared to be "to propose to the parties an acceptable solution and in any case to present a report."¹⁸ If the parties failed to agree within a month from the termination of the labors of the commission, the question was, at the request of

¹⁵ Article I. This provision was not to be applicable to disputes arising out of events prior to the convention and "belonging to the past." It was also provided that disputes for the settlement of which a special procedure was laid down in other conventions between the contracting parties should be settled in conformity therewith.

¹⁶ Article II.

¹⁷ Article XVI. The tribunal to which recourse was to be had was either the Permanent Court of International Justice, or an arbitral tribunal under the conditions and according to the procedure laid down by the Hague Convention of October 18, 1907, for the Pacific Settlement of International Disputes.

It was further provided that if the parties could not agree on the terms of the special agreement after a month's notice, either of them might bring the dispute before the Permanent Court of International Justice by means of an application.

¹⁸ Article XVII.

either of them, to be brought before the Council of the League of Nations to be dealt with in accordance with Article XV of the Covenant.¹⁹

The Permanent Conciliation Commission was clothed with broad powers.²⁰ Thus it was declared in Article VIII that

The task of the Permanent Conciliation Commission shall be to elucidate questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise, and to endeavor to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it and lay down a period within which they are to make their decision.

The task thus defined embraces the exercise of a highly important function. "To endeavor to bring the parties to an agreement" is the undertaking of the mediator whose good offices are tendered to states at variance. The efficacy of the endeavor doubtless depends upon a variety of considerations. A commission of conciliation a majority of whose members are not nationals of the states at variance, and empowered to collect information concerning a dispute, ought to be enabled not only to acquire a close knowledge of every aspect of the case, but also to submit proposals worthy of respectful consideration and oftentimes productive of an acceptable solution of the difference. Moreover, the possibility of such a result is enhanced by the effort of the opposing states to utilize and coöperate with the commission.

Again, in Article XIX of the conventions the commission was empowered to lay down within the shortest possible time "the provisional measures to be adopted"; and the contracting parties undertook to accept such measures and to abstain from all action likely to have a repercussion prejudicial to

¹⁹ Article XVIII.

²⁰ The following excerpts from the German-Belgian treaty disclose the composition of the commission:

"Article IV. The Permanent Conciliation Commission mentioned in Article 2 shall be composed of five members, who shall be appointed as follows, that is to say: the German Government and the Belgian Government shall each nominate a commissioner chosen from among their respective nationals and shall appoint, by common agreement, the three other commissioners from among the nationals of third Powers: these three commissioners must be of different nationalities and the German and Belgian Governments shall appoint the president of the commission from among them.

"The commissioners are appointed for three years, and their mandate is renewable. Their appointment shall continue until their replacement, and in any case until the termination of the work in hand at the moment of the expiry of their mandate. Vacancies which may occur as a result of death, resignation, or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

"Article V. The Permanent Conciliation Commission shall be constituted within three months from the entry into force of the present convention. If the nomination of the commissioners to be appointed by common agreement should not have taken place within the said period, or, in the case of the filling of a vacancy, within three months from the time when the seat falls vacant, the President of the Swiss Confederation shall, in the absence of other agreement, be requested to make the necessary appointments."

the arrangements proposed by the commission, and in general to abstain from any sort of action which might aggravate or extend the dispute.

In the Locarno treaties the report or recommendation of the commission was not given the effect of an arbitral award and made binding upon the states at variance. It is unnecessary to comment on the alternatives which confront those states if they fail to accept the solution proposed by the commission and also remain unable to agree. The significant fact is that with respect to differences, however grave in character and for the solution of which adjustment by a judicial decision is not obligatory because the parties are not in conflict as to their respective rights, the commission of conciliation with its broad powers, and freedom of action and potentialities as a quasi-mediator, is deemed by the contracting states to be a potent agency of amicable adjustment. The Locarno treaties register the conclusion of the negotiators that such a body, rather than any other, offers the immediate, practical means of solving such differences and that it should be utilized accordingly in order to avert war.

CHARLES CHENEY HYDE.

THE LEGAL SIGNIFICANCE OF THE LOCARNO AGREEMENTS

The several agreements signed at Locarno on October 16th have been widely heralded in the press as inaugurating "a new era in international politics," as marking "a turning point in history." Conceding that from the point of view of international politics the Locarno agreements represent a step of far-reaching significance for the promotion of permanent relations of peace and friendship between the Powers concerned, we are led to inquire whether they are of equal significance from the point of view of international law in its stricter sense. What new legal principles, if any, find expression in the agreements, and what relation do they bear to the old established principles which have governed the relations of states during the past three centuries?

Doubtless the most fundamental rule of international law in the year 1914 was that of the sovereign right of every state to take such measures for its own self-protection as might commend themselves to its judgment as necessary and feasible. Each state was the protector of its own claims and the guardian of its own welfare. The dominant conception of national law, that the rights of the individual citizen are to be protected by the coöperative action of the community in maintaining common agencies of justice, was unknown to international law. The community of nations at large recognized no collective responsibility for the protection of its individual members and the maintenance of the general peace. If war broke out it was the affair of the particular parties concerned, each being accountable for its conduct to itself only. Third states, not parties to the dispute, had no alternative but to declare their neutrality and to hope that the war would disturb as little as

possible their normal commercial relations with the belligerents. The sanction of general public opinion, in so far as it existed at all, was in the nature of a post-mortem verdict.

A system such as this, which made each state responsible for its own security and gave it no assurance against attack except in so far as it had taken personal measures of self-defense, had the natural result of bringing about a competition in armaments which was in its turn provocative of suspicion and discord. States too little confident of the adequacy of their own resources for individual self-defense formed alliances for mutual defense, and these alliances were in turn met by counter-alliances of other Powers, which saw in the first alliance a menace to their safety. The highest ideal of nineteenth century statesmanship was apparently that of a balance of power, a political equilibrium of opposing groups. If peace was to be maintained it must be maintained by preventing any Power or group of Powers from becoming so strong as to be able to resort to war without at least doubtful prospect of success.

A further consequence of the system of individual self-help was that it became practically impossible to distinguish between offensive and defensive wars. Clearly the situation might arise where it would become necessary for a state to anticipate a possible future attack under less favorable circumstances by itself attacking forthwith under more favorable circumstances. In such a case the question of the defensive character of the war would depend upon a variety of intangible issues in respect to which each government would have little difficulty in persuading its own people that the situation called for preventive measures. As a matter of fact, during the decades preceding the World War each of the Great Powers proclaimed on every suitable occasion that its armaments, whether land or naval, were purely for defensive purposes.

The first "turning-point in history" came with the adoption of Articles X, XI, and XVI of the Covenant of the League of Nations. Here were articles of international agreement purporting to create a collective responsibility of all the members of the League for the protection of each of them. Henceforth neutrality was to be at an end, and any war or threat of war was to be a matter of concern to the whole League whether particular members were immediately concerned or not. Moreover, a declaration of war by any member of the League in violation of its obligations under the Covenant was to be regarded as an act of war against all the other members of the League, and appropriate remedies, economic and military, were to be taken by the several members in coöperation.

The legal significance of these articles was, of course, obvious to all the world. The generalizations in which they were phrased, not involving specific obligations, did not make them any the less significant. It soon became evident, however, that the new system had been set up under adverse conditions. With Russia an exile from the nations, with Germany and her

allies under pains and penalties, with new states coming unto existence and old boundary lines shifting, with Turkey and Greece at war and unknown dangers threatening in the Far East, it was too much to hope that the inner circle of the Great Powers, upon whom the effective operation of the new system naturally depended, could be counted upon to give more than formal and conditional acceptance to the far-reaching obligations laid down. The United States Government, after having taken the initiative in establishing the new system, underwent a change of party control and refused to become a partner in the undertaking.

From 1919 to 1925 the three most fundamental articles of the Covenant of the League remained practically a dead letter. The limited membership of the Council made action under the Covenant of the League impossible without the coöperation of the Great Powers represented upon it, and this could not be obtained until pending political controversies were settled. In the meantime an effort was made at Geneva in 1924 to recast the principles embodied in Articles X, XI, and XVI of the Covenant and to tie them up with more comprehensive obligations in respect to the arbitration of disputes. The result was the Protocol for Mutual Security, which was duly signed and submitted to the Powers for ratification. But once again the proposal to unite all nations in a general agreement for mutual protection and security failed to receive adequate support, even though the obligation to take part in the application of economic and military sanctions was modified so as to take into account the geographical situation and peculiar political institutions of the individual states. Fundamentally correct as was the principle involved in the Protocol, it appeared that the methods resorted to for its application were not yet feasible.

With the probable failure of the Protocol facing the Great Powers and with the growing realization that the ideal of coöperative defense was the right one if only more satisfactory methods of attaining it could be devised, the suggestion came from Germany that the smaller group of Powers whose interests were most vitally concerned should meet together and attempt to take action upon their own account. Out of this suggestion came in time the Locarno Conference, which met on October 5th and closed its sessions on October 16th with the signing of five main agreements. Speaking in terms of law, these agreements constitute an undertaking on the part of an inner circle of five Powers to put into effect the principle of collective responsibility for mutual protection which was involved in Articles X, XI, and XVI of the Covenant of the League of Nations, but which had under the conditions prevailing failed to command the practical support of the wider circle of states which had pledged themselves to its general obligations. The underlying conception of coöperative action was the same in both cases. But the parties to the Locarno agreements were those more immediately concerned in their successful operation, and they were therefore able to commit themselves to more specific obligations. First in order comes the general pledge to keep the

peace by mutual respect on the part of each state for the independence and territorial integrity of the others; next comes the pledge of mutual aid in the event of an attack by any one of their group upon another; lastly, a comprehensive and unqualified obligation, to which two additional Powers were parties, to submit all disputes to arbitration. It may be observed that while Germany was ready, as proof of the sincerity of her desire for a more stable international order, to guarantee to France the present boundary between the two countries, she was unwilling to give a similar guarantee to Poland in respect to her eastern boundary. Germany does, however, agree not to resort to force to change this boundary, so that her reservation amounts to no more than a claim to appeal at some future time to the processes of direct negotiation or of friendly intervention on the part of the public opinion of the nations at large.

"The old order changeth, giving place to new." Whether the new order of collective action for mutual protection shall take the form of further agreements, such as those concluded at Locarno, between other states whose inner circle constitutes a possible storm center, as in the Balkan peninsula, or whether, should the Locarno agreements succeed in their purpose and bring about an effective coöperation on the part of the leading states, it may not then be feasible to bring into play the original obligations of the Covenant of the League or some other agreement to which all the nations shall be parties, remains a question of practical politics. At any rate, there is nothing either in law or in politics to prevent the two sets of obligations from operating side by side, the one or the other being called up as the emergency may require. In both cases there is now a possibility on the one hand of effective disarmament and on the other hand of obligatory arbitration without restrictions. For these two basic conditions of a true legal system have necessarily been held up until the primary legal problem of collective action for mutual security should be solved.

C. G. FENWICK.

RUM SHIP SEIZURES UNDER THE RECENT TREATIES

Prohibition and rum ships, rum ships and marginal seas, marginal seas and the three-mile limit, the twelve-mile limit, or the one-hour sailing limit of recent treaties—so runs the sequence. Whatever else the American experiment with prohibition may have accomplished, it has certainly focused attention upon the problems of jurisdiction over foreign ships in the marginal seas as no other piece of national legislation has ever done.

Rum ship seizures give rise to two kinds of proceeding: first, criminal proceedings prosecuted against the responsible persons to inflict penalties for violations of the local law; and second, forfeiture proceedings directed against the ships themselves or their cargoes to impose forfeitures for violations of the local law. The nature of the criminal proceeding is well understood and requires no further comment. The forfeiture proceeding is more perplexing.

It has been described by a recent writer as "a civil action with certain criminal aspects" and the same writer has suggested that in principle it ought to be regarded as essentially a criminal action.¹

Whether the proceeding be criminal to inflict penalties upon a person, or civil to secure the forfeiture of a thing, there are always two primary questions to be considered in the rum ship cases involving foreign craft. The first is the substantive question—Has there been a violation of the local law? Unless there has been a violation of the local law, obviously there is no occasion for proceeding further. The second is the jurisdictional question—Has the court obtained jurisdiction over the person of the accused or the thing proceeded against? Unless there is some adequate basis for jurisdiction, the proceeding may fail although a violation of the local law be proved to the satisfaction of the court.*

The answer to the substantive question—Has there been a violation of the local law?—depends chiefly, of course, upon the nature of the acts committed. So far as this phase of the inquiry may be concerned, proceedings against foreign rum runners or their ships are not especially unique. But the answer depends also upon the scope of the local law. In this respect the cases arising from seizures of foreign rum ships have raised some novel and exceedingly interesting questions.

The Supreme Court of the United States has held in some notable cases that the prohibition amendment to the Constitution and the statutes enacted to give effect thereto are operative in all territorial waters including the marginal seas to the three-mile limit.² There are certain provisions in the customs laws of the United States requiring the exhibition of accurate manifests, forbidding the unloading of cargoes without permission, and the like, which are expressly made operative in all marginal waters out to the twelve-mile limit.³ And there is at least one provision in the United States Criminal Code—section 332 providing that whoever aids or abets in the commission of an offence shall be regarded as a principal⁴—which may even operate to make acts criminal although committed by foreigners upon the high seas beyond all territorial or jurisdictional boundaries.⁵

¹ 36 Harvard Law Review, 609, 612.

² *Grogan v. Walker & Sons* (1922), 259 U. S. 80; *Cunard Steamship Co. v. Mellon* (1923), 262 U. S. 100. See comment in this JOURNAL, Vol. 17, p. 504, and in 21 Michigan Law Review, 911.

³ See 9 Geo. II. c. 35, §§ 22, 23; Act of 1790, §§ 9, 10, 11, 12, in 1 Stat. L. 145, 155, 156, 157; Act of 1799, §§ 23, 24, 25, 26, in 1 Stat. L. 627, 644, 646, 647; Act of 1806, § 25, in 14 Stat. L. 178, 184; U. S. Rev. St., §§ 2806, 2809, 2811, 2814; Act of 1790, §§ 13, 14, in 1 Stat. L. 145, 157, 158; Act of 1799, §§ 27, 28, in 1 Stat. L. 627, 648; *The Schooner Betsy* (1818), 1 Mason, 353; U. S. Rev. St., §§ 2867, 2868; Act of 1922, §§ 586, 587, in 42 Stat. L. 858, 980, 981; Act of 1790, § 31, in 1 Stat. L. 145, 164; Act of 1799, § 54, in 1 Stat. L. 627, 668; U. S. Rev. St., § 3067; Act of 1922, § 581, in 42 Stat. L. 858, 979.

⁴ 35 Stat. L. 1152.

⁵ See *Latham v. United States* (1924), 2 F. (2d), 208, 210; *United States v. Ford* (1925), 3 F. (2d), 643, 647.

Have the recent treaties between the United States and other maritime countries to aid in preventing the smuggling of liquor into the United States had the effect of projecting United States laws over still wider areas of the marginal seas? Most of these treaties begin, it will be recalled, with an article reaffirming "the principle that three marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters."⁶ Then follows the second and principal article in which the other contracting state agrees to "raise no objection" to searches and seizures of private vessels under its flag by United States authorities, outside United States territorial waters, whenever there is "reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territory or possessions prohibiting the importation of alcoholic beverages."⁷ The rights conferred by this article are not to be exercised at a greater distance from the coast of the United States than "can be traversed in one hour by the vessel suspected of endeavoring to commit the offense." If the liquor is intended to be conveyed to the United States by another vessel than the one boarded and searched, "it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised."⁸

Do these treaties operate, so far as the ships and subjects of the other contracting countries may be concerned, to extend certain of the inhibitions, penalties, and forfeitures prescribed in the laws of the United States beyond the three-mile line, beyond even the twelve-mile line, to the rather ill-defined line which bounds the one-hour zone? On the one hand, it may be urged that treaties are not the usual means of enacting new penal laws or of extending existing penal laws to new areas, and that paragraph one of article two in each of these treaties begins with an agreement that the government of the other contracting state will "raise no objection" to the boarding of private vessels under its flag or to searches when preliminary enquiries and examination show "a reasonable ground for suspicion." The language of paragraph one suggests merely the settlement of a controversy about jurisdiction rather than an extension of law into new zones. On the other hand, article two expressly authorizes searches and seizures not only of ships which have committed or are committing an offense, but also of ships which are "endeavoring to import," "attempting to commit an offense," or "endeavoring to commit" an offense contrary to the laws of the United States prohibiting the importation of liquor. Merely endeavoring to commit an offense fifteen miles from the coast, let us say, was not necessarily an offense prior to the treaties and is not necessarily an offense now unless the treaties have

⁶ Convention between the United States and Great Britain, May 22, 1924, in the Supplement to this JOURNAL, Vol. 18, pp. 127, 128. See comment in this JOURNAL, Vol. 18, p. 301.

⁷ *Ibid.*

⁸ *Ibid.*

made it so. The language indicates that the treaties were intended not only to settle the controversy about jurisdiction, but also to project the operation of laws of the United States forbidding the importation of liquor over the ships and subjects of the contracting states within the one-hour zone. Article two refers to "the rights conferred by this article," meaning, it would seem, the rights to board, search, seize, and presumably to penalize or forfeit, and not merely the right to enact supplementary legislation. The treaty-making power is adequate, under the Constitution of the United States, and it is well known that these treaties were intended to put a stop without further legislation to the flouting of United States prohibition laws by foreign ships.

That the question is perplexing is sufficiently indicated by the contrariety of recent opinions of the lower federal courts. In *The Pictonian*, decided by the United States District Court for the Eastern District of New York, the court took the view that Great Britain had not only agreed in the treaty to an extension of United States jurisdiction for certain purposes, but that the treaty was self-executing, and that in consequence certain of the penalties and forfeitures prescribed in laws of the United States had become effective as regards British ships and subjects within the one-hour zone.⁹ This view was disapproved in *The Over The Top*, decided by the District Court for the Connecticut District, and it was said that "it is not the function of treaties to enact the fiscal or criminal law of a nation."¹⁰ There is some indication that the District Court for the Southern District of Texas will approve the latter opinion.¹¹ The District Court for the Southern District of Alabama, on the other hand, has recently held in the case of *United States v. Henning* that "the effect of the treaty is to extend the territorial waters of the United States from three marine miles to the one hour's travel, as to the liquor laden vessel and persons on her, when the United States laws are intended to be violated."¹² The present writer ventures to suggest, without elaborating the argument, that the view approved in *The Pictonian* and in *United States v. Henning* is amply justified by the language of the treaties and by the circumstances which prompted their ratification.

The jurisdictional question—Has the court obtained jurisdiction over the person of the accused or the thing proceeded against?—is unlike the substantive question in several respects. It often happens that it may be answered by recourse to any one or more of several different principles. And it is not always possible to tell just which principle really determined the court's decision in any given case.

In the first place, it is frequently enough that jurisdiction to arrest the person or seize the ship has been given in unequivocal terms by a national

⁹ *The Pictonian* (1924), 3 F. (2d), 145.

¹⁰ *The Over The Top* (1925), 5 F. (2d), 838, 845.

¹¹ *The Panama* (1925), 6 F. (2d), 326, 327.

¹² *United States v. Henning* (1925), 7 F. (2d), 488, 490.

statute which is binding upon the national courts. Thus United States courts could hardly be expected to experience serious difficulty in sustaining the jurisdiction to seize a foreign rum ship within the twelve-mile limit for failing to produce the manifest required by federal statute¹³ or for unloading in violation of statute without a permit from the customs authorities.¹⁴

In the second place, the national courts may sustain an even more extensive jurisdiction in these cases upon the broad ground that the scope of jurisdiction on the seas is after all a political question with respect to which the political department's decision is conclusive. Precedents for such a course may be found in the Behring Sea cases. In one of the earliest of the foreign rum ship cases it was remarked that there must be of necessity a zone of debatable waters adjacent to our coasts, and that the question as to how far United States authority should be extended over such a zone for the seizure of foreign vessels was "a matter for the political departments of the government rather than for the courts to determine."¹⁵

In the third place, if the proceeding is criminal, it is possibly enough that the accused is actually before the court. The fact that he has been arrested in violation of the jurisdiction of a foreign state may present no insurmountable obstacle to the jurisdiction of the court to try him for the offense with which he is charged. If the proceeding is civil to forfeit the foreign ship, the question of jurisdiction may be determined by similar reasoning supported by analogies with some of the criminal cases. In any event, it has been argued, "the ship is held by the court under the arrest of the marshal, a judicial officer, made after the ship is in port, not under the seizure made by the revenue officer, an agent of the executive department."¹⁶ And so the court need not go behind the marshal's arrest to examine the means by which the ship was actually brought within the jurisdiction.

In the fourth place, if the court prefers it may justify its jurisdiction upon principles of international law. One of the most interesting features of the recent cases arising out of seizures of foreign rum ships has been the very evident disposition of the courts to sustain the jurisdiction upon the broadest principles. Chief Justice Marshall's famous assertion in *Church v. Hubbart* that a nation's power to secure itself from injury "may certainly be exercised beyond the limits of its territory"¹⁷ has been invoked repeatedly. *Church v. Hubbart* has been mentioned as the leading case sustaining the jurisdiction to make extraterritorial arrests and seizures where the crew and boats of the

¹³ *United States v. Bengochea* (1922), 279 Fed. 537.

¹⁴ *The Muriel E. Winters* (1925), 6 F. (2d), 466.

¹⁵ *The Grace and Ruby* (1922), 283 Fed. 475, 478. See this JOURNAL, Vol. 19, p. 157.

¹⁶ 36 Harvard Law Review, 609, 611. See *The Grace and Ruby*, *supra*.

¹⁷ *Church v. Hubbart* (1804), 2 Cranch, 187, 234. See the British Territorial Waters Jurisdiction Act of 1878, preamble, 41 & 42 Vict. c. 73.

rum ship had assisted in taking liquor ashore,¹⁸ where the rum ship had been controlled from shore and had delivered its liquor to small boats by prearrangement,¹⁹ where the rum ship had delivered its liquor to small boats from shore apparently without prearrangement,²⁰ and even where the rum ship had been seized while waiting beyond the three-mile limit for small boats which were to carry the liquor ashore.²¹ It was not essential that the court invoke the principle of *Church v. Hubbard* in any of the above instances. Possibly this makes it all the more significant that the principle has been so consistently invoked by tribunals which are very close to actualities in respect to the rum ships and marginal seas.

And now the recent treaties have extended the jurisdiction of the United States for certain purposes over a new zone in the marginal seas. Whatever their effect may be as regards a possible projection of United States fiscal or criminal laws into new areas, it is clear that the treaties extend jurisdiction over a new zone. The general purport is clear, but there are many problems.

By what devices, for example, may the new one-hour zone be measured? May the coast guard go out in speed boats capable of making shore in an hour or less, purchase liquor from rum ships, and then rely upon the purchases to justify seizures? It has been said that "it is doubtful whether such purchases can ever furnish a ground of seizure under the treaty, because, as the transactions would not be illegal at the place where made, and the officers making them would have no intention to introduce the liquor purchased into this country in violation of our laws, the foreign vessel would not in fact be participating in any illegal act in making such sales."²² In any event, it has been held, "to use as a decoy a special and unusual type of boat having a capacity for speed far greater than ever used in real transactions, and to obtain a purchase by lying on the part of our officers about her speed, is mere entrapment, quite outside the purpose and intent of the treaty."²³ And it has been held further that the foreign rum ship is not necessarily within the one-hour zone because the craft to which it delivers liquor is capable of making shore in less than an hour under favorable conditions without a load. "It is the speed of the boat conveying liquor, and when it is engaged in conveying liquor to the United States, that must be determined."²⁴

The press has reported one or two instances in which a sea-plane was captured by the coast guard while endeavoring to establish communication

¹⁸ *The Grace and Ruby*, *supra*. See 23 *Columbia Law Review*, 472; 23 *Michigan Law Review*, 163; 32 *Yale Law Journal*, 259. See also the comment of Secretary Hughes, in this *JOURNAL*, Vol. 18, p. 232.

¹⁹ *United States v. 1, 250 Cases of Liquor: The Henry L. Marshall* (1922), 286 Fed. 260, 292 Fed. 486. See also the comment of Secretary Hughes, in this *JOURNAL*, Vol. 18, p. 233.

²⁰ *United States v. Ford* (1925), 3 F. (2d), 643.

²¹ *United States v. Bengochea* (1922), 279 Fed. 537.

²² *The Marjorie E. Bachman* (1925), 4 F. (2d), 405, 407.

²³ *Ibid.*

²⁴ *The Over The Top* (1925), 5 F. (2d), 838, 844.

with foreign rum ships. Should such communication actually be established, and should the seaplane be regarded as a "vessel" within the meaning of the treaties, United States authorities would be justified in searching and seizing foreign rum ships beyond any limits asserted in the ill-starred attempt of an earlier day to control sealing in the Behring Sea.

Another problem arising under the recent treaties is presented in two cases which arrive at contrary results. In *The Frances Louise*, the District Court for the Massachusetts District dismissed a libel asking the forfeiture of a Canadian rum ship under general principles of international law. The case seems to have been clearly within the principle of *Church v. Hubbard*, apparently approved by the same court in an earlier case, but it was not within the treaty with Great Britain, and the court held that the treaty was intended to cover the entire question "in a complete way."²⁵ In *The Panama*, decided by the District Court for the Southern District of Texas, the court arrived at the opposite conclusion and forfeited the ship and her cargo.²⁶ It is believed that the conclusion in the latter case is the correct one. The treaties neither enact a code nor establish general principles. In return for concessions in respect to the bringing in of liquor as ship's stores, the other contracting state agrees in each instance to make concessions in respect to searches and seizures. While this does have the effect of projecting certain United States laws and extending United States jurisdiction for certain purposes into a new zone, it by no means follows that every other right to arrest foreign ships outside the three-mile limit, however well supported in reason or sustained by international usage, is to be regarded as having been surrendered by the United States. The maxim *inclusio unius est exclusio alterius* has no application. Should the conclusion reached in *The Frances Louise* prevail, the treaties will probably need to be revised if they are to be adequate for their avowed purpose.

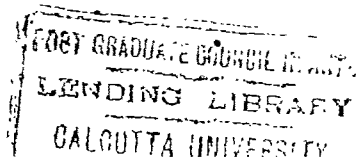
EDWIN D. DICKINSON.

THE SOVEREIGNTY OF THE PANAMA CANAL ZONE

The so-called "Taft Agreement," having to do with the relations between the Panama Canal Zone and the Republic of Panama, was originally negotiated by Mr. Taft, as Secretary of War, and was embodied in five Executive Orders dated December 3, 6 and 28, 1904, January 7, 1905 and January 5, 1911. They were conditioned on certain action to be taken on her part by Panama which she carried out, and which made the agreement in a measure reciprocal. By the Panama Canal Act of August 24, 1912, these orders, together with all other orders and regulations promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and construction of the Panama Canal,

²⁵ *The Frances Louise* (1924), 1 F. (2d), 1004.

²⁶ *The Panama* (1925), 6 F. (2d), 326.



were ratified and confirmed as valid and binding *until Congress should otherwise provide*. On the expressed ground that the Taft Agreement no longer provided an adequate basis for the adjustment of questions arising out of the relations of the Canal Zone authorities and the Government of Panama, the State Department proposed that the Taft Agreement be terminated and replaced by a more permanent arrangement. Accordingly, by a Joint Resolution approved February 12, 1923, the President was authorized to terminate the Taft Agreement with Panama. Pursuant to this resolution, President Coolidge terminated the agreement by an Executive Order dated May 28, 1924, to take effect on June 1, 1924. This leaves the relations between Panama and the Canal Zone in peace time to be governed chiefly by the Panama Canal Treaty of 1903.

Since the termination of the Taft Agreement, however, the two countries have been engaged in negotiating a new agreement, in the form of a treaty, to replace the Taft Agreement, and for other purposes. The questions being considered in the negotiations are doubtless those of long-standing, such as the acquisition of Panaman lands for the protection of the canal, the taxation of the property of the Panama Railroad Company, a private corporation, which is practically owned and operated by the United States Government, the expropriation of land for canal purposes, the establishment of postal facilities, the use of United States Government commissaries for the sale of goods in the Panama Canal Zone, the furnishing of supplies and facilities to vessels crossing the canal, the collection of customs on imports into the zone, the right of radio communication and aerial navigation in Panama, the sanitation of the cities of Panama and Colon, the extradition of criminals, the issuance of exequaturs for consuls. The settlement of these questions will renew the discussion between the United States and Panama of their sovereign rights in the Panama Canal Zone.

The matter of sovereignty is determined by the Panama Treaty of 1903. Prior to that date the United States recognized that the sovereignty reposed successively in New Granada, Colombia and Panama. The treaty of 1846 between the United States and New Granada, the predecessor of Colombia, contains a guarantee by the United States of the neutrality of the Isthmus and the sovereignty of New Granada over Panama. This relation to the Isthmus was maintained by the United States Government from that time up to the events which led to the independence of Panama and the conclusion of the treaty of 1903, by which the United States contends it acquired general and unrestricted sovereignty over the Canal Zone.

A difficulty arises from the fact that Article III of the treaty of 1903 appears to be a general grant of sovereign powers to the United States, while other articles of the treaty appear to limit that grant.

Article III reads as follows:

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in

Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

The United States contends substantially that Article III is a general grant of sovereign authority in the Canal Zone, whereas Panama contends in effect that there was no such general grant but that the United States has only limited sovereign rights in the zone.

Vattel has laid down a rule to aid in the solution of such a question. He said:

The motive which led to the making of it [the treaty] and the object in contemplation at the time is the most certain clue to lead up to the discovery of its true meaning; and great attention should be paid to this circumstance whenever there is a question either of explaining an obscure, ambiguous, or indeterminate passage in a law or treaty or of applying it to a particular case.¹

The history of the negotiations with Colombia, of the secession of Panama, and of the Panama Canal Treaty, demonstrate that the object and purpose of the United States in respect of the Isthmus was to construct, operate and protect an interoceanic canal. Documents are readily accessible to prove this historical fact.

The object and purpose of the parties appear in the preamble of the 1903 treaty as the desire "to insure the construction of a ship canal across the Isthmus of Panama," in the furtherance of which object the Act of 1902 authorized the President "to acquire within a reasonable time the necessary territory." The object and purpose also appear in Article II of the treaty, wherein it is stated that Panama grants to the United States in perpetuity the "use, occupation and control" of the zone and other lands and certain islands" for the construction, maintenance, operation, sanitation and protection of the said canal." All of the other articles of the treaty grew around, and are dependent upon, this great purpose entertained by the United States and Panama. Even Article I of the treaty, in which the United States guarantees the independence of the Republic of Panama, may be explained on the theory that the perpetual independence of Panama is "necessary and convenient" not only for the construction and maintenance of the canal but also for the protection of this enterprise. It is important for the United States to have adjacent to the canal the territory of a small republic which would be a willing ally of this country in constructing and maintaining this great waterway. This guarantee prevents Panama from becoming, without the consent of the United States, a member of a federated state, such as possibly the United States of Central America, or a part of a

¹ Book II, Chapter 17, sec. 287.

large country such as Colombia, which might not be amenable in all respects to the policies of the United States in relation to the canal.

The following brief summary of the treaty shows how the single object of the parties permeates practically all of the articles.

The grants to the United States of certain rights and privileges within the territory of the Republic of Panama (Arts. IV, V, VII, XVII and XXV) relate to the construction, maintenance, operation, sanitation and protection of the canal. Likewise the transfer of Panama's rights in the Panama Canal Company and the Panama Railroad Company (Arts. VIII, XXII), the rates over telegraph and telephone lines established for canal purposes (Art. XI), the payments to be made by the Republic of Panama (Art. XIV), the establishment of a joint land commission to assess damages (Art. XV), the provision for a future extradition agreement (Art. XVI), the warranty of the rights and privileges conferred (Arts. XX, XXI),—all have to do directly or indirectly with the construction, maintenance, operation, sanitation and protection of the canal. The remaining provisions of the 1903 treaty also relate to the canal, namely, the payment by the United States of damages caused by the canal (Art. VI), the exemption of canal property and canal employees from taxes and customs duties (Art. X, XIII), the free immigration of employees and workmen and their exemption from military service (Art. XII), the neutrality and use of the canal (Art. XVIII), the passage and transport for Panaman vessels, troops, munitions of war, officers, etc. (Art. XIX), the use of United States forces for the safety and protection of the canal and of transportation across the Isthmus (Art. XXIII), and the preservation of the rights acquired by the United States through any political or other changes in Panama (Art. XXIV, compare Art. I).

From this summary of the provisions of the treaty of 1903, it will be observed that all of the articles of that treaty, except possibly Article III, relate in some obvious manner to the construction, maintenance, operation, sanitation and protection of the Panama Canal. Therefore, the history of the relation of the United States to the Isthmus, from 1846 to the present time, has centered around this great undertaking, and this fact should, according to Vattel, give a clue to the meaning of Article III of the Canal Treaty. This reasoning leads to the deduction that the rights of sovereignty of the United States under Article III are limited to those necessary or convenient for carrying out the project which was the object and purpose of the negotiators of the treaty. From this point of view the doing of anything which does not further the construction, maintenance, operation, sanitation and protection of the canal would be beyond the powers given to the United States in the Canal Zone. In accordance with this view the United States has turned back to Panama certain lands not necessary for the canal enterprise.

It may be observed in the second place from Article III itself that it in terms does not transfer full and complete sovereignty to the United States.

There remains a scintilla of sovereignty—a reversionary sovereignty still in the Republic of Panama. On this point Mr. Taft, then Secretary of War, stated before the Committee on Inter-oceanic Canals, April 18, 1906, that:

It [Article III] is peculiar in not conferring sovereignty directly upon the United States, but giving to the United States the powers which it would have if it were sovereign. This gives rise to the obvious implication that a mere titular sovereignty is reserved in the Panamanian Government. Now, I agree that to the Anglo-Saxon mind a titular sovereignty is like what Governor Allen, of Ohio, once characterized as a "barren ideality," but to the Spanish or Latin mind poetic and sentimental, enjoying the intellectual refinements, and dwelling much on names and forms it is by no means unimportant. Therefore, when the question of the form of stamp was to be determined, I had not the slightest hesitation in yielding to the view that we should adopt the system which for a time General Davis had himself adopted before he got United States stamps, of merely purchasing the Panamanian stamps and crossing them with the words "Canal Zone."²

The truth is that while we have all the attributes of sovereignty necessary in the construction, maintenance, and protection of the canal, the very form in which these attributes are conferred in the treaty seems to preserve the titular sovereignty over the Canal Zone in the Republic of Panama, and as we have conceded to us complete judicial and police power and control over the zone and the two ports at the end of the canal, I can see no reason for creating a resentment on the part of the people of the Isthmus by quarreling over that which is dear to them but which to us is of no real moment whatever.³

In the third place, while Article III on the one hand seems to grant to the United States the "exercise" of "all the rights, power and authority" within the Canal Zone which the United States would possess and exercise if it were the sovereign to the entire exclusion of the exercise of such rights by Panama, other articles on the other hand appear to restrict the exercise of a general right of sovereignty by the United States. It is a legal maxim that all parts of an agreement should be construed together so as to give full effect and a sensible meaning if possible to all of the provisions.⁴

Article III standing alone might well be held to be a general grant of sovereignty to the United States which consequently would have the right to exercise full commercial, fiscal and governmental autonomy in the Canal Zone. But how is this result to be squared with certain other articles of the treaty?

In the first place, Article II is not an absolute cession, conveyance or transfer of territory. If this had been the intention, no doubt a simple form of cession of territory and dominion would have been employed, as was done

² Hearings, p. 2527.

³ Hearings, p. 2399.

⁴ *Geoffry v. Riggs*, 1890, 133 U. S. 258; *Goetze v. U. S.*, 1900, 103 Fed. 72; *Secy. of State to Baron Lederer*, 5 Moore, 691.

in the case of the Louisiana Purchase, and the Alaska Purchase, with a provision added as to the allegiance of the inhabitants. Article II is a grant to the United States of the "use, occupation and control" for a specific purpose and does not purport to convey absolute title. The United States could not sell or transfer the zone or any part of it, because she has not complete title in fee. It is inconceivable that the United States would claim that the grant of a weak and defenseless nation should be construed most favorably for the grantee. In this connection attention may be called to a limitation on the generality of Article II which occurs in Article XXV. Article II *grants* the use, and so forth, of all lands and waters necessary or convenient for the protection of the canal, whereas Article XXV provides that lands for naval or coaling stations for the protection and neutrality of the canal must be *purchased or leased*.

Article VI prevents the exercise of eminent domain except upon the payment of damages. While compensation for such damages is common practice in modern times, yet this is based upon statutory, constitutional or other legal requirements, in the absence of which it is reduced to a moral obligation. Also in Article X, Panama agrees that there shall not be imposed any taxes or charges upon canal property, or any property appertaining to the canal or persons connected therewith or their effects and so forth. This indicates that in other respects the Republic of Panama retained the right to impose taxes within the Canal Zone. As Panama in Article X waives the right to tax specific property, articles and persons, she manifestly retains the right to impose taxes upon other property, articles and persons, for she did not give up this right in Article X. Mr. Taft discussed this question at the hearings before the Inter-oceanic Canals Committee.⁵

Again in Article XII, the Republic of Panama agrees to permit the immigration of employees and workmen in anywise connected with the canal and its auxiliary works and their families and agrees that all such persons shall be exempt from military service. On the ground that Panama retains that which she did not grant away, Panama still has the right to limit immigration and to compel military service of other persons than those employed in connection with the canal and its auxiliary works. By Article XIII, the United States is exempted from customs duties, imposts or other charges on the importation of vessels, machinery, provisions, supplies, medicines, clothing, and other things necessary and convenient (not all things whatsoever) in the construction, maintenance, operation, sanitation and protection of the canal and auxiliary works and for the use of persons in the service or employ of the United States and for their families. This is a specific exemption limited to importations made by the United States itself for the canal or for persons connected with it. No other persons are entitled to this exemption and it applies only to articles necessary and convenient for the construction of the canal and for the use of persons connected

⁵ Hearings, p. 2757.

with the canal. It follows that importations by other persons or of other articles would be subject to the imposition of customs duties by the Republic of Panama. Moreover, Article XIII contains no words which limit it to importations through Panama territory.

Article XVI provides for a future agreement for the pursuit, capture, imprisonment, detention and delivery of refugee criminals from the zone or the republic. This article indicates that the United States shall exercise police and judicial powers within the Canal Zone to the exclusion of the exercise of such powers by Panama. Article XIX reserves to Panama the right to passage through the canal of her vessels, troops, munitions of war, and to transport over the railway of officials, police forces and their baggage, munitions and supplies without paying charges of any kind. This is an exception from the general control over the *operation* of the canal and the railway granted to the United States in the various articles of the treaty. A somewhat similar restriction on the United States occurs in Article XVIII by which this country undertakes that the canal shall be neutral in perpetuity and open to commerce on the terms of the Hay-Pauncefote Treaty. On the other hand, the United States, by Article XXIII, has the right to employ its police, land and naval forces and to establish fortifications, for the safety and protection of the canal, the ships using it, and the railways and auxiliary works.

From the foregoing it may be contended that, notwithstanding Article III of the Canal Treaty, the complete sovereignty of the United States in the Canal Zone is seriously limited; that, while in respect of judicial power its authority seems to be very broad, in respect of commercial and fiscal matters the United States simply enjoys certain exemptions specifically granted by the Republic of Panama; that even in governmental power the United States is limited to the extent that it cannot impose general immigration restrictions or enforce military service generally on persons in the Canal Zone although the United States enjoys complete administrative powers relating to the maintenance of public order and safety and having to do with the construction, maintenance, operation, sanitation, protection and neutrality of the canal.

This contention leads to the proposition that the Canal Treaty is a grant of limited powers to the United States in respect of the Canal Zone, and consequently that the United States must find in that treaty authority for every right which she pretends to exercise and every act which she does. Accordingly, if the United States imports articles for sale to vessels crossing the canal or to persons not connected with the canal, enters into commercial business not related to the canal, claims an unrestricted right to free importation into the zone, establishes there a postal system and issues postage stamps, or claims exemption from taxation of property of the railway situated within Panama, the United States must find a sanction in the provisions of the Canal Treaty or some other agreement with Panama. The

mere absence of a prohibitory clause would not, in this view, be a sufficient sanction.

On the other hand, it may be contended that the limitations derived from Articles II, IV, X, XII, XIII, are only implied restrictions on the sovereign powers granted by Article III, and that they were never intended by the negotiators to affect or limit the generality of the powers granted in Article III, but were, on the contrary, merely intended to insure that the exemptions and privileges mentioned in the other articles were included in the general rights and powers conceded by Article III. This point of view has been strongly defended by the United States in its diplomatic correspondence with Panama, beginning with Secretary Hay's note of October 24, 1904,⁶ and presumably is known to American students of the subject. For this reason less space is here given to this side of the question. In its discussion of Article III the United States has also taken into consideration the general object and purpose of the treaty, namely, the construction and continued operation of the canal, and the grant to the United States of all powers necessary for this purpose. But the United States does not attribute to them the same restrictive effect on Article III as does Panama. It is not derogatory of the views entertained by either country to say that it was doubtless not the intention of either party that the United States should hold and administer the Canal Zone as an independent colony or possession of the United States. The Canal Zone is more in the nature of a great international right of way across Panaman territory, of which the United States is the administrator and protector with power sufficient to carry out the great design of the parties.

L. H. WOOLSEY.

THE CHINESE CUSTOMS TARIFF CONFERENCE¹

The special conference on the Chinese Customs Tariff provided by the Treaty of Washington, signed February 6, 1922,² met at Peking upon the invitation of the Chinese Government on October 26, 1925, and is still in session as the JOURNAL goes to press. Participating in the conference are the nine Powers which signed the Treaty of February 6, 1922, namely, the United States, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal, and the following Powers having treaties with China on the subject, namely, Denmark, Norway, Spain and Sweden.

The Treaty of Washington provided for a conference to consider the abolition of *likin* by the Chinese Government and the granting by the treaty

⁶ For. Rel. 1904, p. 613.

¹ The information upon which this editorial is based is taken from the official press notices issued by the Department of State.

For the events in China immediately preceding the calling of this conference, see editorial entitled "China and the Powers" in the last number of the JOURNAL (October, 1925), Vol. 19, pp. 748-753.

² Supplement to this JOURNAL, Vol. 16, p. 69.

Powers of certain surtaxes above the present rates on imports into China. The treaty contemplated the continuance of the conventional tariff régime in China, and provided for the periodical revision of the conventional schedules of import duties. But the demands of China growing out of the Shanghai incident on May 30th last, including, *inter alia*, the revision of the "unequal treaties" between China and the Powers have given the conference a wider scope than that foreseen by the Conference of Washington in 1922. The nine Powers parties to the treaty of 1922, in replying to the Chinese demands on September 4, 1925, stated that they were prepared to consider the Chinese Government's proposal for the modification of existing treaties and expressed specifically a willingness to consider a revision of the treaties on the subject of the tariff either at the present conference or at a subsequent time.

The Chinese Government took prompt and full advantage of this offer of the Powers. When the conference convened on October 26th, the chief executive of the Provisional Government, Marshal Tuan Chi Jui, in welcoming the delegates, based his remarks, not upon the Washington Treaty relating to the Chinese customs tariff, but upon the Washington Treaty of the same date relating to the principles and policies to be followed in matters concerning China, in which the nine Powers other than China agreed "to respect the sovereignty, the independence, and the territorial and administrative integrity of China" (Article I, Section 1).³ Marshal Tuan stated that the Chinese people attach great importance to that declaration and that the present conference would provide an opportunity for its realization. He declared tariff autonomy to be an inherent right of sovereignty; that the existing tariff régime in China is contrary to economic principles and results in a loss to China of revenue the amount of which cannot be fully estimated; and that the general feeling of unrest and dissatisfaction within the nation may be traced to this economic inequality. "China," he continued, "is recognized as one of the great markets of the world. The improvement of her financial condition, the growth of her wealth, and the development of her industries will not only be a blessing to herself, but also a source of benefit to friendly nations," and he appealed to the Powers to remove the disadvantages under which the Chinese people have been laboring and contribute to the foundation of international understanding by agreeing to the establishment of a tariff régime in China on the basis of equality. The Chinese Minister of Foreign Affairs spoke in a similar vein.

The agenda of the conference proposed by China placed tariff autonomy as the first of the subjects for consideration. The topic included the adoption by the Chinese Government of the Chinese general customs tariff promulgated on October 24, 1925, coupled with the abolition of *likin*. In addition, the agenda provided for the consideration of (B) provisional measures to be taken during the interim period until tariff autonomy goes into effect, and

³ *Ibid.*, p. 64, at p. 66.

(C) certain related matters. The Powers accepted the agenda and the conference appointed three committees to deal with the three main divisions of the agenda.

The Chinese customs tariff law of October 24, 1925, provides for import duties ranging from a minimum of $7\frac{1}{2}$ per cent, to a maximum of 40 per cent, except for certain luxuries upon which higher duties may be levied. Specific rates are to be fixed in tariff schedules to be promulgated separately; the importation of certain articles, such as salt and opium, is entirely prohibited, and of other articles, such as arms and war munitions, except by special permission.

The only definite result so far reported from the conference is the adoption on November 19, 1925, of a resolution by the committees on tariff autonomy and provisional measures, sitting jointly, in which the delegates of the Powers agreed to the following proposed articles for incorporation, together with other matters to be hereafter agreed upon, in the treaty which is to be signed at the conference:

The contracting Powers other than China hereby recognize China's right to enjoy tariff autonomy, agree to remove the tariff restrictions which are contained in existing treaties between themselves respectively and China, and consent to the going into effect of the Chinese National Tariff Law January 1, 1929.

The Government of the Republic of China declares that likin shall be abolished simultaneously with the enforcement of the Chinese National Tariff Law and further declares that the abolition of likin shall be effectively carried out by the first month of the eighteenth year of the Republic of China (January 1, 1929).

The articles thus agreed upon correspond to the first two of five proposals submitted to the conference at its opening session by the Chinese delegation. Other proposals submitted at the same time by China provided that pending the enforcement of the Chinese National Tariff Law, there should be levied and collected beginning three months from the date of signature of the proposed treaty, an interim surtax of 5 per cent on ordinary goods, 30 per cent on wine and tobacco, and 20 per cent on other luxuries. These matters are still under consideration in committees. Subcommittees have been appointed to deal with the rates of the proposed surtaxes and the purposes to which the proceeds are to be devoted. Other subjects being discussed are the revision of the present tariff schedules pending the exercise of the right of tariff autonomy, the valuation of commodities, the abolition of certain export and coast trade duties on native goods, and the levying of duties and taxes on foreigners residing in China. On the last mentioned subject, the Chinese delegation, at a meeting of the committee on provisional measures held December 10th, declared that although "in no treaty of any sort is there to be found any provisions which concede to foreigners living in or outside settlements; in China an exemption from taxation," in recent years "foreigners have declined to perform their obligations on the pretext that they resided in

the settlement, or that they had not received instructions from their governments"; that foreigners residing outside the settlements or within the railway zones have adopted the same attitude; and that Chinese living in the settlements and railway zones have used these unfortunate examples as precedents to refrain from paying their taxes. The declaration further stated that "the Chinese Government has been obliged to establish provisional barriers around the settlements and railway zones in order to collect taxes and duties," which are detrimental to the administrative authority of the government and to the trade between China and foreign countries. The Chinese further declared it to be

inadmissible in the enforcement of a fiscal régime to make any discrimination either between citizens on account of their nationality or residence or between different parts of a territory subject to the jurisdiction of the same state. This would violate the principle in international law of equal treatment for the citizens of a state and run contrary to the spirit of the Washington Conference, which was designated to respect the territorial and administrative integrity of China.

The declaration ended by stating that as soon as the *likin* system is abolished, in order to enable China to devise a satisfactory substitute system of taxation, "foreigners in China, whether residents within or outside the settlements or within the railway zones, as well as other localities, shall discharge equally with the Chinese their fiscal obligations towards the Chinese Government in conformity with the provisions of the fiscal laws promulgated by China."

So far, it appears that China has carried her main point in the conference, namely, the right to tariff autonomy. Whether or not this right thus recognized is to be exercised unrestrictedly or is to be circumscribed by conditions remains to be seen from the articles of the treaty still to be agreed upon.

GEORGE A. FINCH.

INTERNATIONAL UNIFICATION OF COMMERCIAL LAWS—NEW LEGISLATION IN POLAND

Except it be in the performance of some special treaty obligation, national legislation rarely has for its principal purpose, coördination with the laws of other countries. It is for this reason that the new laws of Poland, promulgated November 14, 1924, regulating bills of exchange, promissory notes and cheques are entitled to especial consideration from the international viewpoint. The new laws adopt almost in entirety the codification elaborated at the two diplomatic conferences of The Hague in 1910 and 1912 for the international unification of the law of negotiable instruments.

The successive partitions of Poland and the Napoleonic régime resulted in the development of widely differing systems of law in the dismembered parts of Poland. Accordingly, when the Polish Republic was created by the Treaty of Versailles, the following systems of law governing negotiable instruments were in force in the various parts of its territory:

(a) Upon the territory formerly under the control of Austria-Hungary, the Austrian law derived from the Conference of Leipsic and introduced in Austria by the Patent of January 25, 1850;

(b) Upon the territory formerly under the control of Prussia, the Prussian law derived from the Conference of Leipsic and introduced in Prussia by Decree of February 15, 1850;

(c) Upon the territory formerly known as the Kingdom of the Congress, the French Commercial Code, with its Articles 110 to 189 relating to negotiable instruments;

(d) Upon the balance of the territory formerly under Russian control, the Russian Law of 1902.

Such conditions gave little encouragement to national consolidation. The need of financial and economic rehabilitation in Poland called for immediate modernization and unification of the laws of credit, of which the law of negotiable instruments constitutes a vital part. Similar conditions existed in other branches of the law. A Commission on Codification was appointed in 1919, consisting of eminent juriconsults, for the reform of Polish law. However, the elaboration of comprehensive codes is the work of years and the need was immediate and vital. The commission therefore determined to draft special laws which could be put into effect in the briefest time possible.

In the field of negotiable instruments, the commission found ready to hand the draft laws elaborated at The Hague in 1910 and 1912, and it adopted these with only such modifications as national practice required. Two main motives may perhaps be emphasized in following this choice. The adoption of any of the local systems in force would have caused strong objection in territories where the system did not prevail, especially as one group of laws was derived from the French codes, and one from German sources. The Hague drafts represent a compromise or merging of the French and the German systems. Anglo-American jurisprudence was also not without influence in the elaboration of the Hague drafts. Indeed Sir Mackenzie Chalmers has said: "On the whole, the Uniform Regulation, as finally settled, approaches the Anglo-American system more nearly than any existing Continental or South American code."

This brings us to the second legislative motive, which is referable to the desire to make the law of Poland harmonize with the laws of other countries upon a subject-matter predominantly international in scope. The instrumentalities of commerce move forward and backward over national boundaries much more readily than the money or the goods they represent. The Hague drafts are an approach to uniformity in a field in which particularism tends to disappear. Justice Story, in his opinion in *Swift v. Tyson* (41 U. S. 1, 19), asserted that "the law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure not the law of a single

country only, but of the whole commercial world." In all probability, the work of unification, once it is resumed, will begin where the Hague conferences left off. This course was recommended in the report of the experts submitted to the Council of the League of Nations in 1923. It may, therefore, be said that the second legislative motive for the new Polish laws represents a vision of the future, just as the first results from the development of Poland's historical past.

It is interesting to observe that precedents already exist on this side of the Atlantic for the step which Poland has taken. The Inter-American High Commission, at its Buenos Aires session in 1916, recommended the adoption of the Hague regulations relating to bills and notes, with certain modifications, by all the Latin-American countries, through appropriate legislation. As a result, the Hague regulations on bills and notes have been substantially incorporated in the codes of Guatemala, Nicaragua, Paraguay, and in the new Commercial Code of Venezuela. Guatemala and Venezuela have also adopted the tentative Hague rules of 1912 in regard to cheques.

Curiously enough, instead of adopting the Hague system, the Republic of Colombia, by the law of July 19, 1923, has enacted a more or less literal translation of the American Uniform Negotiable Instruments Law practically *in toto*. This step is ascribable to the successful reform of the Colombian financial system by the Kemmerer Financial Commission. Whether this move was wise in view of the general structure of the Colombian legal system, we are not prepared to say. It certainly was not in accordance with the recommendation contained in the Phanor Eder Report of 1915 to the Secretary of the Treasury of the United States, acting as chairman of the Inter-American High Commission. In that report the Hague regulations are favored as being better suited to Latin American commercial needs and as being more in harmony with the legal structure of Latin American countries than our own system. A careful analysis of the laws of the countries of North, Central and South America, relating to bills and notes, in comparison with The Hague Convention of 1912, has been recently prepared by G. J. Eder for the Inter-American High Commission and published by its Central Executive Council.

The task of unification in the field of negotiable instruments is recognized as vital to the needs of international commerce. The International Chamber of Commerce at its meeting at Brussels in June, 1925, called for more rapid progress toward international unification and has enlisted the powerful co-operation of the Economic Committee of the League of Nations to this end. The new legislation of Poland has lent strong encouragement to a resumption of the task in Europe, and the forthcoming session of the Committee of Jurists at Rio Janeiro under the auspices of the Inter-American High Commission may be expected to further advance the movement in the Western World.

ARTHUR K. KUHN.

AIDS TO RESEARCH

The American Council of Learned Societies has made the following announcement which may be of interest to those engaged in international investigation:

Through a subvention of \$5,000 a year for three years the American Council of Learned Societies will be able to offer in 1926, 1927 and 1928 a number of small grants (not exceeding \$300) for the purpose of aiding scholars who require assistance in the conduct of projects of research in the humanistic and social sciences. Grants will be made only to mature scholars, experienced in scientific methods of research, and for specific purposes (travel, assistance, copies, photographs, appliances, etc.) in connection with definite projects. Grants will not be available for work the object of which is to fulfil the requirements for any academic degree, and in general preference will be given to applicants who are not eligible to benefit from special funds for research such as those maintained by certain universities.

Applications for grants in 1926 must be in the hands of the Chairman of the Committee by February 28. Scholars who wish to make such applications should secure the circular *Information to Applicants* from the Chairman of the Committee, Dean Guy Stanton Ford, University of Minnesota, or from Waldo G. Leland, Executive Secretary, American Council of Learned Societies, 1133 Woodward Building, Washington, D. C.

The policy of aiding those who are already "mature scholars, experienced in scientific methods," is one that is particularly desirable in America, where many capable of carrying forward investigations have found it impossible because of lack of encouragement and facilities.

A Bureau of International Research has recently been established for a period of years at Harvard University and Radcliffe College for developing research of an international character and of an advanced nature such as might not otherwise be undertaken. This work is to be carried on by members of the staffs of the two institutions.

There are many problems arising from the changing relations of states and their populations which must be investigated in the same spirit as that shown in research in international health matters if the world well-being is to be intelligently conserved. Aid to such research by foundations and gifts show a growing recognition of the importance of this work.

GEORGE GRAFTON WILSON.

ANOTHER TRIUMPH OF ARBITRATION

The irritating and somewhat persistent dispute between Germany and Poland over the interpretation of the nationality clauses of the Minorities Treaty of June 28, 1919, between Poland, on the one hand, and the Principal Allied and Associated Powers, on the other, appears to have been definitely settled during the past year through the mediation and an arbitral decision

of M. Georges Kaeckenbeeck, President of the Arbitral Tribunal of Upper Silesia. It will be recalled that at the outset the Polish Government took the position that the question of the status of Germans born in Polish territory of parents habitually resident there, even if at the date of the coming into force of the above mentioned treaty they were not themselves habitually resident there, and who by Article 4 of the treaty were declared to be Polish nationals, was one which did not fall within the competence of the League of Nations, but that the article had reference only to Polish nationals and not the nationals of Germany or other countries. The Polish Government also contended that it was not obliged to recognize as Polish nationals, Germans born in Polish territory of parents habitually resident there unless the parents were habitually resident there, both on the date of the birth of the person concerned and also on the date of the coming into force of the treaty, that is, January 10, 1920.

On July 7, 1923, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on both these questions, and on September 15 of the same year the court delivered an opinion rejecting the contention of Poland on both points. The opinion was "adopted" by the Council by a resolution of September 27, 1923, but it expressed no opinion on the reasons upon which the court relied in reaching its conclusions. Thereupon, new negotiations between the German and Polish Governments looking toward an accord were begun, in the course of which other controversies regarding the meaning of Articles 3 and 4 of the treaty arose. These negotiations were carried on between a German and a Polish commissioner under the presidency of M. Kaeckenbeeck, acting as mediator, and by protocols adopted at Berlin and Vienna in April and May, 1924, respectively, it was agreed that the various questions in dispute should be submitted to the arbitration of M. Kaeckenbeeck. Twelve questions altogether were submitted, upon each of which a decision was rendered by the arbitrator in July, 1924.

The first question related to the matter of domicile. The German Government contended that the requirement of domicile in order to acquire Polish nationality under Articles 3 and 4 of the treaty was met by residence in Polish territory, even though the individual concerned possessed another domicile in other territory. The Polish Government, on the other hand, contended that an established domicile implied an "exclusive concentration of both personal and economic relations in a single place." It followed, therefore, that no one could be simultaneously domiciled in several places. The decision of the arbitrator on this point was adverse to the Polish claim. The nature of an established domicile, he held, was not incompatible with the coexistence of two domiciles in two different places, for example, a domicile in a city during the winter and a domicile in the country during the summer. What was essential, and this alone, was habitual residence in the country irrespective of whether it was in a single place or in several places.

The second question related to the date at which domicile must be established to entitle a German resident to claim Polish nationality under Article 3 of the Minorities Treaty and Article 91 of the Treaty of Versailles. The German Government contended that it was sufficient that the claimant should have been established in Polish territory anterior to January 2, 1908, and also on the date of the transfer of the sovereignty over the territory from Germany to Poland. Continued and uninterrupted residence between the two dates was not required. The Polish Government, on the contrary, maintained that under Article 3 of the Minorities Treaty, Polish nationality could be acquired only by special authorization of the Polish Government, unless the claimant had been domiciled continuously and without interruption in the territory in question from January 1, 1908, to January 10, 1920, the date of the coming into force of the Minorities Treaty. On this point the arbitrator decided that what was required by the treaty to confer Polish nationality *ipso facto* and without special authorization was, not the existence of a domicile on the two dates mentioned above, but merely domicile on the last mentioned date and continuing since January 1, 1908. An interruption of domicile between the two dates, however, had the effect of rendering special authorization necessary to acquire Polish nationality. Nevertheless, a distinction was made between uninterrupted "domicile" and uninterrupted "residence," the latter not being necessary, habitual and regular residence being sufficient.

The third question likewise related to domicile. The German Government insisted that the domicile contemplated by Articles 3 and 4 was a domicile established anywhere in the territory attributed to Poland and not solely in the territory ceded by Germany. The Polish Government maintained the contrary thesis. On this point the arbitrator sustained the German contention.

The fourth question related to the date upon which the nationality of a German claimant must have been acquired in order to entitle him to claim Polish nationality under Articles 3 and 4. The German Government maintained that a person who was a German subject on the date of the transfer of sovereignty acquired Polish nationality in virtue of the said articles, although his German nationality had been acquired subsequent to the first of January, 1908. The Polish Government, on its part, contended that he must have possessed German nationality without interruption since the second of January, 1908. On this point the arbitrator decided that the possession of German nationality on the date of the cession, and this date alone was sufficient.

Questions 5, 6, and 7 were relatively unimportant and may therefore be passed over.

Question 8 related to the rights of married women and minors under Articles 3 and 4. The German Government contended that women and children who fulfilled the conditions laid down in the said articles, acquired

Polish nationality even when their husbands or legal representatives, respectively, did not fulfill those conditions. The Polish Government maintained the contrary thesis. The decision of the arbitrator sustained the German contention. He added that it could not be objected that the effect of the decision would be to disrupt the unity of the family, since it would be easy to reestablish this unity, either by option or renunciation by the wife, or by special authorization or by special naturalization of the husband.

Questions 9 and 10 were somewhat similar to that which had been brought before the Permanent Court in the case of the French nationality decrees in Tunis and Morocco, namely, whether the acquisition of Polish nationality and the validity of an option were matters which fell exclusively within the jurisdiction of the Polish authorities, or whether they were international matters. The German Government contended that they were questions of an international order; the Polish Government maintained the contrary and insisted that it belonged to the Polish authorities solely to determine whether Polish nationality had been acquired in any particular case in virtue of the treaty. Adverting to both contentions, the arbitrator observed that if the German Government meant to affirm that the Polish authorities were without competence to determine whether Polish nationality had been acquired in a particular case in conformity with the treaty, and that if Germany meant to assert a right to interfere (*s'immiscer*) in such determinations, its thesis must be rejected. On the other hand, if the Polish Government meant to assert that Germany was bound by every such determination on the part of the Polish authorities, when the decision was contrary to the international obligations entered into by Poland, that claim must likewise be rejected. He added:

If it is true that in matters of nationality the competence of each state is, in principle, exclusive, it is no less true that when the acquisition of nationality is regulated by international treaties, the authority of the state is limited by the conventional engagements into which it has entered.

This view, it will be recalled, was in accord with the opinion of the Permanent Court in the French nationality case. The arbitrator pointed out that the matter of the acquisition of Polish nationality was regulated by Article 91 of the Treaty of Versailles, from which it followed that the matter here in controversy was not purely unilateral, but interested both contracting states. Recognition by Poland of the acquisition of Polish nationality by certain German subjects was therefore for Poland an international obligation, just as the recognition by Germany of the loss of German nationality in certain cases was for Germany an international obligation. Consequently, in case of infraction by one of the contracting parties of the obligations created by the treaties, the other co-contracting party had a right to insist by all legal means that the treaties be respected. In regard to the validity of options, the arbitrator reached the same conclusion.

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The eleventh question related to the right of optants for German nationality to remain in Poland. The German Government maintained that those who had opted for German nationality had the right to conserve their domicile in Poland; the Polish Government, on the other hand, contended that they were obliged to leave Poland upon demand of the Polish authorities. The decision of the arbitrator on this point was in favor of the Polish contention. In the course of his opinion, he observed that:

It must be admitted that a cessionary state normally has the right to require the emigration of the inhabitants of the territory ceded, who have opted in favor of the ceding country. This principle, consecrated by international practice and expressly admitted by the best authors, is found at the base even of the stipulations concerning option, in the recent treaties of peace.

He added that the denial of this right in the present case would have a character so exceptional that it could not be presumed. Reasons of humanity and of an economic order, he admitted, might easily be conceived that would make emigration a hardship, but it was not easy to see that Poland had entered into an engagement to allow for an unlimited period the presence in its territory of persons who, having become of full right Polish subjects, had, subsequently, renounced their Polish nationality and renewed their German allegiance, were yet free of their obligations and duties as Polish citizens.

The decisions on all the questions submitted were accepted by both governments, and in accordance with the terms of the protocol adopted at Vienna on May 20, 1924, which provided that the decisions should constitute "the elements of a convention to be drafted by the delegates of both Powers under the presidency of the arbitrator," a convention was signed on August 30, 1924, embodying, in the main, the findings of the arbitrator.¹

By Article 12 of the convention it was provided that the persons remaining in Polish territory and who had made a declaration of option for German nationality which the competent authorities considered valid, should be obliged to transfer their domicile from Poland to Germany, unless their declarations were annulled because of non-conformity to the present convention. Such transfer was to take place in the case of certain persons not later than August 1, 1925, in the case of others not later than November 1, and in respect to others not later than July 1, 1926. It was further provided that in case any optants failed to leave Poland before the dates prescribed, they should be conducted to the German frontier and there delivered to the German authorities.

Unfortunately, the conclusion of the convention was followed by a regrettable occurrence. Apparently the German optants who by the terms of

¹ The texts, in French, of the decisions of the arbitrator, the memoirs of the two governments, the convention of August 30, and various other documents relating to the case are printed in a volume entitled *Actes et Documents de la Conférence Germano-Polonaise, Tenue à Vienne du 30 Avril au 30 Août 1924* (Manz, Éditeur, Vienne).

the convention were required to leave Poland, took no steps to emigrate, and accordingly near the end of July, 1925, as the first date fixed by the convention for removal drew near, some 15,000 Germans, many of them with their wives and children, were forcibly and hurriedly conducted by the Polish authorities to the German frontier. The German authorities thereupon retaliated by expelling in a similar manner some 12,000 Polish families residing in Germany, who had opted for Polish nationality. All accounts agree that the expulsions were attended by grave hardships, especially for the women and children, since no adequate arrangements had been made for the reception and care of the evicted population.

J. W. GARNER.

OTTOMAN PUBLIC DEBT ARBITRATION

The arbitral decision rendered April 18, 1925, concerning the apportionment of the annuities of the Ottoman Public Debt among the various states whose territories, in whole or in part, formerly belonged to Turkey, is of the highest interest. This arbitration was expressly provided for in Article 47, Part Two, of the Treaty of Lausanne of July 24, 1923, which determined in principle the proper apportionment of the external debt of Turkey.¹ No protocol of arbitration could be in simpler terms:

Any disputes which may arise between the parties concerned as to the application of the principles laid down in the present article shall be referred, not more than one month after the notification referred to in the first paragraph, to an arbitrator whom the Council of the League of Nations will be asked to appoint; this arbitrator shall give his decision within a period of not more than three months. The remuneration of the arbitrator shall be determined by the Council of the League of Nations, and shall, together with the other expenses of the arbitration, be borne by the parties concerned. The decisions of the arbitrator shall be final. The payment of the annuities shall not be suspended by the reference of any disputes to the above-mentioned arbitrator.

The history of the case is briefly as follows. The Council of the Ottoman Public Debt (*Dette Publique Ottomane*, an extraordinary institution created in 1881 to meet the exigencies of foreign bondholders), in pursuance of Article 47, notified the various succession states on November 6, 1924, of their respective shares of the Turkish debt. Greece on November 26, 1924, was the first to appeal from this decision to the arbitration provided for. Turkey followed on November 30; France on December 2; Bulgaria on December 2; and Great Britain on December 15.

The Council of the League of Nations sitting in Rome on December 10, 1924, unanimously designated as arbitrator Eugene Borel, Professor of International Law in the University of Geneva, and President of the Anglo-German Mixed Arbitral Tribunal. The latter accepted on December 26,

¹See Supplement to this JOURNAL, January, 1924.

and notified the Secretary-General of the League of Nations that he would formally assume his functions on January 20, 1925. On that date representatives from Great Britain, acting in behalf of the mandated areas of Irak, Palestine, and Transjordan; from France, acting in behalf of the mandated areas of Syria and The Lebanon, together with representatives from Bulgaria, Greece, Italy, Turkey, and the Council of the Ottoman Public Debt, assembled at 2 Cavendish Square, London, in the hall of the Anglo-German Mixed Arbitral Tribunal. The arbitrator then communicated the following instructions:

(a) The place of the arbitration is set at the Secretariat of the League of Nations in Geneva.

(b) The Powers which have presented a complaint to the Council of the League of Nations will furnish a memorandum setting forth the reasons in support of same, and formulating their precise and complete conclusions. This memorandum shall be deposited with the Secretariat of the League of Nations at Geneva on or before February 12, 1925.

The memorandum of each party shall be communicated immediately to all the other parties in the case.

(c) Within a second delay expiring March 7, 1925, all the interested parties shall have the privilege to present a further memorandum in reply to the above memorandum, to be deposited by them with the Secretariat of the League of Nations at Geneva.

Within the same period the Council of the Ottoman Public Debt shall deposit with the same Secretariat a report covering all the points raised in the first memoranda. The second memorandum of each party and of the Council of the Ottoman Public Debt shall be communicated immediately to all of the interested parties.

(d) The parties are summoned for a session of debate which shall open at Geneva Monday, March 16, 1925, and which shall be preceded by a preliminary seance held at the Palace of the League of Nations at Geneva on Saturday, March 14, at four o'clock in the afternoon.

On March 14, the arbitrator presented to the parties a program of the various questions propounded for settlement in the written memoranda and counter memoranda. This program, or agenda, served as the basis for the oral discussions before the arbitrator in Geneva from March 16 to March 21.

The final decision was rendered at Geneva on April 18, 1925, exactly within the limit of three months prescribed by the Treaty of Lausanne.

Never was a simpler device contrived for the solution of more intricate, technical problems. Never was an arbitral decision characterized by greater clarity and good sense. The whole proceeding from start to finish was of the finest simplicity. It may well serve as a model for other similar arbitrations where ponderous procedure and needless delays should be avoided.

The task imposed on the arbitrator presented intricate problems which would have probably confused a tribunal composed of several judges. Professor Borel attacked these problems with that good sense and fair-mindedness which eminently fitted him for the post of President of the Anglo-German Mixed Arbitral Tribunal. His masterly analysis of the

arguments and of the points at issue immensely simplified the debates that followed. His liberal though exact interpretation of his functions as arbitrator greatly facilitated his task. He thus defined at the outset his powers in terms which might profitably be pondered by other arbitral tribunals:

In the judgment of the arbitrator the task entrusted to him consists in finding and applying the common intention of the Powers signatory to the Treaty (Lausanne) . . .

The resources which law in general, and international law in particular, afford him are only means used by him, so far as may be necessary, for the purpose of understanding the common intention of the parties and to give it the effect it implies.

Asked thus to seek this common intention, the arbitrator should exert the effort necessary to find it, and here, in the fulfillment of his task as an interpreter, lies the freedom of judgment indispensable for the attainment of that end. It is superfluous to add that the common will of the contracting parties is to be sought above all in the very terms they have used; that the interpretation of these terms should be faithful and that under no condition should the arbitrator venture to substitute for what the parties have agreed—with or without reason—either a solution appearing more just and equitable, or the application of rules or of *a priori* definitions influencing him at the moment when he takes up the stipulations to be interpreted. To study these stipulations without the influence of any preconceived idea, rule, or definition; to seek in them the common intention of the parties, with freedom of judgment and with the aid of what the history of the treaty may reveal in fact as really sure, pertinent indications of a sufficiently conclusive character; such is the line of conduct which the arbitrator has been forced to follow in the present decision.

It is not possible to give a satisfactory complete summary of the many intricate questions settled in detail by the arbitrator or to comment on all of the principles and rules applied. This would require almost as great a familiarity with the problems presented as the arbitrator himself possessed. The following questions would seem of particular interest.

The general problem of state succession was held by the arbitrator to be met, not by rules of international law, but by definite treaty agreement such as was reached in the Treaty of Lausanne, which enunciated the principle that the share in the Turkish Debt apportioned to each state should bear the same proportion to the total amount as the average total revenue of the territory attributed to each state bore, in typical financial years, to the average total revenue of the Ottoman Empire.

Arguments were adduced to demonstrate that the criterium of revenue was unjust in such cases as where a customs port of entry was transferred, or productive land was taken away. An attempt was made to distinguish between the place of payment (*lieu de perception*) and the place of final deposit (*lieu d'encaissement*) of taxes.

While the arbitrator was willing to concede the force of certain of these

special arguments, he found the specific provisions of the treaty prevented any departures from its general principles, which were calculated, on the whole, to work a more substantial justice. In estimating the revenues of portions of districts divided by several states, the arbitrator held that the treaty intended to take the superficial area of the territory in question as the basis for apportioning the proper share of revenues and of the corresponding annuities to be borne by the respective states. Any attempt to estimate their economic resources and other factors, no matter how pertinent, he felt was precluded, particularly in view of the fact that only three months were allowed for the arbitration, whereas a proper study of such factors might take months or years.

Dealing with various objections to the exemption by the Council of the Ottoman Public Debt of certain territories from a share in the debt, notably Crete, Cyprus, Egypt, The Lebanon, and Irak, the Arbitrator sustained some of these objections, and directed the Council to revise its apportionment accordingly. So likewise, the arbitrator drew the attention of the Council to certain errors of a geographical nature which required revision.

An interesting point raised by Bulgaria concerned the date when she ceased to be liable for the proportionate quota of the debt represented by territory ceded to Greece. The former claimed that the reasonable date should be the time of actual military occupation in 1918, while Greece claimed its responsibility should begin on August 6, 1924, the date of the actual cession of the territory in question by the Treaty of Lausanne. The arbitrator held that the proper date was November 27, 1919, when Bulgaria formally surrendered its rights by the Treaty of Neuilly.

Other questions submitted to the arbitrator dealt with the currency of payment of annuities; the revenues of the Hedjaz Railroad originally built for religious and strategic purposes; the proper disposition of the private funds of Sultan Abdul Hamid which were found in Yildiz Kiosk at the time of his deposition; the correct date of a loan for the irrigation of the Plain of Konia; the compounding of annuities by Italy due from the old Turkish province of Tripoli; the revenues of steamboat concessions on the Tigris and the Euphrates, etc., etc. Such matters, involving in some cases technical considerations of an intricate nature, were settled by the arbitrator with singular ease and good sense.

The decision of the arbitrator is divided into eight main sections as follows: Section I indicates under seven separate paragraphs the various corrections and emendations to be made by the Council of the Ottoman Public Debt. The reasons for these changes are not repeated, but are to be found in the detailed discussion of the arguments as analysed by the arbitrator.

Section II prescribes: (1) The Council is directed, with the help of the financial expert designated by the arbitrator, to reapportion the respective quotas of the Turkish Debt in conformity with the arbitral decision; (2) The interested parties are reminded of their right under Article 47 of the Treaty

of Lausanne to check up these new calculations; (3) "On the conclusion of its new task, the Council of the Ottoman Public Debt shall notify each of the interested states of the rectified total of the annuities it must pay. Any complaints concerning this sum shall be dealt with, upon the request of the state concerned, by the arbitrator, who shall first make written request of said state and of the Council for all the explanations or observations which may be necessary"; (4) Each of the parties will receive upon request a copy countersigned by the arbitrator of the notification of the total amount by the Council, and a full statement of these definite sums shall be deposited with the Secretariat of the League of Nations to be attached to the original copy of the present arbitration.

Sections III, IV, V, and VI take note of various reservations made by the parties in the course of the arbitration and reserve their rights in certain details.

Section VII treats of the question of the compensation of the arbitrator and the allotment of the expenses of the arbitration, which are to be determined by the Secretariat of the League of Nations. These items are to be allotted on the basis of nine parts, three for Great Britain as the mandatory Power for Irak, Palestine, and Transjordan; two parts for France, as the mandatory Power for Syria and The Lebanon; and one part each for Bulgaria, Greece, Italy, and Turkey.

Section VIII provides for the formal filing of the present decision with the Secretariat, and for its distribution.

Under the rubric "Execution of the Decision" the arbitrator has indicated in detail the correct procedure to be followed as prescribed summarily in the text of the actual decision.

It is greatly to be regretted that comment on an arbitral award of such exceptional significance and merit must of necessity be of so cursory a character. But those who may have the special interest as well as the leisure to study the decision in detail will naturally prefer to do so. They will find it an authoritative and illuminating exposition of the problem of state succession as exemplified in a most interesting manner by the two partitions of the old Ottoman Empire as the result of the Balkan Wars of 1912-13, and of the World War.

PHILIP MARSHALL BROWN.

CURRENT NOTES

ANNUAL MEETING OF THE SOCIETY

The Twentieth Annual Meeting of the American Society of International Law will be held at the customary time, namely, the last Thursday, Friday and Saturday of April, which in 1926 fall upon the 22nd, 23rd and 24th days of that month. The Committee on the Annual Meeting has decided that the general subject of the next program will be the codification of international law. The consideration of the subject will be divided between addresses of a general nature, and papers and round table discussions both on the fundamental premises of codification and on the codification of particular topics. The meeting will end with the usual dinner on Saturday evening. The detailed program, with reservation cards for the dinner, will be mailed to the members of the Society in ample time before the meeting.

AMERICAN-BRITISH ARBITRAL TRIBUNAL

What is expected to be the final session of the American-British Arbitral Tribunal convened in Washington on October 26, 1925. As at present constituted, the Tribunal consists of Senator Alfred Nérinx of Belgium, President; Sir Charles Fitzpatrick of Canada, British member; and Judge Roscoe Pound, American member. On November 10th, the Tribunal dismissed seven claims against the United States based on injuries said to have been inflicted on British subjects in Hawaii by the Hawaiian Republic shortly before its annexation by the United States. The Tribunal held that the United States was not liable in international law to redress wrongful acts committed by Hawaii. The Tribunal also rendered several awards in favor of American fishermen because of the disregard by Newfoundland of their rights under the Treaty of 1818 as construed by the Hague Tribunal in 1910.

On November 20th, the Tribunal dismissed twenty claims of British subjects for the destruction of their property by Filipinos after the signature of the Treaty of Peace between Spain and the United States but before it had come into force. Counsel for the British Government argued that the United States was responsible because of the delay of American officials in responding to the claimants' request for protection and because of the negligent manner in which the American forces operated when they landed. The tribunal sustained the contentions of the American agent that since the Treaty of Peace had not come into force when the damage took place, the United States was under no obligation to protect British interests, that no negligence could properly be attributed to the American officials, and that the British Government could not under international

law call the United States to account because of alleged inefficiency of its military and naval forces.

PREVENTION OF SMUGGLING ALONG THE MEXICAN BORDER

On December 23, 1925, the Secretary of State and the Mexican Ambassador at Washington signed a convention for the prevention of smuggling operations along the Mexican boundary, such as narcotics, intoxicating liquor, merchandise, and the smuggling of aliens. The convention is similar to that concluded with Canada on June 6, 1924, and printed in the Supplement to the JOURNAL for October, 1925 (Vol. 19), page 120. The convention also contains a section providing for an International Fisheries Commission between the United States and Mexico to study the question of the conservation of certain fisheries on the Pacific Coast. At the same time, a supplementary extradition convention was signed by the two countries adding to the list of extraditable crimes offenses against the law for the suppression of traffic in narcotic drugs similar to the convention with Canada which was signed on January 8, 1925.

COMMERCIAL AND CONSULAR TREATY BETWEEN THE UNITED STATES AND ESTHONIA

The Secretary of State and the Minister of Esthonia in Washington on December 23, 1925, signed a treaty of friendship, commerce and consular rights similar to the one between the United States and Germany signed on December 8, 1923, and printed in the Supplement to this number of the JOURNAL, page 4, the two treaties differing only in a small number of minor particulars necessary to meet special conditions. The treaty provides for unconditional most-favored-nation treatment as applied to nationals of each country in the other, and to commerce between the two countries. The reservations in relation to immigration and shipping made by the Senate in giving its advice and consent to the ratification of the treaty with Germany were accepted by Esthonia and incorporated in the treaty.

COMMERCIAL AGREEMENT BETWEEN THE UNITED STATES AND LITHUANIA

By an exchange of notes at Washington on December 23, 1925, the United States and Lithuania have entered into a commercial agreement providing reciprocally for unconditional most-favored-nation treatment in the levy of import and export duties and in certain other matters affecting commerce. The agreement will become operative after approval by the Lithuanian parliament. The texts of the notes exchanged are practically identical with the notes exchanged between the United States and Lithuania on March 2, 1925, and printed in the Supplement to this JOURNAL for October, 1925 (Vol. 19), p. 136.

AIRCRAFT BETWEEN THE UNITED STATES AND CANADA

By an exchange of notes between the Department of State and the British Embassy in Washington, the agreement between the United States and Canada, with regard to the entry of United States pilots and aircraft into Canadian territory, has been extended to and including April 30, 1926. This arrangement has been in effect since 1922 and provides in general that when an American machine or pilot wishes to cross the international boundary and fly in Canada, notification should be sent in advance to the Secretary of the Air Board, Ottawa, giving the date of the proposed flight, the owner's name and address, the pilot's name and qualifications, the type of machine to be used, the route and duration of the proposed flight, and the purpose for which it is being undertaken. Special provisions cover commercial aircraft, private aircraft, and customs regulations.

In this connection, it is to be noted that by Executive Order of July 14, 1924, in cases of airships coming to the United States from foreign countries the Secretary of State should be informed in advance of the date and place of the expected arrival.

THE PALMAS ISLAND ARBITRATION

The United States and The Netherlands have agreed upon the designation of Judge Max Huber as arbitrator in the arbitration concerning the sovereignty over the Island of Palmas. The noted Swiss jurist is the President of the Permanent Court of International Justice. Mr. Fred K. Nielsen, formerly Solicitor for the Department of State and Agent and Senior Counsel in the American-British Claims Arbitration, has been appointed counsel for the United States in this case.

INTERNATIONAL CENTRAL AMERICAN TRIBUNAL

The Government of the United States has designated the following American citizens to form the list mentioned in Article III of the Convention for the Establishment of an International Central American Tribunal, signed February 7, 1923, between the Governments of the United States of America, Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica: James M. Beck, Edwin M. Borchard, J. Reuben Clark, Jr., William C. Dennis, David Jayne Hill, Manley O. Hudson, Charles Cheney Hyde, Nathan L. Miller, John Bassett Moore, Edwin B. Parker, Jackson H. Ralston, Jesse S. Reeves, James Brown Scott, George W. Wickersham, and George Grafton Wilson.

RADIOTELEGRAPH CONFERENCE

The Government of the United States has issued invitations to forty-five governments to a Radiotelegraph Conference to be held at Washington in the spring of 1926. At the close of the International Radiotelegraph

Conference at London in 1912 the American delegates extended an invitation to hold the next conference at Washington in 1917. Later proposals were made with a view to holding a joint conference of parties to the International Telegraph Convention and of parties to the International Radiotelegraph Convention. As unanimity could not be obtained for these proposals, the French Government has proceeded to hold the International Telegraph Conference at Paris, beginning September 1, 1925,¹ and the United States has taken the necessary steps to hold the International Radiotelegraph Conference at Washington in the spring of 1926. Congressional authorization for the holding of the Radiotelegraph Conference in Washington was contained in the Second Deficiency Act approved by the President on March 4, 1925, and the sum of approximately \$92,000 was appropriated by Congress to defray the expenses of the conference.

The subjects to be discussed at the conference will include the revision of the International Radiotelegraph Convention and Regulations, signed at London on July 5, 1912, and the discussion of measures for the international supervision of communication by radio between the large fixed stations, broadcasting, including the handling of press messages; radio telephony; measures for the elimination of interference; distress messages so as to take cognizance of increased uses and classes of service; radio aids to navigation; and other purposes for which radio has been used as a result of the development of the art since 1912.

INTERNATIONAL LAW FELLOWSHIPS

The Carnegie Endowment for International Peace announces that Fellowships in International Law for the academic year 1926-1927 will be awarded as follows: three student's fellowships at \$1,000 each; three teacher's fellowships at \$1,500 each, and three fellowships for study abroad at \$1,800 each. Application blanks and other information may be obtained from the Endowment's office, 2 Jackson Place, Washington, D. C. Applications will be received up to March 16, 1926.

EXTRACTS FROM THE ANNUAL MESSAGE OF THE PRESIDENT TO CONGRESS

December 8, 1925

FOREIGN RELATIONS

The policy of our foreign relations, casting aside any suggestion of force, rests solely on the foundation of peace, good will, and good works. We have sought, in our intercourse with other nations, better understandings through conference and exchange of views as befits beings endowed with reason. The results have been the gradual elimination of disputes, the settlement of controversies, and the establishment of a firmer friendship be-

¹ See note in the JOURNAL for October, 1925 (Vol. 19), p. 777.

tween America and the rest of the world than has ever existed at any previous time.

The example of this attitude has not been without its influence upon other countries. Acting upon it, an adjustment was made of the difficult problem of reparations. This was the second step toward peace in Europe. It paved the way for the agreements which were drawn up at the Locarno Conference. When ratified, these will represent the third step toward peace. While they do not of themselves provide an economic rehabilitation, which is necessary for the progress of Europe, by strengthening the guaranties of peace they diminish the need for great armaments. If the energy which now goes into military effort is transferred to productive endeavor, it will greatly assist economic progress.

The Locarno agreements were made by the European countries directly interested without any formal intervention of America, although on July 3 I publicly advocated such agreements in an address made in Massachusetts. We have consistently refrained from intervening except when our help has been sought and we have felt it could be effectively given, as in the settlement of reparations and the London Conference. These recent Locarno agreements represent the success of this policy which we have been insisting ought to be adopted, of having European countries settle their own political problems without involving this country. This beginning seems to demonstrate that this policy is sound. It is exceedingly gratifying to observe this progress, which both in its method and in its result promises so much that is beneficial to the world.

When these agreements are finally adopted, they will provide guaranties of peace that make the present prime reliance upon force in some parts of Europe very much less necessary. The natural corollary to these treaties should be further international contracts for the limitation of armaments. This work was successfully begun at the Washington Conference. Nothing was done at that time concerning land forces because of European objection. Our standing army has been reduced to around 118,000, about the necessary police force for 115,000,000 people. We are not proposing to increase it, nor is it supposable that any foreign country looks with the slightest misapprehension upon our land forces. They do not menace anybody. They are rather a protection to everybody.

The question of disarming upon land is so peculiarly European in its practical aspects that our country would look with particular gratitude upon any action which those countries might take to reduce their own military forces. This is in accordance with our policy of not intervening unless the European Powers are unable to agree and make request for our assistance. Whenever they are able to agree of their own accord it is especially gratifying to us, and such agreements may be sure of our sympathetic support.

It seems clear that it is the reduction of armies rather than of navies that is of the first importance to the world at the present time. We shall look

with great satisfaction upon that effort and give it our approbation and encouragement. If that can be settled, we may more easily consider further reduction and limitation of naval armaments. For that purpose our country has constantly through its Executive, and through repeated acts of Congress, indicated its willingness to call such a conference. Under Congressional sanction it would seem to be wise to participate in any conference of the great Powers for naval limitation of armament proposed upon such conditions that it would hold a fair promise of being effective. The general policy of our country is for disarmament, and it ought not to hesitate to adopt any practical plan that might reasonably be expected to succeed. But it would not care to attend a conference which from its location or constituency would in all probability prove futile.

In the further pursuit of strengthening the bonds of peace and good will we have joined with other nations in an international conference held at Geneva and signed an agreement which will be laid before the Senate for ratification providing suitable measures for control and for publicity in international trade in arms, ammunition, and implements of war, and also executed a protocol providing for a prohibition of the use of poison gas in war, in accordance with the principles of Article 5 of the treaty relating thereto signed at the Washington Conference. We are supporting the Pan American efforts that are being made toward the codification of international law, and looking with sympathy on the investigations being conducted under philanthropic auspices of the proposal to make agreements outlawing war. In accordance with promises made at the Washington Conference, we have urged the calling of and are now represented at the Chinese Customs Conference and on the Commission on Extraterritoriality, where it will be our policy so far as possible to meet the aspirations of China in all ways consistent with the interests of the countries involved.

COURT OF INTERNATIONAL JUSTICE

Pending before the Senate for nearly three years is the proposal to adhere to the protocol establishing the Permanent Court of International Justice. A well-established line of precedents mark America's effort to effect the establishment of a court of this nature. We took a leading part in laying the foundation on which it rests in the establishment of The Hague Court of Arbitration. It is that tribunal which nominates the judges who are elected by the Council and Assembly of the League of Nations.

The proposal submitted to the Senate was made dependent upon four conditions, the first of which is that by supporting the court we do not assume any obligations under the league; second, that we may participate upon an equality with other States in the election of judges; third, that the Congress shall determine what part of the expenses we shall bear; fourth, that the statute creating the court shall not be amended without our consent;

and to these I have proposed an additional condition to the effect that we are not to be bound by advisory opinions rendered without our consent.

The court appears to be independent of the league. It is true the judges are elected by the Assembly and Council, but they are nominated by the Court of Arbitration, which we assisted to create and of which we are a part. The court was created by a statute, so-called, which is really a treaty made among some forty-eight different countries, that might properly be called a constitution of the court. This statute provides a method by which the judges are chosen, so that when the Court of Arbitration nominates them and the Assembly and Council of the League elect them, they are not acting as instruments of the Court of Arbitration or instruments of the league, but as instruments of the statute.

This will be even more apparent if our representatives sit with the members of the Council and Assembly in electing the judges. It is true they are paid through the league though not by the league, but by the countries which are members of the league and by our country if we accept the protocol. The judges are paid by the league only in the same sense that it could be said United States judges are paid by the Congress. The court derives all its authority from the statute and is so completely independent of the league that it could go on functioning if the league were disbanded, at least until the terms of the judges expired.

The most careful provisions are made in the statute as to the qualifications of judges. Those who make the nominations are recommended to consult with their highest court of justice, their law schools and academies. The judges must be persons of high moral character, qualified to hold the highest judicial offices in that country, or be jurisconsults of recognized competence in international law. It must be assumed that these requirements will continue to be carefully met, and with America joining the countries already concerned it is difficult to comprehend how human ingenuity could better provide for the establishment of a court which would maintain its independence. It has to be recognized that independence is to a considerable extent a matter of ability, character, and personality. Some effort was made in the early beginnings to interfere with the independence of our Supreme Court. It did not succeed because of the quality of the men who made up that tribunal.

It does not seem that the authority to give advisory opinions interferes with the independence of the court. Advisory opinions in and of themselves are not harmful, but may be used in such a way as to be very beneficial because they undertake to prevent injury rather than merely afford a remedy after the injury has been done. As a principle that only implies that the court shall function when proper application is made to it. Deciding the question involved upon issues submitted for an advisory opinion does not differ materially from deciding the question involved upon issues submitted by contending parties. Up to the present time the court has given an ad-

visory opinion when it judged it had jurisdiction, and refused to give one when it judged it did not have jurisdiction. Nothing in the work of the court has yet been an indication that this is an impairment of its independence or that its practice differs materially from the giving of like opinions under the authority of the constitutions of several of our States.

No provision of the statute seems to me to give this court any authority to be a political rather than a judicial court. We have brought cases in this country before our courts which, when they have been adjudged to be political, have been thereby dismissed. It is not improbable that political questions will be submitted to this court, but again up to the present time the court has refused to pass on political questions and our support would undoubtedly have a tendency to strengthen it in that refusal.

We are not proposing to subject ourselves to any compulsory jurisdiction. If we support the court, we can never be obliged to submit any case which involves our interests for its decision. Our appearance before it would always be voluntary, for the purpose of presenting a case which we had agreed might be presented. There is no more danger that others might bring cases before the court involving our interests which we did not wish to have brought, after we have adhered, and probably not so much, than there would be of bringing such cases if we do not adhere. I think that we would have the same legal or moral right to disregard such a finding in the one case that we would in the other.

If we are going to support any court, it will not be one that we have set up alone or which reflects only our ideals. Other nations have their customs and their institutions, their thoughts and their methods of life. If a court is going to be international, its composition will have to yield to what is good in all these various elements. Neither will it be possible to support a court which is exactly perfect, or under which we assume absolutely no obligations. If we are seeking that opportunity, we might as well declare that we are opposed to supporting any court. If any agreement is made, it will be because it undertakes to set up a tribunal which can do some of the things that other nations wish to have done. We shall not find ourselves bearing a disproportionate share of the world's burdens by our adherence, and we may as well remember that there is absolutely no escape for our country from bearing its share of the world's burdens in any case. We shall do far better service to ourselves and to others if we admit this and discharge our duties voluntarily, than if we deny it and are forced to meet the same obligations unwillingly.

It is difficult to imagine anything that would be more helpful to the world than stability, tranquillity and international justice. We may say that we are contributing to these factors independently, but others less fortunately located do not and can not make a like contribution except through mutual coöperation. The old balance of power, mutual alliances, and great military forces were not brought about by any mutual dislike for independence, but

resulted from the domination of circumstances. Ultimately they were forced on us. Like all others engaged in the war whatever we said as a matter of fact we joined an alliance, we became a military power; we impaired our independence. We have more at stake than any one else in avoiding a repetition of that calamity. Wars do not spring into existence. They arise from small incidents and trifling irritations which can be adjusted by an international court. We can contribute greatly to the advancement of our ideals by joining with other nations in maintaining such a tribunal.

FOREIGN DEBTS

Gradually, settlements have been made which provide for the liquidation of debts due to our government from foreign governments. Those made with Great Britain, Finland, Hungary, Lithuania, and Poland have already been approved by the Congress. Since the adjournment, further agreements have been entered into with Belgium, Czechoslovakia, Latvia, Estonia, Italy, and Rumania. These 11 nations, which have already made settlements, represent \$6,419,528,641 of the original principal of the loans. The principal sums without interest, still pending, are the debt of France, of \$3,340,000,000; Greece, \$15,000,000; Yugoslavia, \$51,000,000; Liberia, \$26,000; Russia, \$192,000,000, which those at present in control have undertaken openly to repudiate; Nicaragua, \$84,000, which is being paid currently; and Austria, \$24,000,000, on which by act of Congress a moratorium of 20 years has been granted. The only remaining sum is \$12,000,000, due from Armenia, which has now ceased to exist as an independent nation.

In accordance with the settlements made, the amount of principal and interest which is to be paid to the United States under these agreements aggregates \$15,200,688,253.93. It is obvious that the remaining settlements, which will undoubtedly be made, will bring this sum up to an amount which will more than equal the principal due on our present national debt. While these settlements are very large in the aggregate, it has been felt that the terms granted were in all cases very generous. They impose no undue burden and are mutually beneficial in the observance of international faith and the improvement of international credit.

Every reasonable effort will be made to secure agreements for liquidation with the remaining countries, whenever they are in such condition that they can be made. Those which have already been negotiated under the bipartisan commission established by the Congress have been made only after the most thoroughgoing and painstaking investigation, continued for a long time before meeting with the representatives of the countries concerned. It is believed that they represent in each instance the best that can be done and the wisest settlement that can be secured. One very important result is the stabilization of foreign currency, making exchange assist rather than embarrass our trade. Wherever sacrifices have been made of money, it will be

more than amply returned in better understanding and friendship, while in so far as these adjustments will contribute to the financial stability of the debtor countries, to their good order, prosperity, and progress, they represent hope of improved trade relations and mutual contributions to the civilization of the world.

ALIEN PROPERTY

Negotiations are progressing among the interested parties in relation to the final distribution of the assets in the hands of the Alien Property Custodian. Our government and people are interested as creditors; the German Government and people are interested as debtors and owners of the seized property. Pending the outcome of these negotiations, I do not recommend any affirmative legislation. For the present we should continue in possession of this property which we hold as security for the settlement of claims due to our people and our government.

IMMIGRATION

While not enough time has elapsed to afford a conclusive demonstration, such results as have been secured indicate that our immigration law is on the whole beneficial. It is undoubtedly a protection to the wage earners of this country. The situation should, however, be carefully surveyed, in order to ascertain whether it is working a needless hardship upon our own inhabitants. If it deprives them of the comfort and society of those bound to them by close family ties, such modifications should be adopted as will afford relief, always in accordance with the principle that our government owes its first duty to our own people and that no alien, inhabitant of another country, has any legal rights whatever under our Constitution and laws. It is only through treaty, or through residence here, that such rights accrue. But we should not, however, be forgetful of the obligations of a common humanity.

While our country numbers among its best citizens many of those of foreign birth, yet those who now enter in violation of our laws by that very act thereby place themselves in a class of undesirables. If investigation reveals that any considerable number are coming here in defiance of our immigration restrictions, it will undoubtedly create the necessity for the registration of all aliens. We ought to have no prejudice against an alien because he is an alien. The standard which we apply to our inhabitants is that of manhood, not place of birth. Restrictive immigration is to a large degree for economic purposes. It is applied in order that we may not have a larger annual increment of good people within our borders than we can weave into our economic fabric in such a way as to supply their needs without undue injury to ourselves.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE

In accordance with the order of the Senate agreed to on March 13, 1925, Senate Resolution No. 5, submitted by Senator Swanson on March 5, 1925, became the special order of business of the Senate on December 17, 1925. This resolution provides for the adhesion on the part of the United States to the Protocol of December 16, 1920, and the adjoined statute for the Permanent Court of International Justice, with reservations, and reads as follows:

Whereas the President, under date of February 23, 1923, transmitted a message to the Senate accompanied by a letter from the Secretary of State, dated February 17, 1923, asking the favorable advice and consent of the Senate to the adhesion on the part of the United States to the protocol of December 16, 1920, of signature of the statute for the Permanent Court of International Justice, set out in the said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adhesion: Therefore be it

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the adhesion on the part of the United States to the said protocol of December 16, 1920, and the adjoined statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said statute), and that the signature of the United States be affixed to the said protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

1. That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the covenant of the League of Nations constituting part 1 of the treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other States, members, respectively, of the council and assembly of the League of Nations, in any and all proceedings of either the council or the assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the court as determined and appropriated from time to time by the Congress of the United States.

4. That the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

5. That the United States shall be in no manner bound by any advisory opinion of the Permanent Court of International Justice not rendered pursuant to a request in which it, the United States, shall expressly join in accordance with the statute for the said court adjoined to the protocol of signature of the same to which the United States shall become signatory.

The signature of the United States to the said protocol shall not be affixed until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reserva-

tions and understandings as a part and a condition of adhesion by the United States to the said protocol.¹

Debate upon the resolution was opened on December 17th and continued until December 22nd, when the Congress adjourned over the holidays to January 4, 1926.

Previous to the action of the Senate in setting a definite time for the consideration of the World Court Resolution, the House of Representatives on March 3, 1925, adopted, by a vote of 302 yeas to 28 nays, upon motion of Mr. Theodore E. Burton, House Resolution No. 426, reading as follows:

Whereas a World Court, known as the Permanent Court of International Justice, has been established and is now functioning at The Hague; and

Whereas the traditional policy of the United States has earnestly favored the avoidance of war and the settlement of international controversies by arbitration or judicial processes; and

Whereas this court in its organization and probable development promises a new order in which controversies between nations will be settled in an orderly way according to principles of right and justice: Therefore be it

Resolved, That the House of Representatives desires to express its cordial approval of the said court and an earnest desire that the United States give early adherence to the protocol establishing the same, with the reservations recommended by President Harding and President Coolidge;

Resolved further, That the House expresses its readiness to participate in the enactment of such legislation as will necessarily follow such approval.²

CONVENTION FOR THE SUPERVISION OF TRADE IN ARMS AND WAR MUNITIONS

An international conference held at Geneva, Switzerland, May 4 to June 17, 1925, and attended by the representatives of forty-four states, drew up a Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War. The United States was represented at this conference by Representative Theodore E. Burton, the American Minister to Switzerland, Hugh S. Gibson, Rear Admiral Andrew T. Long, A. W. Dulles, Chief of the Division of Near Eastern Affairs of the Department of State, Brigadier General Cordon L'H. Ruggles, and technical assistants from the State, War, Navy, and Commerce Departments. The convention was signed on behalf of the United States and by the plenipotentiaries of twenty-one other states, including Great Britain, France, Italy, Japan, Germany and many other states which are among the arms-producing Powers.

Almost six years before the recent Geneva Conference and during the Paris Peace Conference, the so-called St. Germain Convention of September 10, 1919, was drawn up to provide for the control of the trade in arms and

¹ Congressional Record, December 17, 1925.

² *Ibid.*, March 3, 1925.

ammunition. This convention, however, never became generally effective because it was not ratified by many of the principal arms-producing Powers, including the United States. It was never submitted to the United States Senate with a view to its ratification for reasons set forth in a communication addressed on September 12, 1923, by Secretary of State Hughes to the President of the Council of the League of Nations in reply to the latter's inquiry as to the attitude of the United States Government towards the convention. In this communication Secretary Hughes outlined the American objections as follows:

After a careful examination of the terms of the convention, it has been decided that the objections found thereto render impossible ratification by this government.

While the application of the convention to certain designated areas or zones, extending in effect the Brussels Convention, may fulfill a useful object, the plan of the present convention is much broader. The distinctive feature of this plan is not a provision for a general limitation of armament, but the creation of a system of control by the signatory Powers of the traffic in arms and munitions, these signatory Powers being left free not only to meet their own requirements in the territories subject to their jurisdiction but also to provide for supplying each other with arms and munitions to the full extent that they may see fit.

There is particular objection to the provision by which the contracting parties would be prohibited from selling arms and munitions to states not parties to the convention. By such provisions, this government would be required to prevent shipments of military supplies to such Latin American countries as have not signed or adhered to the convention, however desirable it might be to permit such shipments, merely because they are not signatory powers and might not desire to adhere to the convention. . . .

Finally, it may be observed that the provisions of the convention relating to the League of Nations are so intertwined with the whole convention as to make it impracticable for this government to ratify, in view of the fact that it is not a member of the League of Nations.

Upon receipt of this communication the Council of the League of Nations inquired whether the United States Government, which in earlier communications had indicated its cordial sympathy with efforts suitably to restrict traffic in arms and munitions of war, would be disposed to cooperate in efforts to revise the St. Germain Convention with a view to meeting the objections which this government had formulated. This inquiry was answered in the affirmative, and preliminary meetings were held at Geneva and Paris during 1924 which were attended by the American Minister to Switzerland, Joseph C. Grew, and later by his successor, Hugh S. Gibson. As a result of these preliminary meetings, a draft convention was prepared and used as a basis for the deliberations of the conference which met at Geneva on May 4 and formulated the convention of June 17.¹

¹ The full proceedings of this conference, together with the texts of the instruments elaborated and signed by the delegates, is given in a League of Nations publication entitled

The convention of June 17 provides in substance that arms and ammunition, including vessels of war and airplanes, should be divided into five categories as follows:

- (1) Arms, ammunition and implements of war exclusively designed and intended for land, sea or aerial warfare;
- (2) Arms and ammunition capable of use both for military and other purposes;
- (3) Vessels of war and their armament;
- (4) Aircraft and aircraft engines;
- (5) Gunpowder and explosives and arms of no military value.

Arms of category 1, the convention provides, are to be exported only to the government of the importing state upon an order by an authorized representative of that government. Certain special exceptions to this régime are provided.

Arms in category 2 may be exported to other than governments but under the supervision of the exporting government. In the event of the consignment of a size and character which would lead the government of the exporting state to believe that it is destined for war purposes, the consignment is to be subject to the conditions applicable to arms in category 1.

With regard to ships of war, which fall in category 3, the high contracting Powers undertake to give the fullest publicity with regard to any vessel of war constructed within its territorial jurisdiction for delivery or sale to any other state.

While no restriction is placed upon the sale of aircraft and aircraft engines, category 4, publicity must be given to such sales.

Category 5, material which has no military value, is not subject to restriction under the convention, except in the case of export to the special zones mentioned below.

In addition to the special régime of publicity provided for the sale of war vessels and aircraft, the high contracting Powers undertake to publish, according to agreed forms, quarterly statistics of their foreign trade in arms and ammunition of categories 1 and 2.

The foregoing indicates the purposes of the convention, namely, (1) supervision by the exporting state of the shipment of war material, and (2) full publicity for all such export.

A special régime of control of the arms traffic is provided in the case of certain territories, including central Africa and territories in Asia detached from the Ottoman Empire, where it was considered that there was particular need for such control.

The convention is to come into effect when ratified by fourteen Powers.

While the convention has not yet (January 1, 1926) been submitted to

the Senate for approval, President Coolidge, in his recent message to Congress, in referring to the convention stated:

In the further pursuit of strengthening the bonds of peace and goodwill we have joined with other nations in an international conference held at Geneva and signed an agreement which will be laid before the Senate for ratification providing suitable measures for control and for publicity in international trade in arms and munition and in implements of war, . . .

In comparing the Geneva Convention of 1925 with the St. Germain Convention of 1919 to which the United States Government took objection, it is to be noted that the points of objection raised to the latter instrument have been eliminated from the former. In the Geneva Convention there is no provision for the supervision of the international trade in arms by the League of Nations. The supervision is to be carried out by each sovereign Power within its own jurisdiction and without outside interference. Further, a government is not prevented from permitting the shipment of arms to any other country merely because such country has not adhered to the convention. Under existing legislation, the United States may exercise control as conditions seem to warrant over the arms trade with Latin American countries and countries where extraterritorial jurisdiction is exercised. The proposed Geneva Convention lays down certain general requirements which would be applicable to the arms trade with all countries, but does not attempt to restrict the actual volume of such trade.

It is interesting to note that the convention will not be applicable to shipments of arms to belligerents since the Geneva Conference considered that it might be incompatible with the duties of neutrality to require a neutral state to license or control private arms shipments to belligerents.

TREASURY PLAN FOR THE SETTLEMENT OF THE ALIEN PROPERTY AND OTHER RELATED QUESTIONS¹

The Mixed Claims Commission is now passing upon claims of American citizens and the United States against Germany, and its work is nearing completion. The only provision for the payment of claims allowed by the Mixed Claims Commission is the provision in the Paris Agreement for the payment to the United States of a certain proportion of the Dawes plan annuities which will amount to 45 million gold marks a year when the Dawes plan is in full effect. This annuity is not sufficient to pay the interest carried by the claims which probably will be allowed by the Mixed Claims Commission, and does not, therefore, adequately provide for payment of the claims. If the United States takes no further action, the American citizens will receive but a small percentage of the value of their claims against Germany.

During the war the United States, through the Alien Property Custodian,

¹Statement of Secretary Mellon given to the press Dec. 10, 1925.

seized property located in the United States belonging to non-resident alien enemies. Under the Berlin Treaty this property may be held as security for the payment of the private American claims allowed by the Mixed Claims Commission. As a matter of broad national policy, it is believed the United States should recognize the property rights of private individuals, even though we were at war with their country, and not use this private property of nationals to pay claims against their nation. If this is the proper policy for the United States, the seized property, or its substantial equivalent, should be returned.

When the United States entered the war it also seized German ships interned in our harbors, and it took over and used radio stations and patents owned by Germans. Provision for compensation for such taking or use has not yet been made. The question of national policy here involved is the same as in the case of the alien property.

A plan of settlement which has the consent of a majority of the three interests involved, (American Mixed Claimants, German property owners, and German ship and radio station owners) means a fair adjustment and the satisfaction of all parties concerned.

Giving consideration to these matters, the Treasury has worked out, with the consent and aid of the people interested, a constructive and comprehensive plan for submission to Congress for such action as Congress may deem desirable, to accomplish the following:

1. The prompt payment of private American claims.
2. Return to the German and Austrian nationals of their property or its substantial equivalent.
3. Determination of the amounts and payment of the claims of the German owners of ships, radio stations and patents.
4. The imposition of no new burden on the Treasury, and consequently, on the American taxpayer.
5. The utilization of gold mark credits in Germany, thus assuring that America will receive the benefits of the payments under the Paris Agreement independent of exchange difficulties.

The plan is substantially as follows:

THE PLAN

(1) The United States shall assign to a trustee payments the United States may receive under the Dawes plan on account of reparations and in payment of costs of the Army of Occupation against the delivery by the trustee of an issue of about \$250,000,000 25-year 5% bonds. Principal and interest may be payable either in dollars or marks or partly in dollars and partly in marks, and either in the United States or Germany, all at the option from time to time of the United States. The bonds may be retireable by lot at any time prior to maturity, at par if to be paid in dollars and at a premium after the first year of $\frac{1}{2}\%$ per annum if to be paid in marks. By

"marks" is understood the currency accepted from Germany by the Transfer Committee under the Dawes plan at the rate currently accepted. Principal and interest of the bonds shall be guaranteed by the United States.

(2) The Alien Property Custodian shall purchase from funds in his possession \$50,000,000 of the bonds at par.

(3) Interest earned on cash deposits of the Alien Property Custodian with the Treasurer of the United States prior to March 4, 1923 (aggregating, with later accumulations, about \$31,000,000), and to which under the law owners of property in the hands of the Alien Property Custodian are not entitled, shall be used by the United States, together with the \$50,000,000 proceeds from the sale of the bonds, to pay on the private claims allowed by the Mixed Claims Commission, which cash shall be used to pay all claims of less than \$10,000, and the balance applied on the larger claims with a minimum cash payment of \$10,000.

(4) The balance of the private American mixed claims not paid in full in cash shall be paid in the bonds at par.

(5) The properties in the hands of the Alien Property Custodian, including the bonds and other securities in which his funds are then invested, shall be delivered to their owners.

(6) The President shall appoint an arbiter to render an award of fair and reasonable compensation to Germans for the title to and or use of ships, radio stations and such patents and property as have been taken and used by the United States; provided the total amount of such awards shall not in any event exceed \$100,000,000. Within the limitation above, the United States shall pay the awards in the bonds at par.

ADVANTAGES OF THE PLAN

(1) The plan will have the consent of the three interests—the American claimants, German property owners and German shipowners.

(2) The American claimants will be paid—the small claimants in cash and the large claimants in cash and bonds, which will have a substantial value.

(3) The alien property or its substantial equivalent will be returned to its owners, and the question of American national policy settled.

(4) Other German claims will be determined and paid.

(5) Since no cash is required from the Treasury and the service of the bonds is to come in the first instance from German reparations, no new burden is imposed on the Treasury and the American taxpayer.

(6) Payment of the 55,000,000 gold marks for the Army of Occupation costs are preferred under the Paris Agreement and it would probably be possible always to obtain dollars when desired by the United States. The 45,000,000 gold marks provided for the mixed claimants have no preference, but if the full payments in dollars on this account are not received by the United States, gold marks should be available in Germany. The option to

pay the bonds, principal or interest, either in marks or dollars, will enable the United States to utilize payments in the currency which is available.

(7) While the United States sacrifices payments which it would otherwise receive to reimburse it for the Army costs and for government claims allowed by the Mixed Claims Commission, this sacrifice is made in favor of the American claimants and represents, not new money from the Treasury, but simply the failure to receive reimbursement for money spent in past years.

(8) If the United States should be called upon to make good its guaranty the bonds could be refunded into straight government dollar bonds at the current interest rate the Treasury is then paying on its other issues.

THE UNVEILING OF THE MONUMENT TO SAN MARTIN IN WASHINGTON

Impressive ceremonies were held in Washington on October 28, 1925, on the occasion of the unveiling of the monument to General José de San Martín presented by Argentina to the United States. The ceremony took place in the presence of the President and Mrs. Coolidge, members of the cabinet, the diplomatic corps, and high military and naval officers. The exercises were held under the auspices of the Pan American Union, and Director General Leo S. Rowe presided. The statue was presented by Mr. Honorio Pueyrredon, Ambassador from Argentina, on behalf of his Government and people, and was accepted on behalf of the Government and people of the United States by President Coolidge. The speeches of presentation and acceptance were well worthy of the occasion, and it is regretted that limitations of space do not permit us to reproduce them in full. The latter part of President Coolidge's speech, dealing with the efficacy of American institutions for the preservation of peace, is so pertinent that it deserves reproduction and preservation. The President said:

For me the great significance of San Martín and his deeds and times lies less in their brilliancy in the moment of accomplishment and more in the justifying verdict which a later time and a riper experience have pronounced upon them.

This is a subject which I believe worthy of greater development than my time will permit. We who to-day study the lessons of modern history possess advantages unknown to our predecessors of even a few years ago. We see many things which we could not then have recognized. Thus we see your South America suddenly lifted to a place of impressive eminence among the grand divisions of the world. For it stands to-day as the only continent that has escaped from deep and critical involvement in the most widespread and terrific struggle that has ever been waged for the domination of the destiny of mankind. There is not one among us here to-day who, having passed the meridian of life, can not recall the days when our American experiments were still looked upon throughout a large part of the world as of doubtful value and dubious success. We recall that the sophisticated statesmanship of an older world entertained profound misgivings as to the ultimate fate of these American Republics. These critics wondered whether with their liberal

and democratic organization these new countries would prove able to play their full part and emerge secure and sound from one of the vast periodical convulsions to which our race has seemed to be inevitably subjected. Now, I am glad to say, we hear less of such misgivings. The world has had its test. The institutions of men have been through their trial. That trial has quite definitely answered the questionings of pessimism. It has provided us with much specific information by which we may judge for ourselves whether the institutions of a republican New World or of a monarchical Old World were best adapted as conservators of human happiness and human progress. We are content to leave the final verdict to history. The republican peoples of the Americas are prepared to take their chance on that judgment.

It was no mere accident or coincidence that saved the countries of South America from a far more intimate and disastrous connection with the recent world convulsion. Whoever has given even casual consideration to the past century's evolution of international relationships in that continent must recognize that not only its aspirations but its practical, working processes for dealing with difficult issues between nations have steadily tended toward the insuring of peace. They have looked to the substitution of reason for force. They have repeatedly recognized, in the most practical fashion and difficult circumstances, that even issues of vital interest to the national welfare may be determined to the advantage of all concerned without resort to hostilities. Such problems as international boundary disputes involving sovereignty over great areas and populations have been settled through arbitrations or adjudications, time and again. And these settlements have been followed by demonstrations of good will and mutual confidence, where war, no matter what its verdict, would surely have added to the exasperations of both parties and left a heritage of that mutual distrust which so commonly is responsible for increased armaments and future wars. I do not pretend to controvert the facts of history by denying that South America has had its share of international wars. I am seeking merely to call attention to the fact that there would have been more wars, and more disastrous ones, but for the fact that South American statesmanship has on the whole been dominated by an earnest and increasingly successful purpose to devise and adopt a variety of methods for avoidance of armed conflict. The will to peace has been present, even though the way to it was not always open.

The present occasion naturally brings some reflections upon the workings of the republican system that for a well-rounded century has prevailed throughout the greater part of the Americas. If we will go back over a century of the New World's history, we will find many evidences that these American institutions have peculiarly lent themselves to the support of those fundamental international efforts which look to the maintenance of peace and the prevention of war. It is almost precisely a century since the first Pan American conference was held at Panama City. Its accomplishments did not seem impressive, but even at that it was well remembered as a fine and hopeful gesture. It was seen as an invitation to understanding, to coöperation, and to sincere effort at maintaining peace on this side of the Atlantic.

From that day to this the history of relationships among the nations of the New World has been a continuing story of effort to substitute the rule of arbitration, of mediation, of adjudication, and confidence for the

rule of force and war. To the scholarly statesmanship of the Latin American nations the world owes a debt which it has been too tardy in acknowledging. The truth is that they have demonstrated a peculiar genius in the realm of international accommodation and accord. The high and humane doctrines of international relationship which were expounded by such men as Calvo, Drago, Alvarez, Bello, Ruy Barbosa, Rio Branco, and a long list of others are now recognized universally. The record of arbitrations, mediations, and adjudications among the Latin American countries constitutes one of the fairest pages in a century's story of mankind's effort to eliminate the causes of war. Among their international treaties we will find models of effective covenants for the limitation of armament and the prevention of strife in arms.

The present is a time when men and nations are all giving heed to the voice which pleads for peace. Everywhere they are yearning as never before for a leadership that will direct them into the inviting paths of progress, prosperity, and genuine fellowship. A clearer vision has shown them not alone the horrors but the terrible futility of war. In such a time as this, they will do well to turn their thoughts in all sincerity to these lessons from the statesmanship, the experience, and the constant aspiration of the South American nations. The continent which of all the world has known less of war and more of peace than any other through this trying period is well entitled to pride in the service it has rendered to its own people and in the example which it has set before the rest of mankind.

So the present occasion has appealed to me not merely as appropriate for the exchange of the ordinary felicitations but as one on which these contributions of Latin America in moral and intellectual leadership might be given something of the recognition they have deserved. It is not possible to do more than suggest the subject. But even so fragmentary an allusion to such an inviting field, I hope may serve a useful purpose. It would be worth the effort of men and women who seek means of preventing wars and reducing armaments to study the experiences of the American Republics. I commend them to the close attention of all who would like to see peace as nearly as possible assured and war as far as possible outlawed from the earth.

When President Coolidge's speech was cabled to Buenos Aires, he received a telegram from the President of Argentina thanking him for the sentiments expressed and assuring him that "your words were a true exposition of the feelings which resulted in the emancipation of the American nations, and of the fundamental reasons which account for the similarity of ideals and proceedings which have led to the solidarity of these nations in their efforts to insure order based on republican freedom and a fundamental institution. Your Excellency's thoughts are worthy of your vigorous mentality and of the prestige of your high office when you refer to the examples set by the American peoples through their composed and wise behavior in settling their most trying international questions. Your words will be most effective in finally consecrating peace in the new world."

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD OCTOBER 16, 1925–NOVEMBER 15, 1925

(With reference to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *Evening Star* (Washington); *G. B. Treaty Series*, Great Britain, Treaty series; *Ga. de Madrid*, Gaceta de Madrid; *G. U.*, *Gazzetta Ufficiale* (Italy); *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series, *Monit.*, *Moniteur Belge*; *Nation* (N. Y.); *N. Y. Times*, New York Times; *P. A. U.*, Pan American Union Bulletin; *Press notice*, U. S. State Dept. press notice; *Reichs G.*, *Reichs-Gesetzblatt* (Germany); *Rev. int. de la Croix-Rouge*, Revue internationale de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

April, 1925

3 and May 28 SALVADOR—URUGUAY. Arbitration treaty signed at Madrid Nov. 7, 1924, ratified by Uruguay on April 3, 1925, and by Salvador on May 28, 1925. *D. O.* (Uruguay) April 13, 1925, p. 27. *D. O.* (Salvador), June 4, 1925. *P. A. U.*, Oct., 1925, p. 1063.

8 GREAT BRITAIN—NEPAL. Exchanged ratifications of treaty of peace and friendship and note respecting importation of arms and ammunition into Nepal, signed Dec. 31, 1923. *G. B. Treaty Series*, no. 31 (1925), *Cmd.* 2453.

May, 1925

13 GREAT BRITAIN—NORWAY. Arbitration convention of Aug. 11, 1904, renewed by exchange of notes. *G. B. Treaty Series*, no. 30 (1925), *Cmd.* 2452.

19 GREAT BRITAIN—PORTUGAL. Exchanged notes regarding cancellation of British concession at Chinde and Portuguese concession at Chipoli. *G. B. Treaty Series*, no. 32 (1925), *Cmd.* 2457.

June, 1925

2 BOLIVIA—PERU. Protocol signed in La Paz relating to study and survey of a section of Bolivian-Peruvian boundary line as determined by the treaty of Sept. 23, 1902. *P. A. U.*, Oct., 1925, p. 1061.

10 ALBANIA—GREAT BRITAIN. Exchanged notes respecting the commercial relations between the two countries. Text: *G. B. Treaty Series*, no. 47 (1925), *Cmd.* 2522.

12–15 GREAT BRITAIN—ITALY. Exchanged notes respecting regulation of utilization of the waters of the River Gash. *G. B. Treaty Series*, no. 33 (1925), *Cmd.* 2472.

15 GUATEMALA—SALVADOR. Convention facilitating travel between the two countries, arranged by exchange of notes, came into force. *P. A. U.*, Oct., 1925, p. 1062.

29 LATVIA—SWEDEN. Limited most-favored-nation commercial treaty, signed at

Stockholm on Dec. 22, 1924, came into force. *Commerce Reports*, Nov. 30, 1925, p. 540.

July, 1925

- 4 JAPAN—LATVIA. Commercial treaty signed in Berlin. *Cur. Hist.*, Oct., 1925, 23: 137.
- 7 BELGIUM—LATVIA. Commercial treaty signed at Brussels. *Cur. Hist.*, Oct., 1925, 23: 137.
- 7 GREAT BRITAIN—LATVIA. Exchanged ratifications of treaty for extradition of criminals signed at Riga, July 16, 1924. *G. B. Treaty Series*, no. 44 (1925), Cmd. 2519.
- 9 ARGENTINA—BOLIVIA. Convention on boundaries signed at La Paz, interpreting the treaty on boundaries signed in 1889. *P. A. U.*, Nov., 1925, p. 1162.
- 9 FINLAND—LATVIA. Most-favored-nation commercial treaty of Aug. 23, 1924, came into force. *Commerce Reports*, Nov. 16, 1925, p. 420.
- 16 CZECHOSLOVAKIA—SPAIN. Trade agreement embodying mutual concessions arranged by exchange of notes. *Commerce Reports*, Nov. 9, 1925, p. 353. Text: *Ga. de Madrid*, Oct. 29, 1925, p. 522.
- 16 GERMANY—SPAIN. Commercial treaty signed July 29, 1924, denounced by Germany. *Commerce Reports*, Aug. 24, 1925, p. 467.
- 25 ITALY—LATVIA. Commercial treaty signed in Rome. *Cur. Hist.*, Oct., 1925, 23: 137.
- 27 AUSTRIA—CZECHOSLOVAKIA. Supplementary commercial agreement signed. *Commerce Reports*, Nov. 2, 1925, p. 290.

August, 1925

- 1 ESTHONIA—UNITED STATES. Agreement effected by exchange of notes on March 2, 1925, according mutual most-favored-nation treatment in customs matters, became operative upon its ratification by Esthonia. Text: *U. S Treaty Series*, no. 722.
 - 3 SIAM—SPAIN. Treaty of friendship, commerce and navigation signed at Madrid. *Commerce Reports*, Dec. 7, 1925, p. 596.
 - 8 GERMANY—POLAND. Exchanged correspondence relating to exchange of populations under terms of German-Polish convention of Aug. 30, 1924. *Cur. Hist.*, Oct., 1925, 23: 132.
 - 14 PORTUGAL—SIAM. Treaty of friendship, commerce and navigation signed at Lisbon. *Commerce Reports*, Dec. 7, 1925, p. 596.
 - 17 FRANCE—PANAMA. Exchanged ratifications of commercial travelers' convention signed at Panama, Aug. 16, 1922. Text: *J. O.*, Sept. 13, 1925, p. 8982.
 - 18 BELGIUM—UNITED STATES. Debt funding agreement signed in Washington. *N. Y. Times*, Aug. 19, 1925, p. 1.
 - 19 FRANCE—SAAR TERRITORY. Exchanged ratifications of conventions relating to suppression of tariff frauds in tobacco and other manufactures signed at Paris Jan. 15, 1925. Text: *J. O.*, Sept. 24, and 28-29, 1925, pp. 9254 and 9411.
 - 20 LIQUOR SMUGGLING CONVENTION. Agreement signed at Helsingfors for suppression of liquor smuggling by Finland, Sweden, Norway, Poland, Germany, Denmark, Russia, Esthonia, Latvia and Danzig. *R. R.*, Oct., 1925, p. 360.
 - 21 CZECHOSLOVAKIA—TURKEY. Provisional most-favored-nation agreement became effective, to remain in force until supplanted by a definite commercial treaty. *Commerce Reports*, Oct. 26, 1925, p. 227.
- 24 to October 16 SECURITY PACT. On Aug. 24, French Government in reply to German note of July 20, invited Germany to a conference in London for elaboration of

- a Rhine agreement. Germany accepted invitation on Aug. 27. Texts: *Europe*, Sept. 12, 1925, p. 1224. *Times*, Aug. 27, 1925, p. 9. *N. Y. Times*, Aug. 29, 1925, p. 5. From Sept. 1-4, Allied and German jurists conferred in London on various drafts of security pact and agreed on a report which was sent to their governments. *N. Y. Times*, Sept. 5, 1925, p. 6. *Times*, Sept. 7, 1925, p. 12. On Sept. 28, Germany accepted invitation, in Allied note of Sept. 15, to a conference on Oct. 5, and made verbal statement to Allied ministers accompanied by an *aide-mémoire* on relation of Germany's admission to the League of Nations to the question of war guilt, and evacuation of Cologne. Reply of Allies, which fixed Locarno and Oct. 5 as place and date of security conference, pointed out that the two questions raised would not be discussed at the Conference. *Times*, Sept. 30, and Oct. 1, 1925, pp. 12 and 14. On Oct. 1, conference opened at Locarno, and on Oct. 16, the final protocol was signed and five treaties were initialed (1) Treaty of mutual guarantee. (2) Arbitration convention between Germany and Belgium. (3) Arbitration convention between Germany and France. (4) Arbitration treaty between Germany and Poland. (5) Arbitration treaty between Germany and Czechoslovakia. Texts: *Times*, Oct. 20, 1925, pp. 9 and 14. *G. B. Misc. Ser.*, no. 11 (1925).
- 26 CHINESE-RUSSIAN CONFERENCE. Opened at Peking. *R. R.*, Oct., 1925, p. 360.
- 27 GERMANY-GREECE. Exchanged ratifications of additional provisory commercial agreement, signed May 15, 1925. *Commerce Reports*, Oct. 26, 1925, p. 227.
- 28 GREAT BRITAIN-MEXICO. Announced resumption of diplomatic relations suspended since Oct., 1924. *N. Y. Times*, Aug. 30, 1925, p. 13.
- 28 GROTIUS TERCENTENARY. Commemoration ceremony held at Delft in celebration of the three hundredth anniversary of the publication of *De jure belli ac pacis*. *Cur. Hist.*, Oct., 1925, 23: 138.
- 29 ESTHONIA-NORWAY. Most-favored-nation trade agreement signed in Reval. *Commerce Reports*, Sept. 21, 1925, p. 699.
- 29 GREAT BRITAIN-PORTUGAL. Exchanged notes extending until Nov. 16, 1926, the operation of the arbitration agreement signed at London on Nov. 16, 1914. Text: *G. B. Treaty Series*, no. 41 (1925) *Cmd.* 2516.
- 29 POLAND-SOVIET UNION. Agreement signed for liquidation of recent incidents involving collisions of the border forces of the two countries. *Cur. Hist.*, Oct., 1925, 23: 151.
- 31 LITHUANIA-POLAND. Commercial and political conference opened at Copenhagen for discussion of Memel question, possession of Vilna, and other questions. *Cur. Hist.*, Oct., 1925, 23: 132.
- September, 1925*
- 1 BELGIUM-POLAND. Copyright agreement signed at Warsaw. *Temps*, Sept. 3, 1925, p. 1.
- 1 CHILE-PERU. Province of Tarata transferred by Chile to Peru, the ceremony marking the execution of the first provision of President Coolidge's award in the Tacna-Arica dispute. *Cur. Hist.*, Oct., 1925, 23: 116.
- 1 FOREIGN SERVICE SCHOOL. First year's work of the school, established in the State Department under Executive Order of June 7, 1924, for benefit of successful candidates in the foreign service examinations, was completed, with a graduating class of seventeen, who were assigned to various posts. *Press notice*, Sept. 1, 1925. *Wash. Post*, Sept. 2, 1925, p. 22.
- 1 FRANCE-SPAIN. Exchanged ratifications of reciprocity arrangement relative to sale of mineral waters, signed Aug. 3, 1925. Text: *J. O.*, Sept. 16, 1925, p. 9025.

- 1 to October 29 INTERNATIONAL TELEGRAPH CONFERENCE. Eleventh International conference opened in Paris on Sept. 1 [and closed Oct. 29]. *Temps*, Sept. 2, 1925, p. 3. *Times*, Oct. 15, 1925, p. 13.
- 2 BRITISH-MEXICAN CLAIMS COMMISSION. British Foreign Office announced agreement to submit to a mixed commission all claims of British subjects arising from revolutionary disturbances in Mexico. The two governments will proceed to enter into a convention defining the procedure to be followed by the commission. *Times*, Sept. 3, 1925, p. 9.
- 2-28 LEAGUE OF NATIONS COUNCIL. Held 35th session in Geneva to consider Mosul commission report, Austrian reconstruction, minorities, mandates, etc. *L. N. M. S.*, Sept., 1925, p. 206.
- 4 to October 26, 1925 CHINESE TARIFF CONFERENCE. Identic notes presented to Chinese Foreign Office on Sept. 4 by each of the nine Powers party to the Washington Conference, in reply to identic notes addressed to these Powers on June 24, 1925, relating to proposed conference to be held in China. Text: *Press notice*, Sept. 3, 1925. Agenda for Special Customs Conference prepared by Chinese Government. *Press notice*, Oct. 19, 1925. Conference opened in Peking on Oct. 26, with statement of Chinese proposals by Dr. Wang. American plan, presented to Committee on Tariff Autonomy and Abolition of Likin, by Mr. MacMurray, Japanese proposal by Mr. Hioki, and recommendations of other delegations, were considered by various committees of the conference. *Press notice*, Oct. 28-Nov. 6, 1925.
- 7-26 LEAGUE OF NATIONS ASSEMBLY. Held sixth session, with delegates from 49 states. Resolutions were adopted on reduction of armaments, pacific settlement of international disputes, manufacture of arms and munitions of war, amendment to Art. 16 of the Covenant, world economic conference, etc. *L. N. M. S.*, Sept., 1925.
- 8 GERMANY—GREAT BRITAIN. Exchanged ratifications of treaty of commerce and navigation signed at London on Dec. 2, 1924. *Commerce Reports*, Nov. 9, 1925, p. 354. *Times*, Oct. 9, 1925, p. 13. Text: *G. B. Treaty Series*, no. 45 (1925) *Cmd.* 2520.
- 8 GERMANY—SWITZERLAND. Agreement signed at Berne, modifying terms of provisional agreement of Nov. 17, 1924, governing import restrictions. *Commerce Reports*, Nov. 9, 1925, p. 354.
- 9 POLAND—VATICAN. Concordat regulating relations of Church and State in Poland became effective. *Cur. Hist.*, Oct., 1925, 23: 151.
- 10 GREECE—POLAND. Exchanged ratifications of commercial agreement of April 17, 1925. *Commerce Reports*, Nov. 30, 1925, p. 540.
- 14 HUNGARY—POLAND. Most-favored-nation commercial treaty of March 26, 1925, came into force. *Commerce Reports*, Nov. 9, 1925, p. 355.
- 14 POLAND—UNITED STATES. Agreement of Feb. 10, 1925, to which Danzig is a contracting party, according mutual most-favored-nation treatment in customs matters, ratified by Poland. Ratification by United States not necessary. *U. S. Treaty Series*, no. 727.
- 15 GERMANY—NORWAY. Agreement of April 11, 1925, for lower duty in Germany on canned fish came into force. *Commerce Reports*, Nov. 9, 1925, p. 354.
- 16 AUSTRIA—SERBIA. Most-favored-nation treaty, signed Sept. 5, 1925, came into force. *Commerce Reports*, Nov. 23, 1925, p. 474.
- 16 BELGIUM-LUXEMBURG CUSTOMS UNION—GERMANY. Exchanged ratifications in Berlin of provisional commercial agreement of April 4, 1925, effective Oct. 1, 1925. *Commerce Reports*, Nov. 9, 1925, p. 353. Text: *J. O.*, Aug. 27, 1925, p. 8414.

- 18 LATVIA—NETHERLANDS. Most-favored-nation trade agreement signed, effective for one year from Oct. 2, 1925. *Commerce Reports*, Oct. 26, 1925, p. 227.
- 19 NIAGARA CONTROL BOARD. Report on work performed by the board in connection with diversion of water from Niagara for power purposes, together with notes dated Feb. 3 and Aug. 21, 1923, from the Secretary of State to the British Embassy, made public. Text: *Press notice*, Sept. 19, 1925.
- 19 SWITZERLAND—TURKEY. Treaty of friendship signed at Berne, and temporary agreement effected, by exchange of notes, to govern commercial relations pending negotiations for a definite commercial treaty. *Commerce Reports*, Nov. 16, 1925, p. 420.
- 23 to October 3 GREAT BRITAIN—NETHERLANDS. Exchanged notes extending provisions of extradition treaty of April 13, 1920, to the states of Johore and Kedah. *G. B. Treaty Series*, no. 49 (1925) *Cmd.* 2542.
- 24 LATVIA—UNITED STATES. Debt funding agreement signed in Washington. *N. Y. Times*, Sept. 25, 1925, p. 1.
- 25 GREAT BRITAIN—UNITED STATES. Arrangement concluded by exchange of notes for purpose of preventing interference by radio stations on board ship with radio broadcasting stations on shore. *Press notice*, Sept. 25, 1925.
- 26 CENTRAL AMERICAN TRIBUNAL. State Department announced names of citizens to form list mentioned in Art. III of the Convention for the establishment of an international Central American Tribunal, signed Feb. 7, 1923. *Press notice*, Sept. 26, 1925.
- 28 COLOMBIA-PANAMA BOUNDARY COMMISSION. Appointment of the three Panaman members announced. *Times*, Sept. 28, 1925, p. 13. Members appointed by President of Colombia. *P. A. U.*, Sept., 1925, p. 954.
- 28-30 AIR TRANSPORT CONFERENCE. Preliminary agreements for direct air transport communication between different countries in Europe reached at international conference at Stockholm. *Times*, Sept. 29 and Oct. 2, 1925, pp. 13 and 11.
- 28 INTERNATIONAL JURIDICAL COMMITTEE ON AVIATION. Seventh congress opened at Lyons. *Times*, Sept. 29, 1925, p. 13.
- 28 INTERNATIONAL MARITIME CONGRESS. Fifteenth congress, under auspices of International Maritime Committee, opened in Geneva with 100 delegates representing 17 nations. *Times*, Sept. 29, 1925, p. 13.
- 30 RADIOTELEGRAPH CONFERENCE. Announced that the United States has invited Turkey, Persia, and Argentina to attend conference to be held in Washington in the spring of 1926, but that these governments will not have a vote unless they ratify the London Convention of 1912 before the conference is held. Invitations also issued to 42 other governments. *Press notice*, Sept. 30, 1925.

October, 1925

- 1-7 INTERPARLIAMENTARY UNION. 23d Conference held in Washington. Resolutions: *Adv. of Peace*, Oct.-Nov., 1925. Proceedings: *Cong. Rec.* (daily) Dec. 18, 1925, Appendix.
- 2 CANADA—UNITED STATES. Arrangement concluded, effective Oct. 1, to prevent interference by radio stations on board ship with radio broadcasting stations on shore. *Press Notice*, Oct. 2, 1925.
- 2 NEWFOUNDLAND—UNITED STATES. Arrangement concluded, effective Oct. 1, to prevent interference by radio stations on board ship with radio broadcasting stations on shore. *Press Notice*, Oct. 2, 1925.
- 5-24 DOMINICAN REPUBLIC—UNITED STATES. Exchanged notes relating to resolution

- of approval of National Congress of Dominican Republic, which contains several explanations of the text of the convention signed at Washington, Dec. 27, 1924, providing for assistance of the United States in the collection of customs revenue of the Dominican Republic. Text of resolution and notes: *Press notice*, Dec. 4, 1925.
- 5 PALMAS ISLAND. Announced that the Netherlands and the United States have agreed upon designation of Judge Max Huber, as arbitrator in arbitration concerning sovereignty over the island, under treaty of Jan. 25, 1925. *Press notice*, Oct. 5, 1925.
- 6-10 AERIAL NAVIGATION CONGRESS. Third international congress held at Brussels. Resolutions: *Times*, Oct. 8 and 12, 1925, pp. 13 and 15.
- 9 FRANCE—MOROCCO. Exchanged ratifications of convention relating to fiscal frauds signed at Paris, June 26, 1925. Text: *J. O.*, Oct. 22, 1925, p. 10103.
- 12 GERMANY—SOVIET UNION. Commercial treaty signed at Moscow consisting of (1) general preamble; (2) agreement on rights of citizens; (3) economic agreement; (4) railroad agreement; (5) commercial navigation agreement; (6) taxation agreement; (7) arbitration courts agreement; (8) industrial property agreement. *N. Y. Times* Oct. 13, 1925, p. 2. *Times*, Oct. 14, 1925, p. 15.
- 12 PANAMA—UNITED STATES. Foreign Office of Panama sent formal note to American *Chargé d'Affaires* requesting assistance of United States in restoring and maintaining order, which was given, in accordance with provisions of treaty of 1903. *Press notice*, Oct. 13, 1925.
- 13 CZECHOSLOVAKIA—UNITED STATES. Debt funding agreement signed in Washington. *Wash. Post*, Oct. 14, 1925, p. 4.
- 13 FRANCE—HUNGARY. Commercial treaty signed. *Commerce Reports*, Nov. 23, 1925, p. 474.
- 14 ESTHONIA—SWITZERLAND. Most-favored-nation commercial treaty signed. *Commerce Reports*, Nov. 2, 1925, p. 290.
- 14 GERMANY—UNITED STATES. Exchanged ratifications of most-favored-nation commercial treaty of Dec. 8, 1923. *U. S. Treaty Series*, no. 725.
- 15 MINORITIES CONGRESS. First congress of national minorities of Europe opened at Geneva, with thirty national groups from fourteen countries representing twelve peoples, with an aggregate population of 30,000,000. *Times*, Oct. 16, 1925, p. 13.
- 18 BULGARIA—CZECHOSLOVAKIA. Temporary most-favored-nation commercial agreement signed at Sofia. *Commerce Reports*, Nov. 23, 1925, p. 474.
- 18 to November 4 SYRIA. A new phase of the Druse insurrection, which began last July, broke out in Damascus on Oct. 18, resulting in bombardment by the French of a portion of the city and later in the recall of General Sarraill and the appointment of Senator Henri de Thouvenel as new French High Commissioner. *Cur. Hist.*, Dec., 1925, 23: 447. French official report on disorders received in Paris on Nov. 4. *Times*, Nov. 5, 1925, p. 14.
- 19-29 GRECO-BULGARIAN INCIDENT. On Oct. 19 shots were exchanged on the frontier, followed by invasion of Bulgaria by Greek Third Army Corps. On Oct. 26, League of Nations Council delivered ultimatum to both governments to retire all troops behind respective frontiers within 24 hours. On Oct. 29, assurances were given that hostilities had been brought to an end, and Council appointed a commission of five members to inquire and report on all questions connected with the incident before the end of November. *Adv. of Peace*, Dec., 1925, p. 657. *L.N.O.J.*, Oct., 1925, p. 256.

- 19-30 LEAGUE OF NATIONS MANDATES COMMISSION. Held seventh session in Geneva, to consider reports on British Cameroons, Palestine and Transjordan, Ruanda Urundi, Western Samoa, and South Sea Islands under Japanese mandate. *L. N. M. S.*, Oct., 1925, p. 273.
- 22 PERMANENT COURT OF INTERNATIONAL JUSTICE. Met in extraordinary session to consider dispute regarding frontier between Turkey and Iraq (Mosul) *L. N. M. S.*, Oct., 1925, p. 262.
- 23 to November 14 GERMAN DISARMAMENT. On Oct. 23, German Ambassador at Paris sent note to Ambassador's Conference respecting fulfillment of certain demands in collective note of June 4, 1925. On Nov. 6, Conference of Ambassadors replied, respecting military control in Germany and evacuation of Cologne zone. On Nov. 14, a further note was sent to Germany respecting modifications in the Rhineland régime, and a verbal declaration was made by M. Briand of decision to begin evacuation of Cologne zone on Dec. 1, to coincide with signature of Locarno agreements. Texts: *G. B. Misc. Ser.* no. 12 (1925), *Cmd.* 2527. *Times*, Nov. 18, 1925, p. 19. *Europe*, Nov. 28, 1925, p. 1617.
- 24 DOMINICAN REPUBLIC—UNITED STATES. Exchanged ratifications of convention signed at Washington Dec. 27, 1924 to replace convention of Feb. 8, 1907, providing for assistance of the United States in the collection of customs revenues of the Dominican Republic. *U. S. Treaty Series*, no. 726.
- 26 LEAGUE OF NATIONS COUNCIL. 36th [extraordinary] session convened in Paris to consider Greco-Bulgarian dispute, reports of certain mandatory Powers, and other matters. *L. N. M. S.*, Oct., 1925, p. 255.
- 28 ESTHONIA—UNITED STATES. Agreement signed for funding Esthonian debt. *N. Y. Times*, Oct. 29, 1925, p. 18.
- 28 GREAT BRITAIN—NETHERLANDS. Exchanged ratifications in respect of Canada of most-favored-nation agreement of July 11, 1924. *Commerce Reports*, Nov. 16, 1925, p. 419.
- 29 GREAT BRITAIN—HONDURAS. Agreement signed at Washington for cancellation of external debt of Honduras. *Times*, Oct. 30, 1925, p. 11.
- 29 SERBIA—TURKEY. Peace treaty signed. *C. S. Monitor*, Oct. 30, 1925, p. 3.
- 30 CZECHOSLOVAKIA—JAPAN. Commercial most-favored-nation treaty signed. *Commerce Reports*, Dec. 7, 1925, p. 596.
- 31 GERMANY—ITALY. Commercial treaty embodying reciprocal tariff concessions signed. *Commerce Reports*, Nov. 9, 1925, p. 353.
- 31 to November 9 PERSIA. Change of dynasty and calling of constituent assembly provided for in law passed Oct. 31. Riza Khan became new ruler. *Cur. Hist.*, Dec., 1925, 23: 449. On Nov. 9, Persian Legation announced that Great Britain, Russia, Germany, Italy, Belgium, Poland and the United States had recognized the new régime. *Wash. Post*, Nov. 10, 1925, p. 1.

November, 1925

- 1 BELGIUM—SPAIN. New *modus vivendi* became effective, carrying essentially same tariff provisions as that of April 24, 1925. *Commerce Reports*, Nov. 16, 1925, p. 419.
- 2 TACNA-ARICA. Gen. Pershing's demands for right of the Plebiscitary Commission to interfere in all aspects of the plebiscite, approved by the commission on Nov. 2. On Nov. 5, Foreign Office of Chile announced that Chile had accepted motion of Gen. Pershing regarding guarantees for the holding of the plebiscite. *N. Y. Times*, Nov. 6, 1925, p. 7.

- 6 PERSIA—UNITED STATES. Announced that instructions have been sent to American *Chargé d'Affaires* at Teheran according recognition to the provisional régime in Persia. *Press notice*, Nov. 6, 1925.
- 10 AMERICAN-BRITISH ARBITRAL TRIBUNAL. In session at United States Chamber of Commerce. Dismissed seven claims against the United States which had their origin in Hawaiian history about 1895. *Press notice*, Nov. 11, 1925.
- 6 TRADE-MARKS CONFERENCE. International Conference for the Protection of Industrial Property closed at The Hague, with signing of protocol for the revision of Paris Convention of March 20, 1883, revised in Washington in 1911. *C. S. Monitor*, Nov. 6, 1925, p. 3.
- 14 ITALY—UNITED STATES. Debt settlement agreement signed in Washington. *N. Y. Times*, Nov. 15, 1925, p. 1.

INTERNATIONAL CONVENTIONS

- AGRICULTURAL WORKERS ASSOCIATIONS. Geneva, Nov. 12, 1921.
Ratification: Germany. June 6, 1921. *L. N. O. J.*, Aug., 1925, p. 1032.
- ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.
Accession: Newfoundland. June 22, 1925. *L. N. O. J.*, Aug., 1925, p. 1031.
Ratification: Netherlands. Aug. 6, 1925. *L. N. O. J.*, Sept., 1925, p. 1203.
- ARMS TRAFFIC. Final Act. Geneva, June 17, 1925.
Signature: Austria. July 24, 1925. *L. N. O. J.*, Sept., 1925, p. 1203.
- ARMS TRAFFIC. Protocol on Chemical Warfare. Geneva, June 17, 1925.
Signature: Austria. July 24, 1925. *L. N. O. J.*, Sept., 1925, p. 1203.
- ARMS TRAFFIC. Protocol of Signature. Geneva, June 17, 1925.
Signature: Austria. July 24, 1925. *L. N. O. J.*, Sept., 1925, p. 1203.
- ARMS TRAFFIC CONVENTION. Geneva, June 17, 1925.
Signature: Austria. July 24, 1925. *L. N. O. J.*, Sept., 1925, p. 1203.
- ARMS TRAFFIC. Declaration regarding Ifni. Geneva, June 17, 1925.
Signature: Austria. July 24, 1925. *L. N. O. J.*, Sept., 1925, p. 1203.
- CENTRAL AMERICAN AGRICULTURAL EXPERIMENT STATIONS. Washington, Feb. 7, 1923.
Ratification: Honduras. March 25, 1925. *P. A. U.*, Nov., 1925, p. 1163.
- CENTRAL AMERICAN COMMISSION OF INQUIRY. Washington, Feb. 7, 1923.
Ratification: Honduras. March 16, 1925. *P. A. U.*, Nov., 1925, p. 1163.
- CENTRAL AMERICAN ELECTORAL LEGISLATION. Washington, Feb. 7, 1923.
Ratification: Guatemala. May 14, 1925. *P. A. U.*, Nov., 1925, p. 1162.
- CENTRAL AMERICAN EXTRADITION TREATY. Washington, Feb. 7, 1923.
Ratifications:
 Salvador. May 26, 1925. *P. A. U.*, Oct., 1925, p. 1062.
 Guatemala. May 14, 1925. *P. A. U.*, Nov., 1925, p. 1162.
- CENTRAL AMERICAN FREE TRADE. Washington, Feb. 7, 1923.
Ratification: Guatemala. May 14, 1925. *P. A. U.*, Nov., 1925, p. 1162.
- CENTRAL AMERICAN LABOR LAWS. Washington, Feb. 7, 1923.
Ratification: Honduras. March 23, 1925. *P. A. U.*, Nov., 1925, p. 1163.
- CENTRAL AMERICAN PEACE AND AMITY. Washington, Feb. 7, 1923.
Ratification: Honduras. March 2, 1925. *P. A. U.*, Oct., 1925, p. 1062.
- CENTRAL AMERICAN STUDENTS EXCHANGE. Washington, Feb. 7, 1923.
Ratifications:
 Guatemala. May 14, 1925. *P. A. U.*, Nov., 1925, p. 1162.
 Honduras. March 25, 1925. *P. A. U.*, Nov., 1925, p. 1163.

CHINESE CUSTOMS TARIFF. Washington, Feb. 6, 1922.

Ratification deposited: All signatories. Aug. 5, 1925. *U. S. Treaty Series*, no. 724.

CUSTOMS DOCUMENTS. Santiago, May 3, 1923.

Ratifications:

Haiti. June 22, 1925. *P. A. U.*, Nov., 1925, p. 1162.

Salvador. March 7, 1925. *P. A. U.*, Oct., 1925, p. 1063.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.

Ratifications:

Germany. Aug. 1, 1925. *L. N. O. J.*, Sept., 1925, p. 1203.

Netherlands. May 30, 1925. *L. N. O. J.*, Aug., 1925, p. 1032.

EIGHT-HOUR DAY. Washington, Nov. 28, 1919.

Ratification: Latvia. Aug. 15, 1925. *L. N. O. J.*, Sept., 1925, p. 1204.

EMPLOYMENT (FINDING) FOR SEAMEN. Genoa, July 10, 1920.

Ratifications:

Australia. Aug. 3, 1925. *L. N. O. J.*, Sept., 1925, p. 1204.

Germany. June 6, 1925. *L. N. O. J.*, Aug., 1925, p. 1032.

EMPLOYMENT OF CHILDREN IN AGRICULTURE. Geneva, Nov. 16, 1921.

Ratification: Irish Free State. May 26, 1925. *L. N. O. J.*, Aug., 1925, p. 1032.

EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.

Ratification: Sweden. July 14, 1925. *L. N. O. J.*, Sept., 1925, p. 1204.

EPIZOOTIC OFFICE. Paris, Jan. 25, 1924.

Ratification deposited: Sweden. Sept. 18, 1925. *J. O.*, Sept. 19, 1925, p. 9110.

FALSE INDICATION OF ORIGIN OF GOODS. Madrid, April 14, 1891. Revision. Washington, June 2, 1922.

Adhesions: Brazil, Cuba, Spain, France, Great Britain, Portugal, Switzerland, Tunis.

Commerce Reports, May 25, 1925, p. 489.

FREEDOM OF TRANSIT. Barcelona, April 20, 1921.

Adhesion: Danzig. April 3, 1925.

Ratification: Estonia. June 6, 1925. *L. N. O. J.*, Aug., 1925, p. 1031.

GERMAN PEACE TREATY. Versailles, June 28, 1919. Amendment to Art. 393. Geneva, Oct. 18–Nov. 3, 1922.

Ratification: France. June 2, 1925. *L. N. O. J.*, Aug., 1925, p. 1033.

Germany. June 6, 1925.

Irish Free State. June 26, 1925. *L. N. O. J.*, Aug., 1925, p. 1033.

LEAGUE OF NATIONS. Covenant. Protocol of Amendment to Art. 16 (latter part of the first paragraph) Geneva, Sept. 27, 1924.

Signatures:

Salvador. June 3, 1925.

Union of South Africa. June 30, 1925.

Ratification: Salvador. June 4, 1925. *L. N. O. J.*, Aug., 1925, p. 1032.

LETTERS, ETC., OF DECLARED VALUE. Stockholm, Aug. 28, 1924.

Ratification deposited: France. Sept. 8, 1925. *J. O.*, Nov. 18, 1925, p. 11080.

LOCUST CONVENTION. Rome, Oct. 31, 1920.

Ratification deposited: Uruguay. Aug. 26, 1925. *D. O. (Uruguay)*, Oct. 6, 1925, p. 42.

MARITIME PORTS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.

Adhesion: Australia (excluding Papua, Norfolk Island and the mandated territories of Nauru and New Guinea). June 29, 1925. *L. N. O. J.*, Aug., 1925, p. 1031.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.

Ratification: Sweden. July 14, 1925. *L. N. O. J.*, Sept., 1925, p. 1204.

MEMEL CONVENTION AND TRANSIT PROVISION. Paris, May 8, 1924.

Ratification deposited: Great Britain. Aug. 25, 1925. *G. B. Treaty Series*, no. 48 (1925), Cmd. 2541.

MERCHANDISE CLASSIFICATION. Santiago, May 3, 1923.

Ratifications:

Haiti. June 22, 1925. *P. A. U.*, Nov., 1925, p. 1162.

Salvador. March 7, 1925. *P. A. U.*, Oct., 1925, p. 1063.

MONEY ORDERS. Stockholm, Aug. 28, 1924.

Ratification deposited: France. Sept. 8, 1925. *J. O.*, Nov. 18, 1925, p. 11080.

NIGHT WORK OF YOUNG PERSONS. Washington, Nov. 28, 1919.

Ratification: France. *I. L. O. B.*, Sept. 21, 1925.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.

Ratification: Finland. June 29, 1925. *L. N. O. J.*, Aug., 1925, p. 1031.

OPEN DOOR. (*Integrity of China.*) Washington, Feb. 6, 1922.

Ratification deposited: All signatories, Aug. 5, 1925. *U. S. Treaty Series*, no. 723.

OPIMUM CONVENTION. Geneva, Feb. 19, 1925. *

Signatures:

Bulgaria. July 29, 1925.

India. Aug. 11, 1925.

Latvia. June 8, 1925.

Switzerland. July 18, 1925.

Union of South Africa. June 30, 1925. *L. N. O. J.*, Aug.-Sept., 1925.

PACIFIC SETTLEMENT. Protocol. Geneva, Oct. 2, 1924.

Signature: Haiti. June 4, 1925. *L. N. O. J.*, Aug., 1925, p. 1032.

PAN AMERICAN ARBITRATION TREATY. Santiago, May 3, 1923.

Ratifications:

Haiti. June 22, 1925. *P. A. U.*, Nov., 1925, p. 1162.

Venezuela. June 6, 1925. *P. A. U.*, Dec., 1925, p. 1275.

PAN AMERICAN SANITARY CODE. Havana, Nov. 14, 1924.

Ratifications:

Cuba. June 26, 1925. *P. A. U.*, Oct., 1925, p. 1062.

Costa Rica. June 18, 1925. *P. A. U.*, Dec., 1925, p. 1274.

PARCEL POST. Stockholm, Aug. 28, 1924.

Ratification deposited: France. Sept. 8, 1925. *J. O.*, Nov. 18, 1925, p. 11080.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.

Signature: Belgium. Sept. 26, 1925. *L. N. M. S.*, Sept., 1925, p. 207.

PARCEL POST. Stockholm, Aug. 28, 1924.

Signature: Guatemala. June 2, 1925. *P. A. U.*, Oct., 1925, p. 1062.

POSTAL SUBSCRIPTIONS TO NEWSPAPERS. Stockholm, Aug. 28, 1924.

Ratification deposited: France. Sept. 8, 1925. *J. O.*, Nov. 18, 1925, p. 11080.

POSTAL TRANSFERS. Stockholm, Aug. 28, 1924.

Ratification deposited: France. Sept. 8, 1925. *J. O.*, Nov. 18, 1925, p. 11080.

RHINE NAVIGATION CERTIFICATES. Strasbourg, Dec. 14, 1922 and Dec. 22, 1923.

Ratification deposited: Great Britain. June 8, 1925. *G. B. Treaty Series*, no. 46 (1925).

SERVICE DES RECOUVREMENTS. Stockholm, Aug. 28, 1924.

Ratification deposited: France. Sept. 8, 1925. *J. O.*, Nov. 18, 1925, p. 11080.

TRADE MARKS. Santiago, April 28, 1923.

Ratification:

Guatemala. May 6, 1925. *P. A. U.*, Oct., 1925, p. 1062.

Haiti. June 22, 1925. *P. A. U.*, Nov., 1925, p. 1162.

UNEMPLOYMENT CONVENTION. Washington, Nov. 28, 1919.

Ratifications:

Germany. June 6, 1925. *L. N. O. J.*, Aug., 1925, p. 1032.

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Ratification: Haiti. June 22, 1925. *P. A. U.*, Nov., 1925, p. 1163.

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Ratification deposited: France. Sept. 8, 1925. *J. O.*, Nov. 18, 1925, p. 11080.

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Ratification: Haiti. June 22, 1925. *P. A. U.*, Nov., 1925, p. 1163.

WHITE SLAVE TRADE. Paris, May 4, 1910.

Adhesion:

China. Nov. 6, 1925.

Japan. Oct. 20, 1925. *J. O.*, Nov. 27, 1925, p. 11398.

WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.

Ratification: Sweden. June 9, 1925. *L. N. O. J.*, Aug., 1925, p. 1031.

WORKMEN'S COMPENSATION IN AGRICULTURE. Geneva, Nov. 12, 1921.

Ratification: Germany. June 6, 1925. *L. N. O. J.*, Aug., 1925, p. 1032.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

MIXED CLAIMS COMMISSION—UNITED STATES AND GERMANY*

OPINIONS DEALING WITH CLAIMS FOR LOSS OF EARNINGS OR PROFITS AND FOR LOSS OR DAMAGE IN RESPECT OF INTANGIBLE PROPERTY AND ADMINISTRATIVE DECISION NO. VII

Decision, May 25, 1925

In the joint resolution declaring the war with Germany at an end the Congress of the United States clearly manifested a purpose to demand that American nationals should in all things be placed on a parity with the nationals of the Allied Powers, not only with respect to claims arising during the period of American belligerency but also with respect to all damage caused during the period of American neutrality, by the acts of Germany.

The provision in the joint resolution for the retention by the United States of the property of Germany and its nationals until suitable provision shall have been made by Germany for the payment of claims arising during American belligerency as well as claims arising during American neutrality, relates solely to the enforcement of claims and does not touch the definition of what Germany shall pay for or how much Germany shall pay.

Words used in the joint resolution must be taken to have the same meaning as the same words used in connection with the same subject matter found in the Treaty of Versailles. When this rule is applied there is no warrant for so interpreting the resolution of the Congress as to place upon Germany a heavier burden than that placed upon her by the Treaty of Versailles.

Save in certain excepted cases, Germany is not obligated under the Treaty of Berlin to make compensation for loss by American nationals (1) of prospective personal earnings as such or (2) of prospective profits as such growing out of the destruction of property, but the earning power and the then value of the use of the property destroyed may be taken into account with numerous other factors in determining the reasonable market value of such property at the time and place of destruction, which value, with interest thereon as heretofore prescribed, is the measure of Germany's liability.

Save in certain excepted cases, the provisions of the Treaty of Berlin dealing with damage to property are limited to physical or material damage to tangible things. But two or more different estates or interests in a tangible thing may exist at the same time, the sum of which equals a full, complete, absolute, unconditional, and unencumbered ownership of the whole, and it is important to avoid confusing the nature of the damage to tangible things, with the nature of the estate or interest in those tangible things damaged or destroyed. Under the treaty a thing can have but one value, but several estates or interests may inhere in it.

The excepted cases are those resulting from damage or injury to the property, rights, or interests of American nationals in German territory as it existed on August 1, 1914, by the application either of exceptional war measures or measures of transfer as those terms are defined in the Treaty. In such cases a different rule obtains.

This decision does not deal with the measure of damage to property (1) injured but not destroyed, (2) destroyed but replaced, or (3) taken but returned to the private owner. The measure of damages in such cases varies as the facts in the cases vary.

PARKER, *Umpire*, rendered the decision of the Commission.

*Established in pursuance of the agreement between the United States and Germany of August 10, 1922. Edwin B. Parker, Umpire; Chandler P. Anderson, American Commissioner; Wilhelm Kiesselbach, German Commissioner; Robert W. Bonyngé, American Agent; Karl von Lewinski, German Agent.

Headnotes and references in brackets inserted by the Editor of the JOURNAL. Lack of space prevents the publication of the disagreeing opinions of the two National Commissioners.

The National Commissioners have certified to the Umpire for decision points of difference, as disclosed by their respective opinions embodied in the certificate of disagreement, with respect to the obligations of Germany to make compensation "for loss of earnings or profits of persons or property and for loss or damage in respect of intangible property."

The Umpire decides that, save in certain excepted cases, Germany is not obligated under the Treaty of Berlin to make compensation for loss by American nationals (1) of prospective personal earnings as such or (2) of prospective profits as such growing out of the destruction of property, but holds that the earning power and the then value of the use of the property destroyed may be taken into account with numerous other factors in determining the reasonable market value of such property at the time and place of destruction, which value, with interest thereon as heretofore prescribed by this Commission, is the measure of Germany's liability. The Umpire further decides that, save in certain excepted cases, the provisions of the Treaty of Berlin dealing with damage to property are limited to physical or material damage to tangible things. But two or more different estates or interests in a tangible thing may exist at the same time, the sum of which equals a full, complete, absolute, unconditional, and unencumbered ownership of the whole, and it is important to avoid confusing the nature of the damage to tangible things, with the nature of the estate or interest in those tangible things damaged or destroyed. Under the treaty a thing can have but one value, but several estates or interests may inhere in it.

The excepted cases mentioned above are those resulting from damage or injury to the property, rights, or interests of American nationals in German territory as it existed on August 1, 1914, by the application either of exceptional war measures or measures of transfer as those terms are defined in the treaty. In such cases a different rule obtains.

This decision does not deal with the measure of damage to property (1) injured but not destroyed, (2) destroyed but replaced, or (3) taken but returned to the private owner. The measure of damages in such cases varies as the facts in the cases vary, and those questions arising under this certificate will be reserved and specially dealt with by the Umpire.

The generality and the breadth of the scope of the certificate of disagreement and the lack of a definite statement of the points of disagreement between the National Commissioners render necessary a restatement of the construction placed by this Commission on the Treaty of Berlin, in order understandingly to apply its terms to the several concrete cases and groups of cases presented by the American and German Agents, in the decision of which the National Commissioners have been unable to agree.

A brief survey of the negotiations and agreements antedating the Treaty of Berlin and upon which it is in part based will prove helpful in interpreting its terms.

The pre-armistice negotiations are found in the correspondence between

the United States and Germany beginning with the note of the German Chancellor to President Wilson of October 6, 1918, and ending with the note of the Secretary of State of the United States to the German Government of November 5, 1918. In the latter note is incorporated the only condition of peace dealing with the problems with which this Commission is here concerned, expressed in this language:

Further, in the conditions of peace, laid down in his address to Congress of January 8, 1918, the President declared that invaded territories must be restored as well as evacuated and freed. The Allied Governments feel that no doubt ought to be allowed to exist as to what this provision implies. By it they understand that compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air.

President Wilson expressed his agreement with the interpretation set forth in the paragraph quoted.

The armistice convention was a military document dictated by the military advisers of the Allied and Associated Powers for the purpose, as expressed in the pre-armistice negotiations, to "fully protect the interests of the peoples involved and ensure to the associated governments the unrestricted power to safeguard and enforce the details of the peace." The reparation clause of the pre-armistice negotiations was not embodied *pro hac verba* in the armistice convention but was referred to by the nineteenth paragraph thereof which provides that Germany shall make "reparation for damage done," "With the reservation of any future concessions and claims by the Allies and United States."

With the Treaty of Versailles as such and the history of its making this Commission is not concerned, except with respect to those parts of that treaty which are by reference incorporated in and made a part of the Treaty of Berlin. As these, consisting of some one hundred and thirteen (113) printed pages, comprise by far the major part of the latter treaty (American Treaty Series, No. 658), the remainder thereof being embodied in three (3) corresponding pages, the references in this opinion to parts, sections, articles, paragraphs, and subparagraphs will be understood as referring to the Treaty of Versailles unless the contrary appears from the context. The short titles "section 2 of the resolution" and "section 5 of the resolution" will be understood as referring respectively to those sections of the Joint Resolution of the Congress of the United States approved July 2, 1921, embodied in the preamble to the Treaty of Berlin.

This Commission is principally concerned with Part VIII, dealing with "Reparation," and Part X, dealing with "Economic Clauses," and particularly with Section I or Part VIII, embracing Articles 231 to 244, both inclusive, and Annexes I to VII, both inclusive, and with Sections III and IV of Part X, embracing Articles 296, 297, and 298, with their respective Annexes.

The short title "paragraph 9" as used herein will be taken to refer to paragraph 9 of Annex I to Section I of Part VIII unless the contrary appears from the context. For the sake of brevity the language of the Versailles Treaty will sometimes be paraphrased so as to eliminate Germany's obligations to the Allied Powers and conform to the Treaty of Berlin.

Section III of Part X deals with "Debts" as such. Section IV of Part X deals with "Property, Rights and Interests" and lays down the principles for the settlement of all questions "of private property, rights and interests *in an enemy country*" arising from the application of "exceptional war measures and measures of transfer," as those terms are defined therein. The provisions of this section deal with enemy property, rights, and interests both in the United States and in Germany. This Commission is here directly concerned only with such of them as deal with the property, rights, and interests of American nationals "in German territory as it existed on August 1, 1914." They divide into three classes: (a) Those relating to Germany's obligations to make "compensation" to American nationals for damage or injury inflicted upon their property, rights, or interests, including debts, credits, and accounts, by the application either of exceptional war measures or measures of transfer as those terms are defined in paragraph 3 of the Annex to Section IV of Part X; (b) those relating to Germany's obligations to account for American-owned cash assets as defined therein held by Germany; and (c) those relating to Germany's obligations arising out of debts as such owing to American nationals by German nationals.

The evident purpose of the "Economic Clauses" of the treaty was (1) to restore as far as practicable the economic relations between the peoples of belligerent Powers which had been disrupted by the war and (2) to compensate the nationals of the Allied and Associated Powers for the damages and injuries suffered by them through the application of war measures by Germany in German territory. The war measures with which we are here principally concerned were:

(1) Measures prohibiting the payment of debts or the transmission of funds to enemy territory, which, with respect to claims by natural or artificial persons outside of Germany, in effect declared what was as to them a moratorium, during the existence of which the debtor was not required to pay interest to them for delay. Those measures were strictly territorial in their application and designed to prevent funds falling into the hands of enemy Powers which could be used by them in the maintenance of their economic stability or in the prosecution of the war.

(2) Measures looking to the supervision, the compulsory administration, and the liquidation of enemy property in German territory. Those measures applied to all enemy nationals resident in and out of German territory. The test of their application was enemy nationality rather than enemy territory.

Section III of Part X, among other things, sets up the machinery for a

system of clearing offices—a method of payment—which was not adopted by the United States and with which this Commission has no concern. The American representatives at the Paris Conference were unwilling to commit their government to the clearing-office system and frankly declared that they would advise against its participation therein. Provision was therefore made that this system should not come into force with respect to any of the Allied or Associated Powers save such as should expressly adopt it by the giving of notice.

In order to provide for the payment of debts owing to American nationals by German nationals without adopting the clearing-office system and also to provide for the payment of claims of American nationals arising during the period of American neutrality, paragraph 4 of the Annex to Section IV of Part X was, largely on the suggestion and insistence of the American representatives, written into the treaty. This paragraph provides in substance that the property, rights, and interests of German nationals within the territory of the United States and the net proceeds of their sale, liquidation, or other dealing therewith may be charged by the United States with the payment of amounts due in respect of claims by American nationals (1) "with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory," or (2) "debts owing to them by German nationals," and (3) "with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914" and before America entered into the war.

These provisions in terms simply authorize the United States to charge the proceeds of German property, rights, and interests and the cash assets of German nationals received by it with the payment of the enumerated claims of American nationals. But it will be noted that Germany has not only agreed that the assets of her nationals held by the United States may be applied to the payment of the debts mentioned but has expressly undertaken to compensate her nationals for their property so applied.¹ This is simply an indirect method on Germany's part of undertaking to pay these claims of American nationals, which by virtue of such undertaking become liabilities of Germany. The correctness of this conclusion has been expressly admitted and acquiesced in by the Government of Germany through the German Agent in a formal declaration filed with this Commission.² It is reasonably apparent that the German assets now so held by the United States are more

¹ Paragraph (i) of Article 297 provides that "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States."

² See the formal declaration presented in writing to this Commission by the Government of Germany through the German Agent embodied in the minutes of the meeting of this Commission of May 15, 1923, wherein it was declared that "Germany is primarily liable with respect to all claims and debts coming within the jurisdiction of the Mixed Claims Commission under the Agreement of August 10, 1922."

than sufficient to satisfy Germany's obligations to American nationals, in view of which there does not exist any possible limitation on the extent of Germany's primary liability to pay these claims.

The Economic Clauses (Part X) of the treaty fix the liability of Germany for the application of exceptional war measures and measures of transfer, as those terms are therein defined, to property of American nationals in German territory. Not only are the property, rights, and interests *directly owned* by American nationals protected but also those of "any company or association in which they are interested," to the extent of their interest therein. The provisions of Part X are applicable not only to tangible property but to "property, rights and interests." Here broad and apt terms are used to include stocks, bonds, notes, contract rights, and other intangibles, as well as tangible property. The reason for this is clear. German territory was not invaded. She was directly and solely responsible for what happened within her territorial limits. Her exceptional war measures and measures of transfer principally, though not exclusively, were directed against and operated upon debts, credits, accounts, stocks, bonds, notes, contract rights, and interests, rather than on tangible properties. In applying these war measures Germany acted advisedly, with full knowledge of the nature, character, and extent of the property, rights, and interests affected and of the fact that they were owned by American nationals; and she must be presumed to have had in contemplation the consequences of her acts and her responsibility for such consequences. Germany and her nationals had the use of the property, tangible and intangible, which she requisitioned or impounded through the application of exceptional war measures or measures of transfer, and she and her nationals enjoyed the use and the fruits of and the income from such property.

But with respect to the property of American nationals beyond the limits of German territory the situation was distinctly different. The German legislation and decrees, termed in the treaty "exceptional war measures" and "measures of transfer," had no extraterritorial effect. The property damages wrought by Germany in the invaded territories and by sea and from the air were wrought through physical force operating on physical property, not through legislative measures and administrative decrees. The Allied Powers in their pre-armistice demands, communicated by President Wilson to Germany, had stipulated that "invaded territories must be *restored* as well as evacuated and freed." This they defined to mean "that compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air." This language connotes physical damage. When the military advisers of the Allied and Associated Powers came to dictate the terms of the armistice, they, following the pre-armistice negotiations, while making the "reservation of any future concessions and claims by the Allies and United States," expressly stipulated that Germany should make "reparation

for damage done." And when the representatives of the Allied and Associated Powers came to write these conditions of peace into the Treaty of Versailles they embodied them in Part VIII of the treaty, entitling it "Reparation," but expressly provided (Article 242) that the reparation provisions of the treaty (Part VIII) "do not apply to the property, rights and interests referred to in Sections III and IV of Part X (Economic Clauses) of the present treaty, nor to the product of their liquidation." The framers of the treaty expressly recognized that "the resources of Germany are not adequate . . . to make complete reparation for" "all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war" but nevertheless required and Germany undertook to "make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land; by sea and from the air, and in general all damage as defined in Annex I hereto" (Articles 231 and 232).

Article 233, providing for the constitution of a Reparation Commission and fixing its powers and jurisdiction, stipulates that it "shall consider the claims" for "damage for which compensation is to be made by Germany" and notify the German Government "as to the amount of damage defined as above . . . as representing the extent of that government's obligations." In order to enable the Reparation Commission to perform this function understandingly it was provided (Article 240) that "The German Government will supply to the Commission . . . any information relative to *military operations* which in the judgment of the Commission may be necessary for the assessment of Germany's liability for reparation as defined in Annex I."

Reading the provisions of Articles 232, 233, and 240 together, it is clear that the treaty recognized the fact that Germany's resources were inadequate to make reparation to the Allied and Associated Governments and their nationals for all of the losses and damages sustained by them as a consequence of the war and that Germany's *reparation obligations* were expressly limited to such as are enumerated or "defined" in Annex I.

This was the construction placed by the Allied Powers on the treaty in the compilation of their reparation accounts rendered to the Reparation Commission, which were made up to conform with the ten categories of Annex I of Section I of Part VIII of the treaty. Thus the French Reparation Account is divided into two parts captioned:

"Part I. Damage to Persons. (Paragraphs 1, 2, 3, 4, 5, 6, 8, and 10 of Annex I to Part VIII of the Treaty of Versailles.)"

"Part II. Damage to Property. (Paragraph 9 of Annex I to Part VIII of the Treaty of Versailles.)"

The British Reparation Account is compiled in much the same manner.

It will be noted that the language of Article 232 follows closely the lan-

guage of the pre-Armistice negotiations but makes no provision for compensating American nationals for damages suffered by them during the period of American neutrality. This omission was cured by the provisions of paragraph 4 of the Annex to Section IV of Part X, by virtue of which Germany indirectly assumed liability for the "payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war."

Annex I to Section I of Part VIII, which, as already noted, is expressly mentioned in Article 232 as *defining* Germany's obligations to make compensation for damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each, recites that "Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories." Then follows an enumeration of ten distinct categories, the ninth of which deals with "property" and reads thus:

(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war.

It will be noted that this paragraph 9 so expands Germany's obligation to "make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property . . . by such aggression" of Germany,³ or of Germany and her allies,⁴ as to include damage to property "belonging to any of the Allied or Associated States . . . with the exception of naval and military works or materials;" and further obligates Germany to make compensation not only for damage to property caused by the acts of *Germany or her agents* in the prosecution of the war⁵ but also for (a) damage to property caused by *her allies* and (b) damage to property caused by *any belligerent* directly in consequence of hostilities or of any operations of war.

America's representatives who participated in the making of this treaty understood Germany's pre-armistice commitments with respect to property to mean "direct physical damage to property of non-military character" and with respect to physical injury to mean "direct physical injury to civilians."⁶ This view was accepted in principle by the representatives of the other

³According to the pre-armistice negotiations.

⁴According to the language of Articles 231 and 232 of the treaty.

⁵This is the extent of Germany's obligation arising under the provisions of paragraph 4 of the Annex to Section IV of Part X with respect to making compensation for property of American nationals damaged or destroyed during the period of American neutrality.

⁶Bernard M. Baruch's *The Making of the Reparation and Economic Sections of the Treaty* (1920), page 19.

Powers and it was agreed "that reparation should be limited to what might actually be called material damage."⁷

The treaty itself bears ample evidence of this intention to restrict property damage to "material damage," to "physical damage" resulting from the application of physical force in some form to tangible property. Force was the only measure which Germany could apply for the infliction of damage beyond her own territorial limits. The use of the single word "property," in Article 232 and in paragraph 9 of Annex I, to define the subject matter of the damage dealt with is in itself significant when read in connection with Article 242 (also embraced in Part VIII, "Reparation"), which provides that Part VIII does not apply to the "property, rights and interests referred to in Sections III and IV of Part X (Economic Clauses) of the present treaty, nor to the product of their liquidation." The repeated references to damage to "property" outside of German territory, coupled with the repeated references to damage to "property, rights and interests" in German territory, were not accidental and suggest an intention to employ the word "property" in its narrowest sense in defining the subject matter of damage dealt with outside of German territory. The use of the phrase "carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war" ordinarily connotes physical action operating on tangible things. The use of the phrase "property wherever situated" ordinarily, but not necessarily, connotes physical property. Paragraph 1 of Annex IV obligates Germany to "devote her economic resources directly to the physical restoration of the invaded areas of the Allied and Associated Powers, to the extent that these Powers may determine." This, it will be noted, follows closely the language of the pre-armistice negotiations, in which it was declared "that invaded territories must be restored." Throughout the reparation provisions of the treaty the *physical restoration* of property and the reparation for *physical damage* done to tangible property are constantly dealt with, indicating that the purpose and intent of the drafters of the treaty was to here deal only with tangible property.

After providing that the Reparation Commission shall fix the amount of the damage to be paid by Germany and notify this amount "to the German Government on or before May 1, 1921" (Article 233), the treaty provides that "The commission, in fixing on May 1, 1921, the total amount of the debt of Germany, may take account of interest due on sums arising out of the reparation of material damage as from November 11, 1918, up to May 1, 1921" (paragraph 16 of Annex II to Section I of Part VIII). As this Commission has already held,⁸ the "*material damage*" mentioned in the clause

⁷ Thomas W. Lamont on "Reparations" in *What Really Happened at Paris (1921)*, at page 271.

⁸ Administrative Decision No. III, *Decisions and Opinions*, at page 67. [This JOURNAL, Vol. 18, at p. 608.]

quoted "includes *all* damages in respect of the taking or destruction of or injury to property as defined in paragraph 9 of Annex I to Section I of Part VIII."

The Reparation Commission, constituted under the Treaty of Versailles and expressly clothed with authority to interpret the treaty, in construing paragraph 9 held that it does not authorize claims "for compensation for the loss of enjoyment or of profit from the property affected or for supplementary expenses incurred in order to get the advantages which normally would have been obtainable from the property."

This was a formal decision taken under paragraphs 12 and 13 of Annex II to Section I of Part VIII of the treaty which require unanimity with respect to all questions of interpretation of its reparation provisions. Here is a formal, unanimous decision, so construing the treaty as to limit the right of the Allied Powers to exact reparations from Germany, made within a comparatively short time after the ratification of the treaty, by a commission composed of nationals of the Powers most largely interested in the payment of reparations by Germany, and the Powers largely responsible for the making of the treaty and for the use of the particular language construed. Under every rule governing the interpretation of treaties this decision is entitled to very great weight.

The report of the British authorities in submitting the British Reparation Account to the Reparation Commission recites that

In calculating the amount of damage in each case only damage caused by specific acts of Germany and her allies, or damage directly in consequence of specific hostilities or specific operations of war, has been included, and indirect and consequential damage has been excluded. . . .

Compensation amounting to a very large sum has also been claimed in respect of loss of earnings or business profits owing to the claimants being kept in internment, or, in the case of seafarers, in respect of loss of wages or salary during the time they were unemployed owing to their ship having been torpedoed, and these elements of claim have also been disregarded as being indirect or consequential damage.

In connection with the item in the British account for damages "by air raid or bombardment from the sea" this explanation is made:

All cases of indirect and consequential damage have been rejected, as well as those cases in which there is no clear evidence that damage was due to an act of aggression by the enemy. . . .

Claims in respect of loss of business, profits, goodwill and other consequential damage of a like nature have been excluded. . . .

It can not be doubted that the makers of, and the principal beneficiaries under, the Treaty of Versailles construed its reparation provisions dealing with damage to property as limited to physical or material damage to tangible things. But two or more different estates or interests in a tangible thing

* Reparation Commission (V), Report on the Work of the Reparation Commission from 1920 to 1922, page 47.

may exist at the same time, the sum of which equals a full, complete, absolute, unconditional, and unencumbered ownership of the whole. It is important to avoid confusing *the nature of the damage* to a tangible thing with *the nature of the estates or interests* in that tangible thing which was damaged or destroyed. It can in legal contemplation have but one value, but several estates or interests may inhere in it.

Neither can it be doubted that in the preparation of their reparation claims the Allied Powers have, *in measuring the damages* resulting from the physical injury to or destruction of tangible property, excluded all claims for the loss *as such* of prospective profits of business and of prospective earnings, salaries, wages, and the like.

This brings us to an interpretation of the applicable provisions of the Treaty of Berlin, including those of the Treaty of Versailles which are read into and form a part of it and which have already been considered. Does the Treaty of Berlin place upon Germany a burden with respect to the damage or injury to the persons or property of American nationals heavier than that placed upon her by the Treaty of Versailles? The Umpire holds that it does not.

When Congress of the United States came to consider the terms of a joint resolution declaring at an end the state of war existing between the United States and Germany, which resolution was finally approved July 2, 1921, the Treaty of Versailles had become effective, the Reparation Commission had been constituted thereunder, its decision interpreting the treaty, hereinbefore referred to, had been rendered, the reparation accounts of the principal Allied Powers had been prepared and filed, and the extent of Germany's obligations had been notified to the German Government. There was then no doubt that the term "Damage in respect of all property" as used in the reparation provisions of the Treaty of Versailles was intended to mean, and did mean, as between the Allied Powers ratifying the treaty and Germany, physical or material damage in respect of every estate or interest in tangible property. There is nothing in the joint resolution of the Congress of the United States or in the record of the debates of the Congress when that resolution was under consideration to indicate that as a condition of peace the Congress intended to lay upon Germany a heavier burden than that laid upon her by the Treaty of Versailles. On the contrary, the debates, in so far as they disclose the intention of the Congress in this respect, point in the opposite direction.¹⁰

¹⁰ When the Treaty of Berlin was before the Senate of the United States, Senator Walsh of Montana moved to strike from it the provisions obligating Germany to reimburse the United States for pensions and separation allowances paid by the latter. He said, *inter alia* (page 6367, Volume 61, Congressional Record), "at the conference of Versailles an insistent demand was made by certain of the Allies to exact compensation of Germany for all damages occasioned by the war; and . . . after the debate progressed before the Versailles conference, the contention was finally abandoned by every one of them, and it was agreed that the compensation to be exacted of Germany should be limited

Two and one-half years had elapsed since the signature of the armistice. It was apparent that the United States would not ratify the Treaty of Versailles. It was desirable that the technical state of war existing between the United States and Germany should be terminated. The Congress was mindful of the rule that the indemnity of a victorious belligerent is limited to the terms on which it agrees to close the conflict. Therefore, as a part of the declaration that the war between the United States and Germany was at an end, the Congress by section 2 of the resolution "expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same."

(1) "which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled;" or

(2) "to which *it* is entitled as one of the Principal Allied and Associated Powers;" or

(3) "to which *it* or *they* have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof;" or

(4) "which, under the Treaty of Versailles, have been stipulated for *its* or *their* benefit;" or

(5) "to which *it* is entitled by virtue of any Act or Acts of Congress; or otherwise."

The United States held a position as one of the principal victorious Powers which the Congress was careful to preserve. These *reservations*, which manifestly refer to *existing rights*, were addressed not only to Germany but also to the Powers with which the United States had been associated during the war. The United States was a party to the armistice convention. It was one of the principal of the group of Powers for whose benefit the Treaty of Versailles was made, and, notwithstanding it had not ratified that treaty, the

to the damage which was done to the civilian population. . . . I challenged anyone to attempt to defend pensions and separation allowances as damages done to the civilian population, and no one has attempted so to defend them."

At this point Senator Shortridge, of California, asked Senator Walsh in substance if he feared or thought that the United States, "by whomsoever guided or directed, will ever make" a demand on Germany for the payment of pensions and separation allowances, in effect expressing the opinion that such a contingency was so remote as to make of no consequence the objection of Senator Walsh to the treaty as it stood. This opinion expressed by Senator Shortridge, which was not challenged and which, as appears from the debates, expressed the view held by the Senate, was fully justified when the President of the United States authorized the statement that he had no intention of pressing against Germany or presenting to this Commission any claims falling within paragraphs 5, 6, and 7 of Annex I to Section I of Part VIII of the Treaty of Versailles (see exchange of notes between Chancellor Wirth and Ambassador Houghton on August 10, 1922, printed in connection with the agreement between the United States and Germany providing for the creation of this Commission, American Treaty Series, No. 665.)

rights stipulated for its benefit inured to its benefit when the treaty became effective as against Germany. The Congress was careful not to take any action which could be construed as a waiver or a relinquishment of the rights of the United States arising by reason of its participation in the war, or by reason of its being one of the principal victorious Powers, or by virtue of the terms of the armistice, or under the Treaty of Versailles, or by virtue of acts of Congress, such as those dealing with enemy-owned property and the like.

The position of the Congress in making these reservations was clearly and forcefully expressed by the Secretary of State of the United States in his note, quoted in part by the National Commissioners in their opinions embodied in the certificate of disagreement filed herein, which was communicated to the German Government on August 22, 1921, as follows:

The American Government asserts its intention to maintain all the rights obtained through participation in the war, and thus to maintain an equal footing with its former co-belligerents. It was clearly intended by Congress that America and its citizens should not be at any disadvantage compared with their associates in the war, although the United States did not ratify the Treaty of Versailles.

But there is nothing in these reservations of existing rights which reserves for or confers upon American nationals any rights *greater* than those stipulated for their benefit under the Treaty of Versailles as herein construed and heretofore construed by this Commission.

Section 5 of the resolution consists of but one somewhat complex and involved sentence into which numerous provisions have been crowded, doubtless by more than one draftsman. Obviously it was never intended to displace or to supersede or to enlarge the far-reaching, detailed, and meticulous provisions of Parts VIII and X of the Treaty of Versailles stipulated for the benefit of American nationals and read into the Treaty of Berlin. Property of the Government of Germany and of German nationals had come into the possession of and was held by the United States, by virtue of Congressional legislation. The Congress in declaring the war at an end expressly declared its intention to *retain* possession (that is, maintain the then existing status) of this property until such time as the German Government shall have

(1) made "suitable provision for the satisfaction of all claims" against Germany of American nationals who have since July 31, 1914, "suffered, through the acts of the Imperial German Government, or its agents, . . . loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in" domestic or foreign corporations "or in consequence of hostilities or of any operations of war, or otherwise;"¹¹

(2) granted to American nationals "most-favored-nation treatment . . .

¹¹ See also Administrative Decision No. II, this Commission's Decisions and Opinions, at page 12. [This JOURNAL, Vol. 18, at p. 183.]

in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights;"

(3) "confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals;" and

(4) "waived any and all pecuniary claims against the United States of America."

In this omnibus sentence the Congress declared that the property described of the German Government and of German nationals would be "*retained*" until all four of the enumerated conditions had been fulfilled by Germany. Obviously this section of the resolution was not intended to operate as a treaty but simply as a unilateral declaration of the United States of its right and purpose, notwithstanding its simultaneous declaration that the war was "at an end," to retain German funds which it already held until Germany had met all of the conditions enumerated. This Commission is here concerned only with condition numbered 1, although all four of these conditions will be found to have their substantial counterparts in the Treaty of Versailles.

In an able brief submitted herein by learned counsel and adopted by the American Agent¹² it is pointed out that by the language of Article I of the Treaty of Berlin the United States and its nationals¹³ shall have and enjoy the rights and advantages specified in the joint resolution "including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles," and from this premise it is deduced that the provisions of section 5 must be broader than those of paragraph 9¹⁴ which they "*include*." But this argument falls when it is noted that *section 5* does *not* include or anywhere mention or refer to the Treaty of Versailles, the rights under which were expressly reserved to the United States and its nationals by *section 2* which, as already pointed out, places on Germany no heavier burden, so far as concerns the claims of American nationals, than that placed on her by the Treaty of Versailles.

It is perfectly apparent that the provisions of section 5 are, with respect to Germany's obligations to pay for property damaged or destroyed, in several particulars much narrower than paragraph 9. For instance, Germany's obligations for property damaged or destroyed dealt with in section 5 are limited to damages suffered through the acts of Germany or her *agents*,

¹² Brief submitted by counsel for the Huasteca Petroleum Company, claimant in the *Mirlo* case, List No. 10988.

¹³ Resolution of the Senate of the United States of October 18, 1921, ratifying the Treaty of Berlin, with the express understanding "that the rights and advantages which the United States is entitled to have and enjoy under this treaty embrace the rights and advantages of nationals of the United States specified in the Joint Resolution or in the provisions of the Treaty of Versailles to which this treaty refers."

¹⁴ Paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles.

while paragraph 9 fixes liability on Germany under some circumstances for damages caused by the acts of Germany or her *allies* and under other circumstances for damages caused by the act of *any belligerent*. Section 5 does not mention or include "debts" as such, while, as heretofore pointed out, paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles makes provision for debts owing to American nationals by German nationals.

Through the much-misunderstood clause of section 5 dealing with claims of American nationals for "loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise," provision was made for the protection of all interests of American nationals in both domestic and foreign corporations, where such American nationals had indirectly suffered damage through the ownership of shares of stock in such corporations, or of bonds thereof, or otherwise.

This Commission in construing this language found in section 5 as applied to reparation claims said:

The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of *that act* must have been the loss, damage, or injury suffered. The *capacity* in which the American national suffered—whether the act *operated* directly on him, or indirectly as a stockholder *or otherwise*, whether the subjective nature of the loss was direct or indirect—is immaterial, but the *cause* of his suffering must have been the act of Germany or its agents.¹⁵

In other words, the indirectness of loss by American nationals dealt with in section 5 of the resolution refers to the nationality of the corporate or other entity or to the property in which they may have been interested rather than to the absence or remoteness of any causal connection between Germany's conduct and the particular losses complained of. "American" corporations were advisedly included in the enumeration of those through which as a stockholder an American national may indirectly suffer, so as to include American minority stockholding interests in corporations American in name only and foreign in majority stock ownership and control, because of which the United States, following precedents established by its Department of State, may, acting within its undoubted discretion, well decline to espouse the claims of the corporations as such. In all such cases American nationals have their remedy through the United States espousing their claims in their capacity of stockholders or otherwise, upon proving the extent of their damage and that they have not already been indirectly compensated through payment to the corporation. American nationals who had an interest in property destroyed and who suffered through its destruction, no matter in what capacity they suffered, whether directly or indirectly, are

¹⁵ Administrative Decision No. II, Decisions and Opinions, page 12. [This JOURNAL, Vol. 18, p. 183.]

protected to the extent of their interest. Thus construed, this clause of section 5 is in harmony with the established policy of the American Government to look behind forms and to the substance in discovering and protecting the interests of American nationals. It did not have the effect of broadening the terms of the Treaty of Versailles, but was a declaration of a rule which the United States would have invoked in construing that treaty in the absence of any such express provision.

In the resolution declaring the war at an end the Congress of the United States clearly manifested a purpose to demand that American nationals should in all things be placed on a parity with the nationals of the Allied Powers, not only with respect to claims arising during the period of American belligerency but also with respect to all damage caused during the period of American neutrality, by the acts of Germany. The position of the United States as one of the principal victorious participants in the war—a position which the Congress was careful to proclaim in section 2 of the resolution, and a position which America has at every step carefully preserved—entitled it to make this demand. But as hereinbefore pointed out and as pointed out by the decision in the Life-Insurance Claims¹⁶, the provisions of paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles, read in connection with the other provisions of Part X and those of Part VIII of that treaty, afford to American nationals as large a measure of protection as does the language of sections 2 and 5 of the resolution as carried into the preamble to the Treaty of Berlin.

That this was the view of the American State Department is disclosed by its note communicated to the German Government on August 22, 1921, and quoted in part by the National Commissioners in their opinions herein. There, it will be noted, the State Department expressed the belief that—

there is no real difference between the provision of the proposed treaty relating to rights under the Peace Resolution and the rights covered by the Treaty of Versailles except in so far as a distinction may be found in that part of Section 5 of the Peace Resolution, which relates to the enforcement of claims of United States nationals for injuries to persons and property. With respect to this provision, it should be noted *that it does not increase the obligations or burdens of Germany*, because all the property referred to would be held subject to Congressional action, if no treaty were signed, and would not be available to Germany in any case under the terms of the Treaty of Versailles, save as against reparation obligations. Whether the claims of the United States nationals are pressed in one way or another would be a matter of *procedure*, and would *make no practical difference to Germany in the final result*.

The clause of section 5 to which the Secretary of State here referred is the first of those conditions hereinbefore enumerated to *enforce* which the Congress declared its intention to *retain* the German property already in its hands. Paragraph 4 of the Annex to Section IV of Part X of the Treaty of

¹⁶ Decisions and Opinions, at page 131. [This JOURNAL, Vol. 19, at p. 601.]

Versailles empowered the United States to charge all property, rights, and interests of German nationals within its territory and the net proceeds of their sale, liquidation, or other dealing therewith, among other things, with the payment of claims of American nationals "growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before" the United States entered into the war. The similarity of the language used in paragraph 4 of that annex and in section 5 of the resolution is manifest and suggests that the framers of the resolution had paragraph 4 before them in drawing the resolution. The latter, however, went further than paragraph 4 of the annex, in that it provided for the retaining by the United States of the property of Germany and its nationals until suitable provision shall have been made by Germany for the payment of claims arising during American belligerency as well as claims arising during American neutrality. This is the procedural distinction referred to by the Secretary of State in his note quoted above, which distinction relates solely to the enforcement of claims of American nationals, without in any wise increasing "the obligations or burdens of Germany," and this distinction would, as pointed out by the Secretary of State, "make no practical difference to Germany in the final result."

This procedural distinction does not touch the definition of what Germany shall pay for. That definition found in the Treaty of Berlin does not enlarge the definition found in the Treaty of Versailles. Nor does it directly touch the question of *how much* Germany shall pay. That must be judicially determined by this Commission through the application of appropriate rules for measuring damages to the facts of such claims of American nationals as fall within the terms of the Treaty of Berlin. But the difference mentioned by the Secretary of State concerns only *how payment* shall be made or secured, and this, together with the further question of *when* payment shall be made, are political questions, to be settled by the appropriate political agencies of the governments concerned. Even this procedural distinction disappears when considered in connection with paragraph (h) (2) of Article 297 and paragraph (a) of Article 243 of the Treaty of Versailles, which in effect provide that the property of German nationals held by the United States may be applied to the payment of the claims and debts defined by Article 297 and paragraph 4 of the Annex thereto, and that any balance may be "retained" by the United States and, if so retained, "shall be reckoned as credits to Germany in respect of her reparation obligations;" that is (as that phrase is used in Article 243 applicable to the United States), Germany's reparation obligations to the United States arising during American belligerency, those arising during American neutrality having already been provided for by paragraph 4 of said Annex.

In the opinion of the Umpire the American Secretary of State was right when he expressed the belief to the German Government that "there is no real difference between the provision of the proposed treaty relating to rights

under the Peace Resolution and the rights covered by the Treaty of Versailles" and that the provisions of the peace resolution embodied in the Treaty of Berlin do "not increase the obligations or burdens of Germany."

That this was still the view of the Secretary of State of the United States when the agreement of August 10, 1922, was entered into, under which this Commission is constituted for "determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded by the two Governments on August 25, 1921," is disclosed by his note of August 8, 1922, to the German Government, also quoted from in the opinions of the National Commissioners, in part as follows:

As a matter of fact under a proper interpretation of the Treaty of Versailles probably all claims which are covered by the Treaty of 1921 are included in the Treaty of Versailles.

In its Administrative Decision No. II, handed down November 1, 1923, "Dealing with the Functions of the Commission and Announcing Fundamental Rules of Decision," this Commission said:

Clearly the United States is not in a position to base a claim on an isolated provision of the treaty without reading it in connection with all related provisions to ascertain its meaning and intent. Especially is this true in view of the second paragraph of subdivision (1) of Article II of the Treaty of Berlin, which provides that the United States in availing itself of the rights and advantages stipulated for its benefit in the provisions of the Versailles Treaty read by reference into the Treaty of Berlin "will do so in a manner consistent with the rights accorded to Germany under such provisions."

It will be borne in mind that when the joint resolution of the Congress approved July 2, 1921, was drawn the draftsmen had before them the Treaty of Versailles, in some part of which is found a substantial counterpart for every provision embodied in section 5 of the resolution. Quite obviously this unilateral resolution, which is most general in its terms, was intended by section 2 to safeguard and "reserve" the rights of the United States and its nationals and by section 5 to "retain" a practical method of enforcing those rights, pending the negotiation, execution, and ratification of a formal treaty "restoring friendly relations." Words used in that resolution must be taken to have the same meaning as the same words *used in connection with the same subject matter* found in the Treaty of Versailles. When this rule is applied there is no warrant for so interpreting the resolution of the Congress as to place upon Germany a heavier burden than that placed upon her by the Treaty of Versailles.

The underlying principles controlling the determination of some of the questions now certified are not new to this Commission. They were considered and applied in announcing its Administrative Decision No. III on December 11, 1923, where the rule was announced that—

III. In all claims for losses wherever occurring based on property destroyed during the period of belligerency and not replaced, falling

within classes (B) (2) (e) and (B) (3) (a) as defined in this Commission's Administrative Decision No. I, and also in all claims for losses based on property taken by Germany or her allies outside of German territory during the period of belligerency and not returned, the measure of compensation expressed in awards made will be the amount fixed by the Commission as the value of such property, with interest thereon at the rate of 5% per annum from November 11, 1918, to the date of payment.

Classes (B) (2) (e) and (B) (3) (a) as defined in this Commission's Administrative Decision No. I are those enumerated in paragraph 9¹⁷ hereinbefore quoted. They comprise damage suffered by American nationals caused by Germany or her allies in respect of all property (with the exception of naval and military works or materials) wherever situated which has been carried off, seized, injured, or destroyed, on land, on sea, or from the air, and also damage suffered by American nationals caused by any belligerent in respect of such property directly in consequence of hostilities or of any operations of war.

Elsewhere in that same decision (No. III, page 63) it is said that "the Commission holds that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place."¹⁸

¹⁷ Paragraph 9 of Annex I to Section I of Part VIII (Reparation) of the Treaty of Versailles.

¹⁸ This rule is generally accepted by international and municipal tribunals. That it is firmly established in American jurisprudence there can be no doubt. See the recent case of *Standard Oil Company of New Jersey v. Southern Pacific Company et al.*, decided by the Supreme Court of the United States April 20, 1925. In that case Mr. Justice Butler, delivering the unanimous opinion of the court, said: "In case of total loss of a vessel, the measure of damages is its market value, if it has a market value, at the time of destruction. . . . Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy. . . . It is to be borne in mind that value is the thing to be found. . . . 'It is the market price which the court looks to, and nothing else, as the value of the property.' . . . Value is the measure of compensation in case of total loss." In this case it will be noted that the court held that the Director General of Railroads of the United States, who was in the lawful possession of and operating the lost ship, and who would have continued to operate her for a period of some 18 months had she not been lost, was a special owner of the ship and that the general owner, Southern Pacific Company, was the owner of the reversion and "Together they had full title." The market value of the lost ship for which the Standard Oil Company was held liable embraced not only the compensation recoverable by the owner but also the compensation recoverable by the special owner. No issue of apportionment was made as between them, and the opinion does not deal with their relative rights.

Another phase of this same question was before this Commission in the early part of 1924, when it was called upon to define the principles to be applied by the American and German Agents and their respective counsel in the preparation and presentation of cases, and by the experts in the preparation of their report to the Commission, dealing with the value of American hulls lost during the period of belligerency. The Commission on March 11, 1924, handed down a decision in the form of an order approved by the Umpire and both National Commissioners, a copy of which is in the margin,¹⁸ reciting that after careful reconsideration of the entire subject of the principles to be applied *in assessing the value* of American hulls lost during the period of belligerency the Commission "is of the opinion that the principles announced in its Administrative Decision No. III handed down December 11, 1923, with respect to the measure of damages in all claims for property taken, should be here applied."

These rules have been consistently followed by the Commission. Under them damages for the destruction of American ships ("hulls"—cargoes being separately dealt with) have been measured. Under them damage to the plants and tangible properties of Belgian subsidiaries of American corporations has been assessed as damage done to the property of American nationals and awards have been made to the United States on their behalf. Under them the amount of Germany's liability for the material or physical damage of tangible property of every nature has been determined. In computing the reasonable market value of plants and other properties at the time of their destruction, the nature and value of the business done, their earning capacity based on previous operations, urgency of demand and readiness to produce to meet such demand which may conceivably force the then market value above reproduction costs, even the goodwill of the business,

¹⁸ Excerpt from the minutes of the meeting of the Commission, March 11, 1924:

"The Umpire announced that the Commission had given very careful consideration to the brief of the German Agent filed herein February 26, 1924, dealing with the principles to be applied in assessing the value of American hulls lost during the period of belligerency, and, after careful reconsideration of this entire subject, is of the opinion that the principles announced in its Administrative Decision No. III handed down December 11, 1923, with respect to the measure of damages in all claims for property taken, should be here applied. It was, therefore,

"ORDERED, That in all claims falling within the terms of the Treaty of Berlin based on the destruction of hulls and measure of damages which will ordinarily be applied is the reasonable market value of the property destroyed in the condition in which it was as of the time and place of destruction, if it had a market value; if not, then the intrinsic value of the property as of such time and place. While the reasonable market value, if there were a true and ascertainable market value, will control, notwithstanding the market may have been either depressed or inflated by abnormal conditions howsoever produced, still purely speculative factors will be eliminated as far as practicable in arriving at such market value.

"The American and German Agents and their respective counsel in the preparation and presentation of cases, and the naval experts in the preparation of their reports to the Commission, will be governed accordingly."

and many other factors, have been taken into account. But this is quite a different thing from assessing damage for loss of prospective earnings or profits for a period of years computed arbitrarily or according to the earnings of competitors whose properties were not destroyed, and the awards made by this Commission do not embrace the items claimed of prospective earnings or prospective profits.

Coming now to the application of these principles and rules to the concrete cases presented by the American and German Agents to this Commission for decision, it is found that they divide into the following categories:

(1) Cases on behalf of the charterer of a destroyed ship seeking to recover for loss of net profits which he would have earned during the entire life of the charter had the ship not been destroyed;

(2) Cases on behalf of the owner and/or master of a fishing schooner for

(a) the value of fish, provisions, consumable stores, gear and equipment, and other tangible property lost with the vessel, and

(b) the value of "the probable catch" which would have been made had the vessel not been destroyed;

(3) Cases on behalf of the owner of a destroyed ship for

(a) the value of fuel and other consumable stores on board at the time of the loss,

(b) the amount paid by him as lessee to the lessor of wireless apparatus under a contract obligating the lessee to pay a fixed amount in the event of its loss,

(c) the amounts paid by him to the master and crew of the ship for loss of their personal effects and nautical instruments and for personal injuries sustained by them and for hospital and medical services rendered them,

(d) the amounts paid by him to the master and crew of the vessel, including wireless operator, as wages and bonuses covering a period dating from the destruction of the ship until their return to the United States,

(e) the amounts he would have earned under pending contracts of affreightment or existing charter-parties and which he was prevented from earning by the destruction of the ship,

(f) war-risk insurance premiums paid by him, and

(g) refund of expenses incurred by him in establishing his claims before this Commission, including appraisals by experts, attorneys' fees, and the like; and

(4) Cases on behalf of individual members of the crew of a destroyed ship for personal earnings lost by them following the sinking.

Of these four categories of claims the first is by far the most important with respect to the amount involved. A case typical of claims of this category has been put forward by the American Agent, being Docket No. 24, the United States of America on behalf of the West India Steamship Company, Claimant, *v.* Germany. Briefs prepared by numerous counsel, reflecting both learning and industry, have been filed in this case by the American and

German Agents. It forms the basis of the principal part of the opinion of the German Commissioner embodied in the certificate of disagreement herein. The facts in this case will therefore be carefully examined.

The steamship *Vinland* was stopped and sunk by a German submarine during the period of America's belligerency, while on a voyage with a cargo of sugar from the West Indies to the United States. She was of Norwegian registry and ownership and operated by a Norwegian master and crew under the direction of an American charterer. When her papers were examined by the commander of the German submarine, he at once discovered that she was operating under an American charter and had a belligerent cargo (either American- or Cuban-owned) and advised the master of the *Vinland* that the ship would be sunk. After giving the master and members of her crew an opportunity to get away in their boats the sinking was accomplished by bombing. The charter-party under which she was operated was executed at New York January 29, 1918, on cable authority from the owner dated at Bergen, Norway, January 28, 1918. She was delivered on March 16, 1918, under this charter-party, which by its terms became effective for a period of three months from that date. She was lost on June 5, 1918, with her cargo.

The charter was the familiar form of "Time charter," and so designated. Under it the charterer, claimant herein, the West India Steamship Company, an American corporation, was for a valuable consideration given the entire service of the whole vessel with her master and crew, for a period of three months, or so much of that period as she was capable of rendering service. The owner agreed to maintain the vessel, to furnish it with a full complement of officers, seamen, engineers, and firemen appointed and paid by him, and to provide and pay for all provisions, wages, insurance, and also for all the cabin, deck, engine-room, and other necessary stores. The obligation of the owner was in effect to give to the claimant the whole ship for use within certain circumscribed territorial limits and for a limited period, coupled with the obligation on the part of the owner to maintain, navigate, and operate the ship under the direction of the claimant; in consideration for which the claimant agreed to pay in advance a fixed monthly rental, coupled with the stipulation that "should the vessel be lost, freight paid in advance and not earned . . . shall be returned to the charterers." The charter contained the usual *vis major* clause mutually excepting amongst others the acts of "enemies," and the usual "deficiency" clause stipulating that if time should be lost "from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the vessel for more than twenty-four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service," and also that during the time the ship should be out of service for the purpose of being bottom cleaned and painted "the payment of hire to be suspended until she is again in proper state for the service." The charterer had the right to appoint a supercargo.

to represent it on the ship, the owner furnishing him first-class accommodations, the cost of which was embraced in the hire paid. While this charter-party does not bear the essential indicia of a demise as found in well-considered and authoritative decisions of the municipal courts either of England or America, including the Supreme Court of the United States, still, in the last analysis, a demise is a matter of substance, not of form, and "The question as to the character in which the charterer is to be treated is, in all cases, one of construction"²⁰ of the particular charter, and of the facts and circumstances of the exercise of the rights arising thereunder. Nor is the question as to whether a particular charter is or not technically a demise, as that term is used by municipal tribunals, controlling in determining the right of the charterer of a ship which has been destroyed to an award under the Treaty of Berlin.

The cases now before this Commission put forward on behalf of charterers are cases where the chartered vessel has been destroyed. The rule for measuring damages under the Treaty of Berlin resulting from such destruction is that already announced and applied by this Commission; namely, the reasonable market value of the ship at the time and place of destruction, plus interest thereon, as prescribed in Administrative Decision No. III. As pointed out in that decision, different rules for measuring damages, "varying as the facts in the cases vary," are applicable in cases where ships are "(1) damaged but not destroyed, (2) destroyed but replaced, or (3) taken but returned to the private owner." The Commission has not attempted to lay down any general rules governing the measure of damages in such cases, but has expressly stated that each case falling within those categories would be dealt with as presented.

Most of the cases cited in the briefs of various counsel and put forward by the American and German Agents in support of their respective contentions that the present charter constitutes or does not constitute a demise, which cases arose out of damage to ships not destroyed, wherein a different rule for measuring damages obtains from that applied to cases of the kind now before this Commission, tend to confuse rather than clarify the questions here presented. Those cases involve questions of (1) liability of the charterer to the owner for rental fixed by the terms of the particular charter, or (2) liability as between the owner and the charterer for damage resulting from the negligent operation of the ship, or (3) the right as between the owner or the charterer, or the right of the owner or the right of the charterer, to recover for the loss of the use of a vessel damaged but not destroyed, where the liability of a third party for inflicting the injury either was not disputed or was satisfactorily established. Obviously the liability of the charterer for rental, or for the negligent operation of the ship, depends on the terms of the particular charter with respect to the nature and extent of the charterer's

²⁰ *Leary v. United States* (1872), 14 Wallace (81 U. S.), 607, at 610. *United States v. Shea* (1894), 152 U. S. 178.

possession, and the extent of his control over the navigation and operation of the ship, and on whether the charter was merely a contract for service or a demise of the ship during a fixed term. Likewise, as between the owner and the charterer the terms of the particular charter are important in determining the basis of apportionment between them of the amount of damage for which a third party is liable. But this apportionment does not affect the aggregate amount of such third party's obligation when established under appropriate rules for measuring damages applicable to cases where vessels are injured but not destroyed. On the whole, the rules sought to be evolved from these cases and applied to claims put forward on behalf of charterers of destroyed vessels are not particularly helpful in determining whether such claims fall within or without the terms of the Treaty of Berlin, or in measuring the claimant's recoverable damage, if any, under that treaty.

As applied to the loss of tonnage the tangible things destroyed are ships. The value of their use at the time and under the conditions then existing has been taken into account by this Commission as a factor in determining the market value of tonnage lost. Where, under the terms of a then existing charter-party, the charterer was at the time of the loss entitled to the use of the ship on terms which would have had the effect of reducing the price which the owner could have obtained for it *if sold burdened with the charter*, then at the time of the loss the charterer had a pecuniary interest in that particular ship, a *jus in re*, a property interest or property right the subject matter of which was the ship, an interest entering into and inhering in the ship itself. Such a right and interest is an encumbrance on the ship in the sense of constituting a limitation on the owner's right to possess, control, and use it and as affecting the price at which it could be disposed of in the market burdened with the charter. It is an interest in the subject matter which the municipal courts will protect against both the owner and those claiming under him with notice thereof.²¹ In cases where such interest existed at the time of the loss the measure of damages remains unchanged but the market value of the whole ship must be apportioned between the owner and the charterer in proportion to their respective interests therein; and the United States is entitled to an award on behalf of (a) the owner, if an American national at the requisite dates,²² in an amount equal to the price for which the ship could have been sold on the market at the time of loss *burdened with the charter*, with 5% interest thereon from November 11, 1918, or from the date of loss if destroyed at a later date, and (b) the charterer, if an American national at the requisite dates,²² in an amount equal to the difference if any between

²¹ *De Mattos v. Gibson* (1859), 4 De G. & J. 276, 8. W. R. 514, 45 English Reports Full Reprint, 108; *Messageries Imperiales v. Baines* (1863), 7 L. T. 763, 11 W. R. 322; *Great Lakes and St. Lawrence Transportation Co., et al. v. Scranton Coal Co.* (1917, C. C. A.), 239 Federal Reporter, 603; *The Aquitania* (1920, D. C.), 270 Federal Reporter, 239; *The Bjorneffjord, Flint, Goering & Co., Ltd., v. Robins Dry Dock & Repair Co.*, 1924 American Maritime Cases, 740.

²² Administrative Decision No. V, page 193. [This JOURNAL, Vol. 19, at p. 629.]

the said award on behalf of the owner and the reasonable market value of a free ship not burdened with the charter, with interest on the amount of this difference at the same rate and from the same date. This does not change the rule that so far as Germany is concerned her obligation is limited to making compensation for the tangible property destroyed—the ship—and that such compensation is measured by the reasonable market value of the ship at the time and place of its destruction plus interest thereon computed in accordance with the rules announced in Administrative Decision No. III. This rule for the apportionment of damages will be applied by this Commission in a case where an American-owned ship had been chartered to an alien on terms which operated to reduce its market value encumbered with the charter, and the owner's damage will be assessed at the reasonable market value of the ship *so encumbered*, with interest thereon. Conversely, in a case where the owner is not an American national, Germany will nevertheless be held obligated to make compensation to an American charterer to the extent of the difference if any between the reasonable market value of the ship free of the charter and the reasonable market value of that ship encumbered with the charter, with interest on the amount of this difference.

If the owner of an encumbered ship were awarded its entire unencumbered market value, then the owner who had made an improvident charter would profit by the destruction of his vessel. And if in addition thereto the charterer should, as contended by American counsel, be awarded an amount equal to the net value of the use of the ship during the full term of the charter, then Germany's aggregate obligations would be in excess of the aggregate of the reasonable market values of all interests in the whole ship.

Where a vessel was destroyed, Germany is obligated under the Treaty of Berlin to pay the reasonable market value of the whole ship, including all estates or interests therein, provided they were on the requisite dates²² impressed with American nationality. In arriving at the market value of the whole ship, it is a *free ship* that is valued, and no account is taken of the independent market value of any charter that may exist thereon. Such charter may at a given time be an asset or a liability as determined by several factors, chief among which is the relation of the stipulated hire to the current market hire.

When the whole ship destroyed was American-owned the aggregate amount of Germany's obligations for its loss is not affected by the existence of a charter or charters. But if any estate or interest in the ship was foreign-owned and the remainder American-owned, then Germany's obligations may be affected by the existence of a charter.

If the vessel destroyed was American-owned and under a foreign charter, and (a) if the stipulated hire was less than the current market hire, then ordinarily the charter was an asset to the charterer and an encumbrance and burden on the ship, so that the American owner owned less than a free ship;

²² Administrative Decision No. V, page 193. [This JOURNAL, Vol. 19, at p. 629.]

but (b) if the stipulated hire was more than the current market hire, then the charter ordinarily was a liability to the charterer, and an asset to the owner tending to increase the price which could have been obtained for the vessel by selling it on the market at the time of the loss, so that the American owner owned more than a free ship. In such a case, however, under the treaty, Germany's liability is limited to the reasonable market value of the tangible thing, namely, the free ship.

If the vessel destroyed was foreign-owned and under an American charter, and (a) if the stipulated hire was less than the current market hire, then the charter was ordinarily an asset to the charterer and an encumbrance and burden on the ship, decreasing the selling price which the owner could probably have obtained for the ship on the market at the time of the loss, so that the foreign owner owned less than a free ship, and the difference between the interest of the foreign owner and a free ship would have been the interest of the American charterer in that ship, the value of which American interest Germany, under the treaty, is obligated to pay; but (b) if the stipulated hire was more than the current market hire, then the charter was ordinarily a liability to the charterer, in which event he has suffered no damage resulting from the loss of the ship; but the existence of the charter may well be an asset to the owner tending to increase the price which the owner could probably have obtained for the ship by selling it on the market at the time of the loss, so that the foreign owner owned more than a free ship.

Applying what has been said to the case of the *Vinland*, it appears that the ship was destroyed. This was a physical damage to a tangible thing and falls within the treaty, if the other treaty requisites are present. The charter was not destroyed. By its own terms it terminated when the ship was destroyed, whereupon the charterer was entitled to a refund of such advance hire as had been paid but not earned. But if the charterer's rights and interest in the vessel were an asset in its hands existing at the time of the loss, then it had an interest *in the ship* at that time and *that interest* was destroyed. Hence a claim can be here asserted in its behalf to the extent of its interest in the reasonable market value of the ship at the time of its destruction.

The charter-party was entered into with full knowledge of the existence of a state of war, in which the charterer's nation was a principal belligerent; a condition which entered as a factor in determining the potential active life and the reasonable market value of the ship under a belligerent charter, and the reasonable market value, if any, of the charter itself²³ embraced in the reasonable market value of the whole ship. At the time of its loss the vessel belonged to the claimant to use during the charter term so long as she was

²³ In the case of *The Bjorneffjord*, Flint, Goering & Co., Ltd., v. Robins Dry Dock & Repair Company, in the United States District Court, Southern District of New York, 1924 American Maritime Cases, 740, the court held, "The charterer had a right to the use of the vessel, which had a value and could have been disposed of in the open market."

in a serviceable condition. But the claimant's right to use the ship was not an absolute right. It was limited by the risk of her being damaged or destroyed from *any* cause. It was limited by the right of the enemies of the United States lawfully to destroy the ship while in the service of a belligerent. These limitations on claimant's rights, as between it and the owner were expressed in the charter, and as between it and the enemies of the United States constituted implied conditions read into the charter, which was entered into in contemplation of *all* risks of loss, including the risks of war. No claim is made that the act of Germany in sinking the *Vinland* was unlawful as tested by the rules of international law governing the conduct of a belligerent. If that act was lawful then no right of claimant was invaded thereby, for while the claimant, as against her owner, had the right to the use of the ship, it never had a right to her use as against Germany's right lawfully to destroy her. However, as this Commission has frequently held, it is not concerned with the legality or illegality of Germany's acts but only with the question of determining whether or not Germany by the terms of the treaty accepted responsibility for the act causing the damage for which claim is made. Leaving out of consideration, therefore, the quality of Germany's act in destroying the *Vinland*, and assuming *arguendo* the correctness of the position of American counsel that the claimant had the legal right to the *continued* use of the ship and that that right was property which was destroyed, nevertheless the Umpire holds (1) that any loss of prospective profits as such resulting from the termination of that right is not a damage in respect of property for which Germany is liable under the reparation provisions of the Treaty of Berlin, but (2) that to the extent that the claimant's right to the use of the ship constituted an interest in the ship, comprehended in the computation of her reasonable market value at the time of her loss, Germany is obligated to make compensation on behalf of the claimant.

All marine insurance and war-risk insurance on the ship itself was carried and paid for by the owner. The charterer carried war-risk insurance to protect it against the loss of freight moneys which it would have earned had the cargo been delivered at destination, and it collected from two insurance companies \$11,000 war-risk insurance on account of the loss which it sustained in the sinking of the ship. This claim is here put forward for the net amount which the charterer would have earned from the carriage of such freight had it been safely delivered at its destination, less the \$11,000 received by the charterer from insurance companies; and also for the net amount which it is claimed the charterer would have earned from the carriage of freights on another round trip during the life of the charter, had the ship not been destroyed. Obviously the claim in the form presented is for the loss of prospective profits, and as thus presented it does not fall within the terms of the Treaty of Berlin.

But at the time the *Vinland* was destroyed the claimant by virtue of a

valid charter was, against her owner, entitled to the full use of the whole ship for a fixed term, to use as it saw fit. If the hire stipulated to be paid thereunder was less than the current market price, this charter had a market value. The charterer's interest in this vessel under this contract was "property . . . belonging to" the charterer within the meaning of that term as found in the treaty.²⁴ The ship was the charterer's ship, to use in its unrestricted discretion, within the territorial limits and during the time specified, for the only purpose for which she existed—the carriage of freight and passengers. She *belonged to the charterer* as against the owner, to tie up at a wharf, to load or unload, or to sail the seas, as it might direct.

Did this charter operate as a burden or an encumbrance on the ship so as to affect the price which a purchaser, desiring and able to buy, would have paid on the market for her, subject to the charter, at the time she was destroyed? If so, the owner at the time of her destruction owned only an encumbered ship, and the charterer had an interest in the ship when destroyed, equal to the difference then between the market value of a free ship and the market value of the encumbered ship.

But if the charter did not have the effect of encumbering the ship or affecting its market value, or if the stipulated hire was in excess of the current market hire at which similar ships could have been chartered, then the charterer has sustained no loss from her destruction falling within the terms of the Treaty of Berlin.

In a case, clearly distinguishable from the group of cases of which the *Vinland* is typical, an American judge used apt and forceful language, sought to be here applied by several American counsel, as follows:

The ship is the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew are the servants of the charterers. There is, in fact (to borrow a simile from another branch of the law), an estate carved out of the ship and handed over for a specified term to the charterer, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys, and the use of the vessel, master, and crew, for the advancement of the charterer's gains.²⁵

The Umpire subscribes to this statement of the law as applied to the facts of the case which the learned judge had before him, but it can not under the Treaty of Berlin be applied, as it is sought to be applied in many of the group of cases now before the Commission, not to carve an estate out of the ship, but to engraft upon the market value of the destroyed ship prospective profits which it is claimed would have been earned had the ship not been

²⁴ Paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles.

²⁵ Judge Hough in *The Santona* (D. C., 1907), 152 Federal Reporter, 516, at page 518. Cited with approval by Mayer, D. J., in *The Aquitania* (1920), 270 Federal Reporter, 239, at page 244, and by Goddard, D. J., in *The Bjorneffjord*, Flint, Goering & Company, Ltd., v. Robins Dry Dock & Repair Co., 1924 American Maritime Cases, 740.

destroyed, during periods varying in extent from a few days to several years, some extending far beyond the date of the signing of the armistice convention of November 11, 1918. In some instances it is probable that the amount so claimed equals or exceeds the reasonable market value of the whole ship at the time destroyed.

The Umpire holds that the United States on behalf of an American charterer of a ship which has been destroyed is entitled to an award against Germany to the extent, but only to the extent, it shall establish that the charterer had an interest in her reasonable market value free of charter at the time of her destruction and the extent of that interest.

The case of the charterer of the *Vinland*, West India Steamship Company claimant, has not been certified to the Umpire for decision, but has been put forward by the American and German Agents as typical of a group of cases before the Commission for decision. It and all similar cases will be prepared and presented by the respective Agents in accordance with the principles here announced.

In cases where the whole value of the tangible property destroyed is impressed with American nationality it will not ordinarily be necessary for this Commission to concern itself with apportioning the aggregate amount of the award between the owner and others claiming through or under him. The function of this international commission is to fix the amount of the financial obligations of Germany arising under the Treaty of Berlin. The distribution of the amount so fixed, as between the American owner of property damaged or destroyed and other American nationals whose rights are derived through him, is ordinarily a function for municipal tribunals according to local jurisprudence.²⁶

We now come to the application of the principles hereinbefore announced to the remaining three of the four categories, with their several subdivisions, of concrete cases presented by the American and German Agents to this Commission for decision. When Germany's obligations in respect to these several categories of claims are mentioned, it will be understood that they refer to Germany's obligations to pay claims impressed with American nationality on the essential dates as defined by Administrative Decision No. V.²⁷

The Umpire decides that—

With respect to category number (2), dealing with claims on behalf of the owner and/or master of fishing schooners:

Germany is obligated to pay (a) the reasonable market value of the fish, provisions, consumable stores, gear, equipment, and all other tangible property lost with the vessel, but

²⁶ See Administrative Decision No. II, pages 8 to 10, inclusive. [This JOURNAL, Vol. 18, pp. 180-182.]

²⁷ Administrative Decision No. V deals with "Germany's obligations and the jurisdiction of this Commission as determined by the nationality of claims." [This JOURNAL, Vol. 19, p. 612.]

Germany is not obligated to pay (b) the value of the "probable catch" which had not been caught but which it is claimed would have been caught had the vessel not been destroyed;

With respect to category number (3):

Germany is obligated to pay on behalf of the owner of a destroyed ship—

(a) to the extent of the owner's interest therein, the reasonable market value of fuel and other consumable stores on board the destroyed vessel at the time of her destruction;

(b) the reasonable market value of wireless apparatus leased by the owner, under a contract to pay a fixed amount in the event of loss thereof, which amount has been paid by the owner to the lessor—not exceeding, however, the amount so paid, it being the value of the property or the owner's interest therein, not the cost of it or the liquidated damages fixed by the contract between the lessor and the owner, that constitutes the measure of Germany's obligation;

(c) the reasonable market value of the personal effects and nautical instruments lost by the master and/or members of the crew of a destroyed vessel, to the extent of payments made to them therefor by the owner; and also reasonable compensation for personal injuries sustained by them, and for hospital and medical services rendered to them, to the extent of payments made to them or for their account by the owner; *provided*, however, that such master and members of the crew owed permanent allegiance to the United States at the time of suffering such loss or injury and at the time the payments were made to them by the owner;

Germany is not obligated to pay on behalf of the owner of a destroyed ship—

(d) the wages and bonuses paid by him to the master and crew thereof, including wireless operator, covering a period from the date of the destruction of the vessel until their return to the United States;

(e) the amount he would have earned under pending contracts of affreightment, or under an existing charter-party, which amount represents prospective profits lost to him by the destruction of the ship;

(f) the amounts paid by him for war-risk insurance;

(g) the expenses incurred by him in establishing his claim before this Commission, including appraisals by experts, attorneys' fees, and the like;

And with respect to category number (4):

Germany is not obligated to pay claims put forward directly on behalf of individual members of the crew of a destroyed ship for prospective personal earnings lost by them following the sinking.

It will be noted that paragraph (9) of Annex I to Section I of the reparation provisions of the treaty covers "Damage in respect of all property *wherever situated*" and that paragraphs (1) and (2) of this Annex cover "Damage . . . *wherever arising*." Claims of American nationals arising in German territory, or with respect to damage to property situated in

German territory, falling under the reparation provisions of the treaty, will be governed by such provisions. But claims of American nationals resulting from damage or injury to their property, rights, or interests in German territory as it existed on August 1, 1914, by the application either of exceptional war measures or measures of transfer, as those terms are defined in the treaty, will be governed by the economic provisions (Part X) of the treaty, under which a different rule for measuring damages obtains. This distinction is illustrated by a case²⁸ decided by the Anglo-German Mixed Arbitral Tribunal, wherein it was held that

A claim in respect of the loss of profits, wages paid to the crew while under detention *in Germany*, and other expenses occasioned by the detention and use of a merchant steamer by the *German authorities* during the war, comes under the provisions of Part X (Article 297 (e)) of the Treaty of Versailles and not under Part VIII of the treaty.

Here the crew was interned first on a prison ship and then on shore. The vessel remained unused in the port of Hamburg for about one year and thereafter was used by the German military authorities for carrying coal. She was not destroyed and was ultimately returned to her British owners. The tribunal held that, under the provisions of Part X of the treaty, Germany was obligated to pay to the owner of the ship the net annual profits which the operation of the ship would probably have yielded to the owner during her potential active life, taking into account war conditions; and also the amount paid by the owner as wages and allowances to the crew, up to the date of the internment of the crew but not thereafter.

All questions concerning the measure of damages in claims of this nature before this Commission falling within the provisions of Part X of the treaty will be dealt with in each case as presented.

This decision in so far as applicable will control the preparation, presentation, and decision of all claims submitted to the Commission falling within its scope. Whenever either agent is of the opinion that the peculiar facts of any case take it out of the rules here announced, such facts, with the differentiation believed to exist, will be called to the attention of the Commission in the presentation of that case.

Done at Washington May 25, 1925.

EDWIN B. PARKER,
Umpire.

²⁸ The Owners of the S. S. *Seaham Harbour*, Claimants, v. German Government, (1922) I Decisions of Mixed Arbitral Tribunals, 550 (1924) IV, *ibid.* 27.

ADMINISTRATIVE DECISION NO. VIII DEALING WITH CLAIMS OF THE ASSOCIATION OF AMERICAN HOLDERS OF FOREIGN SECURITIES, INCORPORATED, AND ITS MEMBERS

Decision, May 27, 1925

The rule of the Commission requiring notice of all claims to be filed within six months after its first meeting is a stipulation agreed to in notes exchanged between the German and American Governments and therefore became a part of and must be read into the agreement conferring jurisdiction upon the Commission. It has the force of a jurisdictional limitation upon the claims which the Commission is authorized to pass upon.

The purpose of this stipulation could not be fulfilled by the filing of a general blanket notice that a group or class of claims would subsequently be presented. It is essential that the notice given in a claim to be presented should identify it as a claim which had been previously submitted to the Department of State and also examined and prepared for notification.

The doctrine with regard to the legal effect of the ratification of contracts between private persons under municipal law has no bearing to evade the legal effect of an international agreement fixing a certain period within which the claims must be notified.

BY THE COMMISSION:

The Agents of the two governments have requested a ruling by the Commission as to its jurisdiction over certain claims on the following agreed statement of facts:

The above named association, an American corporation, organized and existing under the laws of the State of Rhode Island (Exhibit 1, filed with Statement of Facts), on April 9, 1923, filed with the American Agency notice of claim on behalf of said association and its members against the Government of Germany, which notice was transmitted by the American Agency to the Department of State and referred by said department to the American Agent under the Rules of the Mixed Claims Commission IV (d) on April 9, 1923. The said association, as such, does not own or claim to own any of the securities involved in the claims herein referred to. At the time of the filing of the notice, as aforesaid, the American Agent had no information regarding the names of the members of said association, or as to the amount of damage, if any, said to have been suffered by each of the members. On or about May 12, 1924, the said association submitted to the American Agent a list purporting to contain the names of the members of the association as of April 9, 1923, which list also showed the amount of damage alleged to have been suffered by each member (said list is filed as Exhibit 12, and accompanies the Statement of Facts). On or about November 11, 1924, the said association filed a corrected list in four parts purporting to contain the names of parties elected to membership under the provisions of the by-laws, in the said association at meetings of the stockholders thereof held on April 2 and April 4, 1923. Part 1 comprises a list purporting to contain the names of customers of the firm of Zimmerman and Forshay submitted by Lewis A. McGowan on April 2, 1923, and elected members of the association under the provisions of Article 3, Section 3 of the by-laws; Part 2 comprises a list purporting to contain the names of firms and individuals submitted by

Lewis A. McGowan on April 2, 1923, and elected to membership in the association in accordance with the provisions of Article 3, Section 5, of the by-laws thereof; Part 3 comprises a list purporting to contain the names of individuals submitted by Lewis A. McGowan on April 2, 1923, and elected as members of the association under the provisions of Article 3, Section 3, of the by-laws thereof; Part 4 comprises a list purporting to contain the names of customers of the firm of George F. Redmond and Company submitted by William R. Turner on April 2, 1923, and elected as members of the association under the provisions of Article 3, Section 3, of the by-laws thereof (See for the four parts of this list Exhibit 25, accompanying the Statement of Facts). It is the understanding of the American Agent that the names of the individuals appearing on Part 1 of the list of members comprise such members as were holders of securities acquired subsequent to November 11, 1918. According to the proof submitted the firm of Zimmerman and Forshay of New York, acting through John S. Scully, one of the members of the firm, prior to April 9, 1923, conferred with Lewis A. McGowan and authorized him to have such customers whose names appear on Part 1 elected as members of the association. This action was taken voluntarily by said firm for the benefit of such customers, without their knowledge or consent; said customers were, however, subsequently notified of the action so taken (Exhibits 19, 20 and 24, accompanying Statement of Facts). The names appearing on Part 2 of the list of members comprise, in the main, names of firms dealing in German securities. Part 3 of the list of members comprises two individuals who, prior to April 9, 1923, authorized, according to evidence submitted, Lewis A. McGowan to take the necessary steps to secure their election as members of the association (Exhibit 17, accompanying Statement of Facts). Subsequent to April 9, 1923, Lewis A. McGowan submitted sworn statements covering claims on behalf of four firms and/or individuals whose names appear on list Part 1. The American Agent is advised that Lewis A. McGowan has secured, but not as yet filed with the Agency, ratifications by at least five hundred parties whose names appear on the list of members of the association. He is further advised that similar ratifications by the others appearing on the list of members of the association are being submitted to Lewis A. McGowan daily (Form of ratification, together with form of power of attorney, will be found attached to Exhibit 20, accompanying Statement of Facts). The American Agent was furnished on or about December 4, 1924, by Lewis A. McGowan, with thirty-three powers of attorney duly executed by parties whose names appear on said lists.

On these facts the Agents of the two governments request an administrative ruling on the question "whether, under clause (d) of Rule IV of this Commission, the ratification subsequent to April 9, 1923, of the election of said parties in the list of members filed with the statement of facts herein constitutes the parties so ratifying such election members of said association as of the date of their election prior to April 9, 1923, so as to enable said

parties to present in their own behalf or through said association proof of claims for the consideration of this Commission under the notice of claim filed herein (Exhibit 1, filed with the statement of facts)."

The provisions of Rule IV (d) referred to in the foregoing question are as follows:

(d) Within six months after October 9th, 1922, the American Agent shall give notice of all claims which will be submitted to the Commission and not already filed, by delivering to the Secretaries a list or lists of such claims, and a copy thereof to the German Agent.

This rule is based on a stipulation agreed to by the two governments in entering into, and as part of, their agreement of August 10, 1922, under which this Commission is organized. This stipulation in the form finally agreed upon is set out in the note of August 10, 1922, from the American Ambassador at Berlin to the German Chancellor as follows:

With regard to your suggestion that the Commission shall only consider such claims as are presented to it within six months after its first meeting, as provided for in Article III, I have the honor to inform you that I am now in receipt of instructions from my government to the effect that it agrees that notices of all claims to be presented to the Commission must be filed within the period of six months as above stated.

For the reasons above stated, this stipulation became a part of, and must be read into, the agreement which confers jurisdiction upon this Commission, and it accordingly has the force of a jurisdictional limitation upon the claims which this Commission is authorized to pass upon. The purpose of this stipulation is expressed by the German Chancellor in his note of the same date, to which the American Ambassador's note is a reply. The German Chancellor says:

In the view of the German Government it would furthermore be in the interest of both Governments concerned that the work of the Commission be carried out as quickly as possible.

The purpose of this stipulation could not be fulfilled by the filing of a general blanket notice that a group or class of claims would subsequently be presented. Moreover, if such a notice were held to be sufficient, the stipulation would be meaningless, because the general classification of claims to be considered by the Commission is embodied in the three categories of claims in Article I of the agreement of August 10, 1922. In order to give meaning to the stipulation, therefore, it is necessary that the notice should identify the claims more specifically than merely as claims within these categories which are to be presented on behalf of unnamed claimants. This view is confirmed by a statement made in a circular letter issued by the Department of State, which was given wide publicity, announcing the organization of this Commission and calling attention to the time limit within which notice of claims must be given. This circular letter states:

In order that the desired notice can be given to the commission within

the required time, it is important that claims be presented to the Department at as early a date as possible so that they may be examined and prepared for notification to the commission.

In other words, before the notice can be given, the claims notified had to be "presented to the Department" and "examined and prepared for notification to the commission." It is essential, therefore, that the notice given of a claim to be presented should identify it as a claim which had been previously submitted to the Department of State and also examined and prepared for notification.

It is contended on the part of the claimants in this case that the notice given as described in the above-quoted Agreed Statement of Facts complies with this requirement.

The agreement of August 10, 1922, including the stipulation of the same date, which, as above stated, is embodied in it, fixes the jurisdiction of this Commission, and its application is governed by public and international law.

The real parties to the agreement are the two Powers concerned and no contractual relation, either under municipal law or under international law, exists between the persons on behalf of whom the United States, being the only claimant existing,¹ is presenting claims and the German Government as the defendant.

The much disputed doctrine with regard to the legal effect of a ratification of contracts between private persons *under municipal law* has therefore no bearing here.

The real purpose of fixing a certain period within which the claims must be notified has been stated above.

To evade this legal effect of an international agreement recourse cannot be had to technicalities of municipal law.

Even if it be proved that the "members" of the claiming association were "elected" to their membership before April 9, 1923, it is undisputed that such "members," with possibly some exceptions which do not concern the Commission in this decision, did not know about their "election" and neither were bound to accept it nor did they accept it before April 9, 1923.

If, nevertheless, these "members" should now be allowed to bring their claims before the Commission by accepting the "membership" after the expiration of the time agreed upon between the two governments, this would mean that the time for filing claims with the Commission was kept open, beyond the time fixed by the stipulation, for the benefit of certain claimants who were unknowingly elected to the membership of the claimant association before April 9, 1923. Such result would clearly be contrary to the real purpose and meaning of the stipulation as above defined.

Therefore the question submitted to this Commission under the foregoing agreed statement must be answered in the negative, since a ratification subsequent to April 9, 1923, of the election of parties in the list of members filed

¹ See Administrative Decision No. II, page 8. [This JOURNAL, Vol. 18, p. 179.]

with the statement of facts does not enable the parties so ratifying such election to present proof of claims in their own behalf or through the claiming association for the consideration of this Commission.

Although this decision deals only with the jurisdiction of this Commission under the agreement of August 10, 1922, and not with the liability of Germany under the Treaty of Berlin, nevertheless it is appropriate to point out that under certain other recent decisions of this Commission a large portion of the claims under consideration would not be sustained as financial obligations of Germany within the terms of the Treaty of Berlin, even if they were allowed to be presented to this Commission on their merits.

Done at Washington May 27, 1925.

• EDWIN B. PARKER,
Umpire.

CHANDLER P. ANDERSON,
American Commissioner.

W. KIESSELBACH,
German Commissioner.

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BOOK REVIEWS AND NOTES *

La "Querela Pacis" (La Plainte de la Paix) d'Érasme (1517). By Mme. Elise Constantinescu Bagdat. Paris: Les Presses Universitaires de France, 1924. pp. xv, 218. Distributed by Martinus Nijhoff, The Hague. 4 Gld.

When this scholarly book is translated into our own tongue, it will be widely read throughout the English-speaking world. The reason will be, not that we have no edition of that remarkable work, *The Complaint of Peace*, in English, for there are a number of editions available; rather because nowhere in English, or probably in any other language, is there any such illuminating commentary upon the origin of the work, upon its various editions, upon Erasmus' ideas of war, or upon the historical and philosophical value of this early sixteenth-century expression of the will to world peace.

The text of Erasmus' work, appearing here as a translation from the edition of Clericus, Lugduni Batavorum, 1703-1706, is preceded by a letter from the author to Philippe, Bishop of Utrecht. It is followed by notes, a full bibliography, and an alphabetical index of proper names.

One reading the commentaries in this book readily understands why a renaissance of Erasmus is on the way among the scholars of the world. Erasmus' *Colloquies* and *The Praise of Folly* made his name a household word in his own day and to three centuries that followed. One critic says that they are the only works by Erasmus read for their own sake today. This book, however, gives no uncertain conviction that Erasmus has a message for all interested in the international problems of our own time. After reading this fresh contribution to an understanding of Erasmus, one finds it difficult to question the author's estimate of *The Complaint of Peace* as "*l'ouvrage d'Érasme qui a été le moins remarqué et qui mérite le plus d'attention.*"

In his more familiar works, Erasmus shines as a satirist, looks upon his world as a mess of folly, throws his jibes at kings and princes and popes; and yet he received bounty and munificence from those same kings, princes and popes. He was sought by all of the leading schools of his time; indeed, he was the most sought-after man of his day. Madame Bagdat gives us the distinct impression that this father of the Reformation, yet friend of every school of religion, this ardent lover of letters, fêted by scholars high and low in his own day, deserves his rebirth amid the attentions of our own. One catches here anew the peculiarly nonpartisan nature of Erasmus, founded in

* The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes. ED.

an infinite reasonableness, in a loathing of all fanaticism, in an abounding common sense, in sound learning. Erasmus could assail the rich and powerful without losing their friendship. He was a pacifist with an informing poise that won rather than alienated intelligent men. Dr. Bagdat serves our times by introducing to us again Desiderius Erasmus, through his *The Complaint of Peace*.

The new interest in Erasmus is both the cause and the result of newly discovered materials relative to this man. The edition of the "letters" by Percy Stafford Allen, the *Bibliotheca Erasmiana*, the works of Kalkoff, Zickendraht, Woodward, Nichols, are evidences of the new awakening of which this book is far from an inconspicuous expression.

The Complaint of Peace was read for its own sake in its own day. It was published at the request of John Le Sauvage, Bergundian Secretary of State, in the light of the then approaching Conference of Cambrai, in March, 1517. This new book convinces one that the old masterpiece may well be read for its own sake today.

Erasmus knew war at first-hand. He was in England in 1514, at a time when England and France were at war. During that year he wrote a letter to the Abbot of Saint Bertin, said to be the first of his writings against war. This letter was developed a year later under the title *Dulce Bellum Inexpertis*, a work published in this country in 1907 under the caption, *Erasmus Against War*. Then came *The Complaint of Peace*. The author's careful analysis of the *problème très délicat* of the date of the first edition of this *Complaint of Peace*, which she places in 1517, is but one of a number of her delicious examples of scholarly analysis.

Perhaps Erasmus' chief interest—he was a man of many interests—was to convince men that war is confusion and "a sink of all manner of vices," as he says in one of his *Colloquies*; but as he says here, "I do not condemn every war, for some are necessary, nor do I taunt any prince, yet it can not be denied that when war breaks out there is a crime on one side or the other, if not on both."

But this book by Erasmus brings before us not only Erasmus' condemnation of the war system; it is a veritable and abiding picture of those fifteenth and sixteenth century social agencies creating national states and capitalistic methods, of the passing of the renaissance and the dawning of a new era indeed.

It is an interesting fact that a French translation of *The Complaint of Peace* was one of the books by Erasmus examined in Paris by the Sorbonne, in 1525, and condemned to be burned. Indeed later, Berquin, the translator of the condemned text, was himself sent to the stake. Times have certainly changed, for this gracious edition by the daughter of Dr. Georges Constantinescu, "*mort en 1918, victime du devoir*," is published by *Les Presses Universitaires de France*.

ARTHUR D. CALL.

Histoire Diplomatique de la Grèce de 1821 à nos jours. By Edouard Driault and Michel Lhéritier. Paris: Les Presses Universitaires de France, 1925. 3 vols. pp. xvi, 475, xv, 498, xxiii, 516.

This work is a most valuable contribution to an important phase of the everlasting Eastern Question which occupies such a prominent part in the history of the world. Strictly speaking, the Turkish problem, known under the name of the Eastern Question, began with the Greek War of Independence (1821-1828), from which time the gradual dismemberment of the Ottoman Empire commenced.

The first volume, after reviewing the events of past centuries bearing upon this question, narrates the diplomatic history of the years 1821 to 1830 connected with the incidents and the negotiations for the settlement of the conflict between the insurgent Greeks and Turkey. The second volume, beginning with the preliminary negotiations for the formation of a Greek State, ends with the expulsion from the country of the first king of Greece, the Bavarian Prince Otho. The third volume continues the narrative from 1862 to 1878, the period of the Danish dynasty in Greece to the conclusion of the Treaty of Berlin of 1878.

The authors in their first volume, after surveying the struggles of the European Powers with Turkey, mention the dreams of some of the Christian princes to ascend the throne of Constantinople, describe in detail the famous project of Catherine II of Russia to revive the Byzantine Empire by crowning her grandson Constantine as the Emperor of Byzantium, and end by a reference to the famous treaty of Tilsit of 1807 between Napoleon and Alexander I of Russia. The first quarter of the nineteenth century which is replete with important political events, is also the epoch of the renaissance of Greece, but on account of the views then held by the sovereigns and their statements upholding the doctrine of the Holy Alliance, the rebirth of Hellas encountered serious difficulties. The authors lay stress on the preservation of their nationality by the Greek people by linking it with their religion. "The Church," they say, "was the conservator of the Greek nation, the hope of its resurrection, the pledge of its imperishable destiny." After referring to the events of the Greek Revolution the massacres on "a large and small scale," the battle of Navarino which had a decisive influence in the creation of the Greek State, the historians describe the tortuous methods of European diplomacy and particularly the intrigues of Prince Metternich, the pivot of the Holy Alliance, and the arduous negotiations with the Sultan's Government, who only gave way to the counsels of the Powers when the Russian army reached Adrianople in 1829 and threatened to march to Constantinople, the result of which was the acceptance by the Turks of the decision of the Powers to form a Greek State out of the provinces then under the Sultan. The book is replete with sources of information taken from official documents of the various governments, some being derived from archives not yet published.

The second volume begins with a description of the renewal of the negotiations with the Sultan's ministers and the final consent of Turkey for the creation not of a semi-sovereign state, as was intended, but of an independent state of Greece. After reviewing the various political events of that time in Europe, the authors give a vivid picture of the intrigues of the ministers of the Powers in Athens during the reign of King Otho, each diplomatist straining every nerve to undermine the influence of the other. The years 1843-1862 were full of internal and external troubles in Greece. Internal, they were due to the arbitrary methods of the King, and the support he found among some Powers; external, they were always with Turkey on account of the efforts both of King Otho and the Greek people to free their kinsmen across the border. This volume ends with the description of the happenings in Greece in 1862, which resulted in the expulsion of King Otho and Queen Amelia on account of the violation of the royal promise to respect the Constitution which the king granted after the revolt against him in 1843.

The third volume which is also founded on official documents, some even as yet unpublished, deals with the events of the period of 1862 to 1878. The authors, after describing the diligent efforts of the three "Protecting Powers," namely, England, France and Russia, to find a suitable prince to rule over turbulent Greece, and the selection this time of a scion of the royal family of Denmark who, under the name of George I, King of the Hellenes, was installed in Greece, narrate at length the various political events of this reign, the Cretan question occupying a prominent part in it. The authors give us the interesting information that Napoleon III conceived the idea of forming a Greek Empire in Europe, with Constantinople as its capital, and also an Arab Empire by uniting the Arabic-speaking people into one powerful state, and that he actually approached England on the subject, but that the British Government disapproved the project and furthermore that Russia informed the Sultan about it. Here we are given an outline of a treaty of alliance concluded between Greece and Serbia in September 14, 1867, which, being renewed in after years, played such a prominent part during the Balkan wars of 1912-1913. This volume deals extensively with the rising of the Slavs and the Bulgarians, the Russo-Turkish War of 1877-1878, the conflicting interests of the various European Powers in the Near East, the diplomatic struggle between "the elephant and the whale," to use the expression of Prince Bismarck (namely Russia and England), and the signature of the famous Treaty of San Stefano by which Russia created Greater Bulgaria, extending from the Aegean to the Black Sea. As it is known, this treaty was superseded by that of Berlin of 1878, which in after years gave rise to numerous questions, such as the Cretan, Macedonian, Armenian, and others, which the authors promise to treat in a subsequent volume, bringing the narrative up to our days.

THEODORE P. ION.



Recent Developments in International Law. By James Wilford Garner. University of Calcutta, 1925. pp. xiii, 840. Index.

Professor Garner's lectures, delivered at the University of Calcutta under the Tagore Professorship in 1922, will meet with a very welcome reception from both students of international law and the wider circle of the general public interested in the great problems of our foreign policy. The volume differs from the average textbook in being less formal in arrangement and less dry and technical in its presentation of the subject. The lectures deal successively with the development of the conventional law of war and its interpretation and application during the World War, and with the growth and progress of international arbitration, conciliation, legislation, administrative organization and judicial institutions. The two closing lectures tie up with the opening lecture on recent and present tendencies in the development of international law by discussing the progress of codification and the "reconstruction" of international law.

Two outstanding characteristics of Professor Garner's volume may first be mentioned. Since the lectures deal only with the recent developments of international law, they omit consideration of the older customary law, except in respect to those phases which were called into question during the World War or which have been modified by recent general conventions. Thus the lectures are a sort of commentary upon modern conventional law and are to the reviewer the best comprehensive treatment that we have in English of the progress that has been made in this field down to 1922. Further, the author is thoroughly familiar with the writings of European publicists, and by means of numerous footnotes keeps us closely in touch with the continental point of view both upon debated questions of the law of war and upon the theoretical principles underlying the future development of the law of peace. In this respect Professor Garner has done us a great service, for the average American publicist is too little aware of the significant contributions that are being made to the science of international law by foreign scholars, principally French and German.

Following the opening address, seven lectures deal with the international conventions adopted at The Hague in 1899 and 1907 regulating the conduct of war. The author anticipates a reproach on the part of certain readers for having devoted an undue proportion of space to the law of war, but justifies himself by pointing out that as a matter of fact the recent developments of international law (to the date of the preparation of the lectures) have related more largely to the law of war than to the law of peace. While admitting that the laws of war have been frequently violated during recent wars, particularly during the World War, and while conceding that many of the violations were due to the inherent conditions of modern warfare as well as to the repudiation by belligerents of their obligations, the author is nevertheless of the opinion that the laws of war are still valuable as restraint upon excesses, and he does not share the view of those who hold that any attempt

at revision is waste effort. Specific changes are suggested as means of bringing the laws of war more into touch with the new conditions.

The lecture on the Treaties of Peace and International Law is an able and very useful summary of the legal aspects of the several treaties entered into in 1919. This is followed by an equally valuable survey of the progress of international arbitration, including a study of the establishment of the Hague "Permanent Court" and an analysis of the decisions rendered by it. Perhaps the best chapter in the volume is the lecture on the Development of International Legislation and Organization. Here the author traces the progress from the earlier political congresses, which arbitrarily laid down rules of law for the family of nations, to the international "unions" created for the promotion of economic and social interests, and finally to the League of Nations. The analysis of the Covenant of the League and of its implications in respect to the traditional principles of international law is a balanced and impartial statement which may be commended to all students of international organization. So also the chapter on the Development of the International Court of Justice will bear study as an unbiased description of the problems involved in the creation of an international court.

In respect to the codification of international law, Professor Garner is of the opinion that the method to be followed should be that of "partial and gradual" codification, the materials to be furnished by scientific bodies and the adjustment of conflicting points of view to be left to official international conferences. The closing chapter on the Reconstruction of International Law deals largely with the revision of the laws of war, but the author realizes that the "true function of international law" should be rather the regulation and promotion of pacific relations between states, and he points out that in the future there will be more and more a "shifting of emphasis from the rights of states to duties; from individual to collective responsibility; from national sovereignty to international control; from independence to interdependence and ultimately the law governing the relations of states will tend to become less and less international and more and more supernational."

It is the hope of the reviewer that this volume, so readable in style, so scholarly in substance, and so moderate in tone, may reach a wide circle of readers.

C. G. FENWICK.

New Governments of Central Europe. By Malbone W. Graham, Jr., assisted by Robert C. Binkley. New York: Henry Holt and Company, 1924. pp. x, 683. 6 large charts. Index.

This work is divided into three parts. Part I, consisting of 407 pages, treats of the governments of Germany, Austria, Hungary, Czechoslovakia, and Yugoslavia. In this the author traces the progressive breakdown of the

empires in Germany and Austria-Hungary and the establishment of the republics in the succession states, closing with four chapters on the political renaissance in Yugoslavia. An analysis of the actual process of revolution and reorganization has been attempted, including the rôle of political parties in this process. In a work of this character there is bound to be some unevenness of treatment; for instance, whereas there is a rather full account of the rise of the People's Republic and the Republic of Soviets in Hungary, the treatment of the legislative activity attendant upon the restoration of the old constitutional order there seems somewhat inadequate, especially when we consider that the legislation passed subsequent to February 28, 1920, is still in force. However, in the main Professor Graham has achieved his purpose with notable success.

Part II, consisting of 230 pages, consists of selected documents illustrative of the text. One is inclined to marvel at the prodigality of the publishers who can afford, in a work for sale to the general public and to college students, to include among other documents of permanent value so many proclamations, manifestoes, telegrams, party programs, etc., of transitory or historical interest. There are some lacunae in this part; for instance, the Hungarian laws mentioned above. However, we should be very grateful to Professor Graham for what he has done. Students of international affairs will find here many documents nowhere else available in English, and among these not a few of real constitutional importance.

The third part is an index of 29 pages, making the book a thoroughly useful manual or reference book for the subject and period covered.

HERBERT F. WRIGHT.

Hugo Grotius—Opinions sur sa vie et ses oeuvres, recueillies à l'occasion du tricentenaire du "De iure belli ac pacis," 1625-1925. By A. Lysen, with a preface by Jacob ter Meulen. Leyden: A. W. Sythoff, 1925. pp. x, 109. 4.50 guilders.

This is a collection of twelve brief essays (six in French, four in English, one in German, and one in Latin), each a gem, and each masterfully describing some field of human endeavor in which Hugo Grotius displayed prominence. A word about each.

I. The first, a French translation of a Dutch article by C. van Vollenhoven on "The Book of 1625,"¹ traces down to modern times its influence on two fronts: against those who admit no limitations on the rights of states, except their own national interest; and against pacifists. It ends with a few words about the circumstances under which it was written.

II. It is followed by a French translation of another Dutch article,² written in 1883 by T. M. C. Asser, to commemorate the tricentenary of the birth

¹ *Het boek van 1625* (in *De Gids*, janvier, 1925).

² *Hugo de Groot, 1583—10 April—1883* (in *De Gids*, avril, 1883).

of Grotius. It lays stress upon the contribution of Grotius to jurisprudence in the field of public and international law.

III. Very appropriately, there is an extract from *Le droit international; les principes, les théories, les faits*,³ of Ernest Nys, in which that distinguished authority on Grotius and his predecessors details the main events in his life.

IV. There follows that portion of J. Basdevant's life of Grotius which deals with his general theory of law, originally appearing in Pillet's *Les fondateurs du droit international*.⁴

V. Akin to this is an excerpt from Christian L. Lange's *Histoire de l'internationalisme*⁵ on the subject of "*Le Droit International de Grotius*," which is self-explanatory.

VI. The compiler has included an account of Grotius' "*De Jure Belli ac Pacis*" contained in Andrew White's *Seven Great Statesmen in the Warfare of Humanity with Unreason*,⁶ which, apart from the anti-religious animus of its author, presents a fairly good outline of the evolution of international law up to Grotius' time, and an excellent analysis of Grotius' great work and its early effects. Although he mentions the names of Grotius' Spanish predecessors, they seem to him but names.

VII. A French translation of a portion of Sylvino Gurgel do Amaral's *Ensaio sobre a vida e obras de Hugo de Groot*⁷ treating of the *Mare Liberum* and its adversaries, particularly Seraphinus de Freitas (1625), the Portuguese, who is defended as the first adversary, and Selden, the Englishman (1636). It is evident from this that Freitas has not received the attention he should have.

VIII. Grotius' skill as a diplomatist is set forth in an article by Hamilton Vreeland, Jr., reprinted from this JOURNAL.⁸

IX. The piety of Grotius is traced through his education, his theological works and his letters, in an extract from Joachim Schlüter's *Die Theologie des Hugo Grotius*.⁹

X. This is complemented by a single page on "The Character of Hugo Grotius", from the pen of William Rattigan.¹⁰

XI. The scholarly side of Grotius is set forth in an extract from *A History of Classical Scholarship*,¹¹ by John Edwin Sandys, wherein Grotius' ability as

³ I, 1912, pp. 244-250.

⁴ Paris, 1904, pp. 230-239.

⁵ Publications of *l'Institut Nobel norvégien*, IV, Kristiania, etc. 1919, pp. 310-325.

⁶ New York, 1912, pp. 79-102.

⁷ Rio de Janeiro-Paris, 1903, pp. 64-78.

⁸ "Hugo Grotius, Diplomatist," Vol. 11 (1917), pp. 581-592.

⁹ Göttingen, 1919, pp. 3-13.

¹⁰ "Hugo Grotius" (The Great Jurists of the World, IV) in *Journal of the Society of Comparative Legislation*, new series, Vol. VI (1905), pp. 75-76.

¹¹ II, Cambridge, 1908, pp. 317-319.

a commentator on the Latin classics, a translator of Greek poetry and, indeed, a writer of Latin poetry, is warmly commended.

XII. The little volume is brought to a close by an appreciation, in Latin, of Grotius' skill as a poet, by the celebrated Peerlkamp.¹² A sample of his elegiacs on the joys of winter is something "of which Ovid would not be ashamed," and a sample of his heroics is given in the address of Heemskerck to the Dutch soldiers before the battle with the Spanish fleet at the time of the capture of Ostend by the Spaniards in 1604.

The book is enhanced by a reproduction of Mierevelt's portrait of Grotius, a facsimile of the title page of the 1625 edition, and a reproduction of an unpublished letter of Grotius dated June 28, 1635.

The selection is made with very good taste, and the book is attractively printed. There is only one branch of human knowledge in which Grotius ventured that is not touched upon in this collection—that of anthropology¹³—but perhaps the omission was intentional, in order not to sound at this time a discordant note in the paeans of praise.

HERBERT F. WRIGHT.

Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel (Staatusukzession).

By Dr. Paul Guggenheim. Berlin: Franz Vahlen, 1925. pp. xxvii, 200. M. 8.

The author is a member of the Zurich bar. He was one of the scholars of the Netherlands Government for 1925 attending the Academy of International Law at The Hague. It is perhaps not entirely a coincidence that the problems growing out of changes of state sovereignty should again be the subject of a monograph by a jurist of Zurich. The great authority achieved by the work of Max Huber, now presiding judge of the Permanent Court of International Justice¹ naturally inspires an effort of emulation. Since Judge Huber's book was published, numerous new problems of practice have arisen by reason of the Russo-Japanese War, the Balkan wars and, particularly, the great struggle of 1914-1918.

The author regards his problem in the light of a search for rules of international law objectively controlling changes of sovereignty and the effects of such changes. His main thesis is that these rules are supra-national and

¹² P. Hofman Peerlkamp, *Liber de vita, doctrina et facultate Nederlandorum, qui carmina Latina composuerunt* (editio altera, Harlemi 1838), pp. 327-332.

¹³ While Grotius was at Paris as Ambassador from Sweden, he published a little treatise on the origin of the American aborigines, which resulted in a controversy on the subject with Johan de Laet, in which Grotius was decisively worsted. Cf. Herbert F. Wright, "Origin of American Aborigines: A Famous Controversy," in *The Catholic Historical Review*, Vol. III (1917), pp. 257-275.

¹ *Die Staatensukzession. Völkerrechtliche und staatsrechtliche Praxis im XIX Jahrhundert.* 1898.

do not depend upon the will of the old or of the successor state. They evolve from the moment of the acceptance of any state into the community of states (p. 11). He does not accept Huber's theory that the rules of state succession result from the power of the state, as a corporate entity, to create a successor to an aggregate of rights and duties. The author believes the latter view involves a surrender to the absolutistic view of sovereignty and furthermore fails to meet the case of newly created states (p. 37). He prefers to derive the obligation of the new state from objective international law rather than from an act of state will. Where financial obligations are concerned, Huber adopts the theory of a property charge, while Cavaglieri prefers the theory of unjust enrichment (p. 90). The author's view is in line with recent schools of thought arguing for limitations upon state sovereignty. In logical fashion he endeavors to apply these principles to fix, by the accepted practice of the international community of states, the obligations resting upon successor states. He has been influenced by the progressives of the German school, particularly by Schücking, Strupp and Wehberg.

The book is by no means limited to academic discussion. Frequent references are made to the provisions of the principal treaties of the past two decades. These are referred to in the body of the book as illustrations of doctrinal discussion. In the Annex (pp. 169-200) the author gives a selection of changes of state sovereignty, particularly those resulting from the recent peace treaties, and for these he supplies a condensed statement of the historical origin and the documentary sources of the change of sovereignty.

A reading of the book leaves the reader under the impression that international law in this field is rapidly formulating, though still incomplete. The detailed provisions of the peace treaties give evidence that the Powers desired to leave as little as possible to the control of customary law. The field seems promising for efforts of codification.

ARTHUR K. KUHN.

Citizenship. By W. H. Hadow. New York: Oxford University Press, American Branch, 1923. pp. x, 240. \$2.

This is a philosophical study of the state and the relation of the individual citizen to the state and to the world. It is not a legal work. No attention is given to the nationality laws of England or any other country. Few legal writers are even mentioned by name, and the history of international law is summed up in two short paragraphs (pp. 177-178). Among the writers discussed are Plato, Aristotle, St. Paul, St. Augustine, More, Bacon, Hobbes, Spinoza, Rousseau, Kant, Hegel, Treitschke, and Mazzini. The earlier chapters are almost purely philosophical, while the later chapters contain a more practical application of the results of the author's studies of the affairs of the world.

The first two chapters relate to moral philosophy, the duty of the individual to himself, to his family, to his neighbors, to his country, to his church and to the world in general. The third chapter, entitled, "Liberty, Equality, and Fraternity," considers principally the limitations which apply from the nature of things to those words, which are so often loosely used.

In the fourth chapter, entitled "The State as Means," the author leaves the realm of pure philosophy and considers various ways in which the state in his own country, England, has served the citizens practically, especially in the matter of road-making and the institution of free schools. In this chapter the author digresses in an interesting way upon the subject of language and observes that, as civilization progresses, languages become more simple instead of the opposite.

In "The State as End" the author considers principally the absolutism of Machiavelli and Treitschke, in which the individual is swallowed up in the state. In the following chapter, "The State as Personality," the author continues the subjects of the two preceding chapters. He agrees with neither the individualism of Rousseau nor the absolutism of Machiavelli and Treitschke. He holds that the rights of the individual and of the state are entirely consistent under a proper political system. With regard to this subject the author dwells at some length on the metaphysical reasoning of Hegel.

In his chapter on "Citizenship and Empire" the author again descends from the realm of metaphysics to the earth and sketches the history of the great empires of the world, past and present, giving special attention to the British Empire. He does not use the term, "British Commonwealth of Nations."

The chapter on "Internationalism and Cosmopolitanism" is perhaps the most timely portion of the book. The author has no use for that "tepid humanitarianism which cares equally for all people because it cares very little for any," or for that "false perspective," which causes men of a certain type to see good in any country but their own. He also condemns the new "internationalism," which would abolish distinctions of nationality and divide the inhabitants of the world horizontally into classes. The author is distinctly a nationalist. He holds that the good of mankind is served by leaving each nation to develop itself in its own way, to work out its own salvation. He believes that "the statesman . . . is in the position of an advocate who has to make the best terms he can for his client." But he is likewise a strong believer in international coöperation. In this relation the author gives an account of the League of Nations and what it has accomplished, not only in settling differences between European states, but also in promoting international coöperation in economic as well as in humanitarian activities.

In his concluding chapter, "De Civitate Dei," the author ascends again into the region of philosophy, dwelling in particular upon the limits of indi-

vidual freedom and the dependence of the individual upon the world in which he is born. He thus rounds out his book, which, as stated above, is distinctly a philosophical study.

The writer of this brief notice will not presume to criticise such an interesting and suggestive book, which is evidently the result of broad culture and careful and discriminating study of the deepest problems of mankind. It is regretted, however, that the author did not discuss more fully some of the practical questions which especially concern the world at the present day, particularly the significance and probable future development of Bolshevism and Fascism; the moral as well as legal right of a country to control and limit the immigration of aliens and to exclude members of races which are proven to be unassimilable; the right of expatriation, and the extent to which a real change of loyalty may accompany and coincide with a change in the artificial and legal tie of allegiance; the extent to which a state may, through bilateral or multilateral agreements, especially agreements to submit controversies with other states to arbitration or judicial settlement, surrender certain generally recognized rights of sovereignty, without limiting itself in such a way as to prevent a full and free national development; and the question whether such agreements necessarily involve a loosening of the tie of allegiance between the individual and the state to which he belongs.

RICHARD W. FLOURNOY, JR.

Izvol'ski im Weltkrieg: Der Diplomatische Schriftwechsel Izvol'skis aus den Jahren 1914-1917. Published under direction of the German Foreign Office, with a commentary by Freiderich Stieve. Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte, 1925. pp. viii, 265. Index and facsimiles. M. 12.

Taking up Izvol'ski's correspondence on the eve of the war, the first documents printed being dated August 31, this supplementary volume is of hardly inferior interest to the same editor's compilation, *Der Diplomatische Schriftwechsel Izvol'skis 1911-1914*, and to the intervening expansions of the *Russian Orange Book*. In lighting up certain dark corners of Entente diplomacy during the war itself, the documents also reflect a few rays into its background. Most damaging to the asserted innocence of the Allied Powers is Izvol'ski's telegram to Sazonov of October 13, 1914, dealing with their war aims, which, Delcassé has told him, "he himself has often and frankly discussed with you"—that is, during the period of Delcassé's embassy in Russia. Numerous items are included, among them: France's recovery of Alsace-Lorraine, England's acquisition of German colonies, Russia's access to the Straits, and, as chief aim of all the Allies, the break-up of the German Empire. "In addition," continues Izvol'ski, "Delcassé asked me to call your attention, with reference to the negotiations carried on at Petersburg in 1913, to the fact that France's demands and wishes remain the same, except

for the imperative desire to destroy Germany's political and economic power. The necessity of this condition is imposed by present circumstances, notably by England's entrance into the war" (p. 119).

The further elaborations of this programme have long since been revealed to us in the "secret treaties" published in 1917 and embodied in the Allies' demands at the Peace Conference—with the exception of Russia's claims which had given her associates so much trouble. The effort to satisfy Russia's desires regarding the Straits was complicated at first by the hope of keeping Turkey neutral and later by Great Britain's reluctance to give her ally a free hand. This fundamental difference of opinion also affected Entente diplomacy in the quest for new allies, which began at the very outset of the struggle. Russia's rôle in this connection was dominated by a resolve to keep the solution of the Eastern Question in her hands. She exacted that Italy and Rumania be bound to direct their operations primarily against Austria-Hungary, and strove to re-create the Balkan League under her own ægis by finding satisfaction for Bulgaria at the expense of Greece and Serbia. Greece's compensations, necessarily out of Turkish territory, must be kept remote from the Straits; Serbia's expectations must be wholly directed against the Dual Monarchy, upon whose dissolution Izvolski insisted, in opposition to the reluctance of France and England. Despatches filled with such intrigues contribute little to bear out the public utterances of Allied statesmen as to the character of the war in which they were engaged.

The 308 documents, translated into German from the Russian secret archives, appear well edited, except for occasional slips in the perilous business of retransliterating foreign proper names from the Russian, one of which renders that of the American Ambassador in Paris as "Garriek." The 40-page summary gives an adequate idea of the documents' significance, though it is marred by overstraining minor points in the effort to pile up all possible evidence of war guilt against the Allies.

J. V. FULLER.

The Senate and the League of Nations. By Henry Cabot Lodge. New York and London: Charles Scribner's Sons, 1925. pp. 424. Index. \$4.00.

This book is of great and absorbing interest. For those in middle life who have lived through the tense years of the last decade, it has almost the intimacy of their own diaries, with the piquant difference of having been written by some other and perhaps very different kind of man; and for the young and for posterity, it will have the importance of a historical document of the first rank. For in it is recorded the story of the greatest debate on an international question in our history; and its author is the leader on the negative side of that debate, the most potent antagonist of President Wilson's international proposals. That he was also the protagonist of a positive, constructive policy of his own, his book fails to make equally clear. No

candid reader, however prejudiced he may be in Mr. Wilson's favor, can lay it down without the conviction that in this, as in most other human stories, there is much of truth on both sides.

The chief weakness of the book, it must be admitted, is its failure to state adequately and justly the opposite policy, and the motives of its author, which Senator Lodge was so fervently combatting. But its chief result should be to dispel the prevalent assumption that President Wilson was an unalloyed idealist of the purest ray serene, while Senator Lodge was a time-serving politician and vote-getter possessed of nothing higher than the crude, raw realism of petty party and personal politics.

About one-fourth of the book discusses Wilson's foreign policy before the dispute over the League of Nations began; and the remaining three-quarters tell the story of the debate in the Senate, and give (in 82 pages) a verbatim report of the famous conference of three and a half hours in the White House on August 19, 1919. This part of the book includes, by way of appendices, Wilson's address to the Senate on January 22, 1917, Lodge's speech in reply on the same day, and Lodge's speeches of February 28 and August 12, 1919. An index of fourteen pages is helpful. •

Senator Lodge (as he recalls on p. 1) was leader of the Republican minority in the Senate from the summer of 1918 to March 4, 1919, and then became leader of the Republican majority in the Senate and chairman of the Committee on Foreign Relations. He had been an influential member of the vitally important committee for nearly a quarter-century,—during a score of years when Woodrow Wilson was only a successful college professor and an unsuccessful university president; and it was natural and proper that he should take very seriously the national and constitutional, as well as the international, responsibilities which devolved upon him in such a position. His account of our foreign relations during Wilson's first administration is given chiefly for the purpose, it would appear, of explaining the origin of Lodge's distrust of the man and the president, and of disproving the theory that he was animated in his later opposition by party politics and personal hostility. He denies this animus categorically (pp. 2, 9, 23, 62, 129, 219) and substantiates his contention by recording his support of Wilson in the repeal of the Panama Canal tolls discrimination, which support was given in the face of both Republican and Democratic opposition to the President, and which called forth from Wilson a note of cordial appreciation (pp. 3-9).

Wilson's Mexican policy on the other hand was marked, Lodge believed, by infractions of international practice and by personal bias against Huerta as an individual who had incurred Wilson's wrath through "disobedience"; but Lodge admitted that there was a fair question as to the wisdom of recognizing Huerta, and strongly upheld the President's hands in dealing with him, and even reënforced what he considered to be a hesitating, if not a timorous, policy on Wilson's part (pp. 12-24). It was precisely because of

Wilson's conduct of the Mexican problem, Lodge declares (p. 219), that his distrust of him began.

When the World War came, Lodge at once believed that "nothing less was at stake on the result of the conflict than the freedom and civilization of the Western World," and he "felt a keen regret that the United States had not made a protest as to the invasion of Belgium." He nevertheless advocated the maintenance of "strict but rigidly honest and fair" neutrality for the United States, although he criticized the President's interference with private loans and exports to the belligerents, his attempt to purchase, instead of interning, German merchant-ships in New York harbor, and his appeal for neutrality "in thought as well as in action." He also accepts credit for frustrating the Democratic attack on British violation of our neutral rights by advancing the specious argument that it was more important to protect American lives than American dollars. After the war began, Lodge proudly claims, he and the other Republicans in Congress "not only put no obstacle whatever in the way of legislation desired by the Administration for the conduct of the war, but aided that legislation in every possible way" (p. 31).

Wilson's dealing with the *Lusitania* affair in 1915 is made to appear the breaking-point between the two men; for Lodge regarded this dealing as both weak and tricky. A full chapter is devoted to it, and forms very sad reading for those Americans who cherish a higher ideal for their public servants than that of "adroit fencing," or "shadow-boxing" over words and phrases. Lodge's treatment of the affair formed a sensational part of the presidential campaign of 1916, and was the cause, it appears, of Wilson's subsequent dislike for him. He states in his book that he favored entering the war immediately after the sinking of the *Lusitania* (in May, 1915), and indulges in outspoken resentment against the prime argument of the campaign which reflected Wilson in November, 1916, namely, "He kept us out of war."

Wilson's lack of preparedness, both for the military prosecution of the war into which he finally led us, and for the diplomatic prosecution of the peace which he aspired to make, is criticized and illustrated, the latter by his failure to come to a definite understanding with the Allies as to their war aims before he committed the United States to helping them (p. 83). The Fourteen Points are conceded to have been important as a basis of the negotiations for peace, but they were not carried through. Peace should first have been made, by December, 1918, and the League of Nations should have been discussed afterwards (p. 98-9). The origin of the Covenant is traced, chiefly in Wilson's own words, from the proposals of General Smuts and Mr. Phillimore through Wilson's final draft (pp. 100-103). Then the contest over its adoption by the United States is recorded in detail, from Wilson's first return from Paris on February 24, 1919, to the Senate's final rejection of the treaty and its return to the President on March 19, 1920 (pp. 99-212).

The question, Who killed the League of Nations? so far as the United States is concerned, is answered by Senator Lodge pointing his finger at President Wilson and declaring that the Covenant would have been ratified *with reservations* by the Senate if Mr. Wilson had not prevented the Democratic senators from voting for such ratification; this declaration, however, is not supported by proof. As for himself, he declares that he was sincerely desirous of achieving that ratification, although he admits later (in October, 1924) that he was well satisfied not to have our country in the League on any terms. Of course, the friends of Wilson and the League point an accusing finger at Lodge and declare that if it had not been for his influence, enough Republican senators would have voted with the Democrats to ratify the Covenant *without reservations*; but this is a pure assumption as to what might have been, and therefore incapable of proof.

The great debate is rightly held by its leader to have served the purpose of supplying the country with a thorough-going educational campaign; and he makes the further point that it amply vindicates the Constitution in giving the Senate a share in the control of our foreign relations. The President's failure is characterized as the greatest in modern times, and it is attributed to his dominant motive which was not, according to his senatorial opponent, a high idealism, but personal selfishness. His European competitors early discovered that his one thought was to create a system of which he would be the head, and by first conceding the League of Nations and "then by judiciously threatening its defeat, they compelled him to do everything they desired," namely, many evil things, including the surrender of Shantung to Japan.

The final impression left by this book upon its present reviewer is, that while every American who is opposed to his country's entrance into *any* league of nations which is based upon military and economic coercion may be profoundly grateful to Senator Lodge (or President Wilson) for keeping us out of the league as at present constituted, he may also be grateful that Senator Lodge changed his mind and repudiated a league based upon such force. For he cannot suppress the conviction that if the Senator's change of mind had not been confirmed and strengthened by the Democratic administration of President Wilson, a Republican advocacy of such a league would have induced him to return to his first love—and to his own natural inclination. In which case, the said American would have been obliged to exclaim with the disgusted Mercutio: "A plague o' both your houses!"

WM. I. HULL.

Sovereign States and Suits before Arbitral Tribunals and Courts of Justice.

By James Brown Scott. New York: New York University Press, 1925. pp. x, 360. Index.

Dr. Scott's new volume is a transcript of lectures delivered by him at the New York University in the spring of 1924. His repeated absences from

this country have prevented the careful revision of his manuscript until this time and so deferred publication.

The "Lectures" cover 246 pages of excellent paper with large print and wide margins. The Appendices cover 94 pages and include such well known documents as the Virginia Declaration of Rights of 1776, and the Declaration of Independence of the same year, the Articles of Confederation of 1781, portions of the Constitution of the United States, of the Hague Conventions of 1899 and 1907, the Statute of the Permanent Court of International Justice of 1920, and the Protocol Establishing the Court, of like date.

The purpose of the lecturer is definite, and it is carried out with thoroughness and careful elaboration. It is

First. To establish that the Thirteen American Colonies, from the instant of their Declaration of Independence of July 4, 1776, to the time of the formation of a united government by them, were severally sovereign and independent states, as they stated in the Articles of Confederation, and so continued until the Confederation was consummated "and until they formed the more perfect Union of the Constitution, creating a government of the Union and delegating to it certain powers of sovereignty, reserving to themselves the other powers of sovereignty which they did not grant to the Union." Dr. Scott having by many citations of cases, irrefutably established the independent and sovereign character of the several communities, formerly colonies but now discharged from all connection with or dependence on the mother state, shows:

Secondly. That these sovereigns had full right and power to combine in such manner as they saw fit and to surrender all or any part of their new sovereignty by convention or agreement to the United States, reserving all rights not surrendered; that accordingly the Confederation was formed, weak and ineffectual, yet a step forward; and, finally, the Federal Union with its Constitution indicating and defining what was conceded to the Federal Government and reserving *all* other rights and powers to the several States.

Third. That this Confederation provided an interstate tribunal and the Constitution further instituted a Supreme Court on which was conferred judicial power in "controversies between two or more States." In a tabulated list of such controversies adjudicated in that high tribunal, Dr. Scott enumerates 52 cases decided, the first in 1799, and the last in 1924.

His contention is that the experiment of sovereign states uniting and making a partial surrender of sovereignty to a representative central government, and erecting, as a part of that government, a Supreme Court of Judicature, empowered to adjudicate controversies between the several states, has thus during a century and a quarter proved practical and successful. He argues that the League of Nations, with its Permanent Court of International Justice, is but a logical and natural extension of the methods of our original federation and final Constitution, which foreshadow its success and assure its efficacy. With his customary thoroughness and precision, he supports

this thesis, collecting many decisions and citations in its aid. He pauses to especially commend the twenty-one Treaties for the Advancement of Peace, negotiated by Mr. Bryan while Secretary of State (and ratified by the Senate). Of them he says "They are, if I may say so, the greatest advance toward peaceful settlement made by any one man, at any one time and in any one instrument." He does not seem to attach equal importance to the vast negotiations and agreements at Versailles, which are somewhat cursorily mentioned and whose chief figures are, most of them, not once named, although Dr. Scott had an honorable participation in those labors.

He traces the development of the Hague Court and thinks its provisions resemble those for the decision of controversies between the States found in our own Articles of Confederation, but finds it a tribunal of arbitration rather than a court for judicial decision. However, he believes that arbitration, with its freer and more diplomatic adjustment of controversy, is still highly useful, and that the Hague Court and the Permanent Court of International Justice ought to supplement one another much as do courts of law and equity. He deplores the changes made by both the Council and Assembly of the League in the statute of the latter court as advised by the jurists, and contends for the restoration of the original draft, in the shaping of which, we may say, Dr. Scott is credited with an important share. The provision added by the League permitting the court, on agreement of the parties, to "decide a case *ex aequo et bono*," he says is doubly to be regretted as a recurrence to arbitration and thus an interference with the functioning of the Hague tribunal.

Dr. Scott's account of the conference of the ten jurists who shaped the scheme of the Permanent Court is full of interest. He shows the predominance there of Elihu Root, who had in mind Madison's *Debates* and the compromises which made the adoption of our Constitution possible. He made clear to his European colleagues the dual system of representation adopted and, by imitating it, adjusted the difficult question of the choice of judges. He says Mr. Root had suggested such a court in 1907, and that his "firm and deft hand put it into shape in 1920." The plan, he declares, "was as closely modeled on the Supreme Court of the American States as one tribunal can resemble another without being identical."

So far Dr. Scott proceeds on *terra firma*. As to our constitutional history, his statements are in accord with the accepted understanding, and as to recent international affairs, he might almost say "all of which I saw and a great part of which I was" (*magna pars fui*), and his narrative is convincing, except that he sometimes accords to others the credit due his own achievements. When he draws his conclusions and predicts the future he will not meet with the same universal agreement. His conclusion is that because the union of thirteen contiguous states, alike British in origin, with the same speech, religion, morals, blood, law and wrongs, was successful, that because the Supreme Court instituted by them to adjudicate controversies between

them has for a century and a quarter functioned, in the main, effectively; therefore, a league of nations intended to be all-embracing, and a permanent court instituted to adjudicate interstate controversies among its members, must achieve equal success and are equally assured and feasible.

We must remember, however, that a chief argument on the part of the founders of this nation for the union of the colonies or their successors, was found in these very facts of contiguity, community of law, language, blood, beliefs, customs, fears and enemies, which are wanting in the new worldwide organization. The laws, language, blood, religions, morals, locations and varied backwardness or advance in civilization of its members rather separate than unite them. The fact that various young men and women of Connecticut and Massachusetts of like age and condition have intermarried and found the unions prosperous and happy does not prove that the same outcome can be predicated for the unions of New England girls and Zulu chiefs. They have but little in common. Neither can the success of a court, all the judges of which are trained in the same law and represent the same development and traditions, in adjudicating the controversies of the thirteen homogeneous states, give ground for assurance, or even for hope, of like happy results in a tribunal where the judges understand one another's laws as little as their language, morals or points of view, where the laws they are to apply are scanty, nebulous and conflicting, where there is little enacted regulation, no settled line of precedents, and where, by the terms of their institution, they are to disregard precedents, even their own.

It would seem that Dr. Scott's facts, though not his later conclusions, must be welcomed by the numerous opponents of the League and the Permanent Court in this country. Their chief contention has been that the League will constitute a superstate and the court, its creature, having the final right of interpretation and decision, will steadily extend its power and as steadily paralyze and destroy that of the individual states, much as the Federal Government and its courts, under far more exact restraints, have dealt with our state governments. Dr. Scott's views fully sustain their contention, since he finds the League and its court such a close parallel to our union and its judicial department.

The fact that no provision is made for enforcing the judgments of the Permanent Court, Dr. Scott does not deplore, deeming it unnecessary. "Public opinion," he says with much justice, "is after all the greatest force in the world. . . . All the awards of arbitral tribunals for the past century and more have been obeyed under the pressure, it is believed, of an enlightened and insistent international opinion." He cites *Virginia v. West Virginia*, 246 U. S. 565, briefly to the effect that it was there decided that the United States has power to enforce a judgment in favor of one state against another of this Union (although no such power is expressly given). The decision seems to establish the doctrine that a grant of judicial powers to a tribunal

to adjudicate controversies between states, otherwise sovereign, carries *ipso facto* without specification, all powers requisite for enforcing its determination. This holding by our own Supreme Court would be used overwhelmingly against any claim on our part that the Permanent Court had not like power, a vital matter for consideration.

Dr. Scott says that the Committee of Jurists recommended that the Permanent Court be permitted to render advisory opinions, but this the Assembly of the League disapproved and eliminated. Yet, he says, the principal occupation of the Court has been the preparation of such opinions at the League's request. Attention is called to Article XIV of the covenant of the League of Nations, which provides as follows: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

Dr. Scott's wide knowledge of his subject both through study and through long and intimate participation in international affairs, his tenacious memory and his courteous moderation, are all evidenced in the text, which is, from time to time, enlivened by anecdote and humor.

In closing, he deems the future of the Permanent Court assured, but thinks it would be doubly assured if the obstacles to the entrance of the United States were removed. If this were done and the rejected portions of the plan of the jurists were restored, he believes it would prove as competent "to administer justice between and among the nations, as the Supreme Court of the United States to administer justice between and among the States of the American Union," and he adds, "I would venture the prediction that one would be as permanent as the other because each is indispensable."

CHARLES NOBLE GREGORY.

Britain and Egypt—The Growth of Egyptian Nationalism. By M. T. Symons. London: Cecil Palmer, 1925. pp. xiv, 331. 7s. 6d.

There are in this book three main divisions dealing with (a) the political history of Egypt under Lord Cromer, then General Kitchener and Premier Zaghlul; (b) the problem of the Sudan; (c) the review of certain miscellaneous features concerning the trend of civilization, and the chances of the Egyptians being able to govern themselves successfully.

The noticeable feature in these three divisions is that, while professing to give a history of the country from the days and doings of Arabi Pasha, there are some remarkable omissions, such as the lack of reference to the perpetual manoeuvring of the "Capitulation" Powers, not only among themselves but occasionally the change of sides from supporting to opposing Great Britain, during which the aims of the Nationalists became a pawn in the diplomatic game of the European Powers. Again, there is no serious attempt to understand that the apparent vacillation of Great Britain in her policy was conditioned by incidents, such as that when Germany telegraphed to

her Consul-General to cease supporting Britain, this unpleasing form of ultimatum being occasioned by the competition of British and German firms for railway concessions in Turkey and Asia Minor. (*Vide, Life of Granville*, Vol. I, Chaps. 9 and 12; also Grey, *Twenty-Five Years*, Vol. I, Chap. II, p. 9.)

Details concerning the management of the Suez Canal, or the steady pressure of France from the Sahara against the Sudan, are passed over as being immaterial to the perpetual intriguing of the French in Cairo with the Nationalists.

On the whole, the book is slightly hostile to the Kitchener Administration, which is again peculiar, as under this, the Sudan was regained; the Nile developed by means of the various dams and barages; the railways were brought to a high state of efficiency; the power of the Mahdi was destroyed, by means of which policies, Egypt was made safe for the fellaheen, while the national wealth and safety were steadily increased; all of which rendered possible the creation of an Egyptian Parliament, the dream of the Nationalists. Yet, curiously, Mr. Symons admits that under this régime, which lasted to 1914, the population of Egypt rose from $6\frac{3}{4}$ millions in 1882, to over 12 millions in 1919, while her agriculture and trade made great strides.

The later part of the volume pays much attention to the details of government, such as the exercise of the press censorship during the war, which is seldom efficiently done because military censors are so often, as in the nature of the case, inclined to be arbitrary. The author fails to remember that during 1914-1918 too much was at stake for the Allies to permit of the formation of a national government for a people who for many years had not shown much steadiness of character in public affairs. He rightly draws attention to the influence of the foreign trained Egyptian students as being affected by the surroundings and life of the countries in which they were educated. No doubt, these, as in Far Oriental countries, acted as a leaven which gradually infected the mass of the population with a desire for governing and developing their country, free from foreign supervision. Indubitably these students formed the radiating centres of revolt against British officials, methods and form, and from their body produced the local leaders. The same is seen in China, Japan, and Persia.

The book is documented, but there is a certain laziness apparent in the giving of references; for instance, the few pages of notes at the end are without a reference of any kind, and to a great extent the volume is rendered annoying as there is no index.

The presentation of the case for Nationalism is good. The portraiture of the after-war vacillation of the Allies in general and the British in particular, is illuminating.

W. B. CARPENTER.

BOOK NOTES

German Collection of Decisions of the Mixed Arbitral Tribunals

There has recently been published in Berlin the second volume of a collection in German, of the decisions of the Mixed Arbitral Tribunals, functioning under the treaties of peace of 1919. These decisions are concerned mainly with certain matters relating to debts and private claims under Articles 296, 297 and 304 of the Treaty of Versailles and similar provisions in the other treaties. They deal largely with such subjects as nationality, contracts, cash assets, corporations, the measure of damages, exceptional war measures, rates of exchange, and other matters of legal interest. A French edition of these decisions, more voluminous than the German, is the *Recueil des Décisions des Tribunaux Arbitraux Mixtes*. The German collection, though printing fewer cases, is more selective, and professes to publish only the important cases. The second volume now issued contains 62 decisions not yet published in the *Recueil* and 144 which have been published there. The work, known as the *Entscheidungen der Gemischten Schiedsgerichte*, is edited by a committee of lawyers in Berlin, of which Justizrat Dr. W. Loewenfeld is chairman. The publisher is Carl Heymann's Verlag.

A Handbook of Public International Law. By T. J. Lawrence. 10th Edition by Percy H. Winfield. London: Macmillan & Company. 1925. pp. xvi, 205. Index.

In this edition of the late Dr. Lawrence's popular handbook, Dr. Winfield has brought the text down to date from the year 1915. The amendments and additions which he has made to Dr. Lawrence's text have been inserted in brackets.

The Pathway of Peace. By Charles Evans Hughes. New York: Harper & Bros. 1925. pp. xi, 329.

In this volume, Mr. Hughes has been good enough to make readily accessible some of the many addresses which he made while Secretary of State. Those selected for publication deal with questions and policies having more than a passing interest. The addresses are divided into four parts, those dealing with (I) foreign policy; (II) Pan American policy; (III) addresses chiefly legal; and (IV) various subjects. In an appendix is reproduced the message of President Harding to the Senate transmitting Mr. Hughes' letter of February 17th asking the consent of the Senate to the adhesion of the United States to the Permanent Court of International Justice, and the letter of March 1, 1923, from Mr. Hughes to President Harding replying to certain queries from the Senate Committee on Foreign Relations upon the same subject.

In the addresses dealing with foreign policy, Mr. Hughes has incorporated

his address before the Canadian Bar Association at Montreal, September 4, 1923; the address delivered upon assuming the duties of presiding officer at the Conference on Limitation of Armament at Washington; the paper read at the annual meeting of the American Historical Association at New Haven, Conn., on December 29, 1922; his response to the delegation of "The Women's Committee for Recognition of Russia," on March 21, 1923; his address on the Permanent Court of International Justice, delivered before the American Society of International Law, April 27, 1923; his address before the Council on Foreign Relations, at New York City, on January 23, 1924; and his speech in support of the Dawes Plan, at the Pilgrims' Dinner in London on July 21, 1924.

In the section dealing with Pan American policy, Mr. Hughes includes two addresses on the Monroe Doctrine, one delivered before the American Bar Association at Minneapolis, August 30, 1923, and the other at Philadelphia on November 30, 1923, to celebrate the Centenary of the Monroe Doctrine under the auspices of the American Academy of Political and Social Science. Two other addresses complete this section, the radio address on Latin American Relations, delivered January 20, 1925, and Mr. Hughes' remarks on the codification of international law, made as Chairman of the Governing Board of the Pan American Union on March 2, 1925.

International Relations as Viewed from Geneva. By William E. Rappard. New Haven: Yale University Press. 1925. pp. x, 228. Index. Price \$2.50.

This volume is one of the series published by the Institute of Politics, and contains the six lectures delivered by Professor Rappard at Williamstown, Mass., in the summer of 1925. Professor Rappard, of the University of Geneva, was for four years a member of the Secretariat of the League of Nations, and is now a member of the Permanent Mandates Commission of the League. The purpose of his lectures at Williamstown was to explain the work of the League of Nations "as it appears to one on the spot." This he has done by grouping the functions of the League under three headings, first, the League to execute the peace treaties, secondly, the League to promote international coöperation, and thirdly, the league to outlaw war. Dr. Rappard is, of course, an ardent advocate of the League of Nations, and he naturally regrets that the United States is not a member. As President Lowell says in his introduction, "Anyone wishing to understand the actual operations of the League, the major problems with which it has dealt, its method of handling them, and the obstacles it encounters," will find them clearly set forth in small compass in Professor Rappard's lectures.

Völkerrechtsfragen. Berlin. 1925. Ferd. Dümmlers Verlag.

Nine parts have appeared in this series edited by Heinrich Pohl and Max Wenzel, as follows:

- Heft 1. Weltunionen, Haager Friedenskonferenzen und Völkerbund. By Dr. Philipp Zorn. pp. 60. M. 2.25.
- Heft 2. Der deutsche Einmarsch in Belgien. By Dr. Heinrich Pohl. pp. 28. M. 1.50.
- Heft 3. Die Revision der Mannheimer Rheinschiffahrtsakte. By Dr. Hans Vomhoff. pp. 104. M. 3.50
- Heft 4. Die Tanger-Frage. By Dr. Kurt-Fritz von Grävenitz. pp. 85. M. 3.50.
- Heft 5. Ein Deutscher darf nicht ausgeliefert werden! By Dr. Wolfgang Mettgenberg. pp. 68. M. 3.50.
- Heft 6. Die Eisenbahnen Elsass-Lothringens. By Dr. J. M. Bumiller. pp. 78. M. 3.50.
- Heft 7. Die Unterseebootfrage. By Dr. Bernhard Skrodzki. pp. 88. M. 3.50.
- Heft 8. Das internationale Arbeitsrecht in der Seeschifffahrt. By Dr. Karl Keim. pp. 73. M. 3.50.
- Heft 9. Frankreichs Kampf um den Rhein. By Kammergerichtsrat Ernst Keetmann. pp. 67. M. 3.50.

BOOKS RECEIVED ¹

- Baker, Newton D. *Progress and the Constitution*. New York: Charles Scribner's Sons, 1925. pp. 94. Price, \$1.25.
- Bolland, William Craddock. *A Manual of Year Book Studies*. Cambridge: Cambridge University Press, 1925. pp. xix, 162. Index. Price, 12s. 6d. net.
- Bustamante, Antonio S. de. *The World Court*. New York: The Macmillan Company, 1925. pp. xxv, 379. Price, \$3.00.
- Culbertson, William Smith. *International Economic Policies—A Survey of the Economics of Diplomacy*. New York: D. Appleton & Company, 1925. pp. xix, 575. Price, \$3.50.
- Documental History of Law Cases Affecting Japanese in the United States 1916-1924*. San Francisco: Consulate General of Japan, 1925. Vol. I, pp. ii, 413; Vol. II, pp. vii-1051.
- Greer, Guy. *The Ruhr-Lorraine Industrial Problem*. The Institute of Economics Series. New York: The Macmillan Company, 1925. pp. xx, 328. Index. Price, \$2.50.
- Grey, Viscount. *Twenty-Five Years 1892-1916*. New York: Frederick A. Stokes Company, 1925. Vol. I, pp. xxx, 331; Vol. II, pp. x, 353. Index. Price, \$10.00 net.
- Harriman, Edward A. *The Constitution at the Crossroads*. A Study of the Legal Aspects of the League of Nations, the Permanent Organization of Labor and the Permanent Court of International Justice. New York: George H. Doran Company, 1925. pp. 274. Price, \$3.00 net.

¹ Mention here does not preclude an extended notice in a later issue of the JOURNAL.

- Hsieh, Pao Chao. *The Government of China 1644-1911*. Johns Hopkins University Studies in Historical and Political Science. Baltimore: Johns Hopkins Press, 1925. pp. x, 414. Price, \$3.00.
- Isay, Hermann. *Die privaten Rechte und Interessen im Friedensvertrag*. Berlin: Franz Vahlen, 1923. pp. xviii, 488. Index.
- Joffre, Alphonse. *Le Mandat de la France sur La Syrie et le Grand-Liban*. Lyon: L. Bascou, 1924. pp. 150. Price, Fr. 8.75.
- Kellor, Frances, and Hatvany, Antonia. *The United States Senate and the International Court*. New York: Thomas Seltzer, 1925. pp. xix, 353. Index.
- Kulemann, W. *Die Genossenschaftsbewegung*. Berlin: Otto Liebmann, 1925. II Band. pp. xii, 380. Index. Price, 12 marks.
- Liszt, Franz von, and Fleischmann, Max. *Das Völkerrecht*. Berlin: Julius Springer, 1925. pp. xx, 768. Price, 30 gold marks.
- Lundstedt, A. V. *Superstition or Rationality in Action for Peace?* London: Longmans, Green & Company, 1925. pp. 239. Price, \$4.50.
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REVIEW OF CURRENT PERIODICALS

BY CHARLES G. FENWICK

1. AMERICAN POLITICAL SCIENCE REVIEW, November, 1925.

A useful survey of the work of the Institute of Politics, held now for its fifth successive summer at Williamstown, Mass., is contributed by Bruce Williams in the section of *Notes on International Affairs* (pp. 791-800). H. Ch. G. J. van der Mandere follows (pp. 800-808) with a brief but illuminating estimate of the influence of Grotius upon the development of international law, pointing out the foundations which Grotius laid for the establishment of a system of law which, under the adverse conditions of the time, could not be built up in his day, but which is now in process of construction. The organization of the nations, which we are aiming at today, has become possible because of the fundamental principles of the natural law which Grotius sought to apply to states as moral persons.

2. AMERICAN BAR ASSOCIATION JOURNAL, September, 1925.

American Policy and Chinese Affairs, by Hon. Frank B. Kellogg (pp. 576-579), is the text of an address delivered by the Secretary of State on Sept. 2, 1925, at the annual meeting of the American Bar Association. American policy towards China, says Mr. Kellogg, may be summed up as a policy "to respect the sovereignty and territorial integrity of China, to encourage the development of an effective stable government, to maintain the 'open door' or equal opportunity for the trade of nationals of all countries, to carry out scrupulously the obligations and promises made to China at the Washington Conference, and to require China to perform the obligations of a sovereign state in the protection of foreign citizens and their property." *The Legal Aspects of our Relations with Mexico*, by Hon. Charles B. Warren (pp. 586-593), dwells chiefly upon the obligations of the Mexican Government to the Government of the United States and outlines the principles of international law by which those obligations must be judged. The municipal law of Mexico, applicable to its own citizens, lacks authority in respect to aliens when it comes into conflict with the provisions of international law. The Special and General Claims Commissions, set up by the conventions of 1923, are dealing with questions of injury to the person of American citizens or damage to their property down to that date, prominent among which questions are those arising under the application of Art. 27 of the Mexican Constitution of 1917 relating to the expropriation of private property in the sub-soil.

Ibid., October, 1925. *Codification of International Law*, by Hon. George W. Wickersham (pp. 654-661), takes up the objection that the United States

cannot safely become a member of the Permanent Court of International Justice until the law to be applied by the court has been formulated and agreed upon by the leading states, and shows that the objection is not only immaterial so far as the policy of the United States is concerned, but that it is also inconsistent with the general character of international law and with the position of the Supreme Court of the United States in its application of the principles of international law in cases before the court. Attention is called to the appointment by the Council of the League of Nations of a Committee of Experts charged with the duty of preparing a provisional list of the subjects of international law in respect to which codification might seem feasible, and to report to the Council upon ways and means by which international conferences might be held to secure the adoption of the rules recommended. Considerable discussion is given over to the meaning of "American International Law" and the proposals for its separate codification.

3. COLUMBIA LAW REVIEW, November, 1925.

Occupation under the Laws of War, by Elbridge Colby (pp. 904-922), is a careful study, with copious references to adjudicated cases, of technical questions connected with belligerent occupation. This instalment deals with the general law of occupation, its purpose and methods, the restrictions imposed upon the military occupant, and the relations between the occupant and the citizen body of the occupied territory.

4. THE ROUND TABLE, December, 1925.

The Locarno Treaties (pp. 1-28), is a very clear and forceful estimate of the strength and weakness of the new situation resulting from the agreements signed on Oct. 16, 1925. Hopeful as is the outlook in Europe from certain points of view, there are also grave dangers attending the ratification of the treaties, both in respect to the relations of Great Britain to the political problems of eastern Europe and in respect to the relations of the members of the British Commonwealth to the obligations assumed by the mother country. The conclusion is reached that, however dangerous certain features of the Locarno settlement may be, the alternative of rejecting the treaties would create such a grave situation, fraught with far greater dangers, that the treaties should be ratified forthwith and attention then be given to the question of interpreting or amending them.

5. FOREIGN AFFAIRS, January, 1926.

After Locarno: the Security Problem Today, by Eduard Benes (pp. 195-210), points out that most of the political events in Europe during the last six years have been connected with the problem of security, and outlines the three stages through which it has passed: the attempted guarantee pact

between France and Great Britain, to which the United States would have been a party had the agreement signed by President Wilson been ratified; the Treaty of Mutual Assistance and the Geneva Protocol drawn up under the auspices of the League of Nations, which were to bring about the coöperation of the whole body of states for their mutual protection; and finally a partial guarantee pact limited to the small group of states more particularly concerned, including Germany, and carrying with it the admission of Germany into the League of Nations. The author looks upon these regional pacts as but a step towards "one great world convention guaranteeing world security and peace." *The Codification of International Law*, by George W. Wickersham (pp. 237-248), points out the relation of international law to the constitutional law of the United States and shows the sources from which the existing rules of international law are drawn. The need of a more comprehensive and exact code of law to be applied by the Permanent Court of International Justice is next discussed together with the steps taken by the Council of the League of Nations to provide for the codification of international law by the appointment of a committee to draw up a list of provisional subjects in respect to which codification might seem feasible. The difficulties of codification are adverted to and comparison is made with the work of the American Law Institute, organized in 1923 to reduce our American common law to written form in order to secure an orderly and systematic exposition of the law enforced in the several States of the Union.

THE PART OF INTERNATIONAL LAW IN THE FURTHER LIMITATION OF NAVAL ARMAMENT

BY CHARLES CHENEY HYDE

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Naval fleets are maintained by development and replacement because their possessors dare not fail to make provision for a maritime war in which they may be participants. No means yet devised and accepted for the amicable adjustment of international differences have removed from responsible statesmen a sense of the necessity of anticipating such a contingency. Despite increasing efforts in every quarter to cultivate wills for peace and abhorrence of armed conflict, as well as a desire to adjust grave differences by judicial process or through commissions of conciliation, war is still regarded as a contingency which must be reckoned with, and as one which is as dangerous as it is seemingly remote. In making provision against a contingency which none would welcome or hasten, the governments of maritime states do not necessarily encourage war or indicate approval of recourse to it. A particular conference of maritime states may in fact uplift the hopes of prospective belligerents which resent and oppose agreements restricting recourse to measures and instrumentalities on which they expect to rely. On the other hand, general arrangements respecting belligerent activities may serve to lessen a zeal for war and to remove its very approach further from the horizon. Everything depends upon the ambitions of the states which consent to confer. The point to be observed is that agreements for the regulation of maritime war in so far as they purport to proscribe or check the use of particular instrumentalities or recourse to particular measures, are not to be deemed bellicose in design or effect. Such regulatory agreements are advocates of peace rather than of war. Moreover, as will be seen, they may be the means of encouraging states to reduce armaments which would otherwise be maintained.

Agreements for limitation of naval armament are at times deemed to be feasible not primarily because war is regarded as a remote or fanciful contingency, but rather for the reason that the proposed limitation does not appear to change the existing relative naval strength of the contracting Powers. If it can be shown that when war ensues no one of them will be in a relatively worse position on account of what it has undertaken to give up, the general advantage from the limitation is not offset by any detriment which any contracting party may assert to be peculiar to itself. Respect for this principle was the decisive factor which rendered acceptable to the Powers

¹ An address delivered under the auspices of the Association of the Bar of the City of New York, January 21, 1926.

concerned the proposal of Secretary Hughes for the scrapping and replacement of capital ships which he presented at the Conference on the Limitation of Armament at Washington in November, 1921.

The maintenance of an existing ratio of naval strength in the form of a reduction in particular kinds of tonnage, such as capital ships, is simplified when it can be shown that encounters of such ships are likely to be chiefly those with vessels of the same general class, and that they are needed for conflict with their own kind. Again, naval advisors have something concrete to work upon when the particular form of tonnage sought to be reduced, such as that of capital ships, is regarded as the primary test of the measurement of naval strength.

The maintenance of an existing ratio of naval strength presents a much more complicated problem when the forms of tonnage sought to be reduced, such, for example, as submarine craft, are likely to be employed for a variety of purposes, and against ships of every class. Again, submarine naval vessels may be in fact of greater relative importance to one state than to another; and a particular state may contend that a reduction which respects the existing ratio of submarine tonnage will produce a relative detriment to itself. Thus it may assert that its minimum requirements cannot be fairly measured by recourse to any existing ratio.

Whether a particular instrumentality is of peculiar value to the possessor in the prosecution of war must be determined by the soldier or sailor rather than the lawyer. Again, whether such an instrumentality is of relatively great importance to a particular state will, in its judgment, depend invariably upon the opinion of its own technical advisors. The lawyer may, however, reasonably examine the causes which impel the military expert to reach his conclusions; and if those causes are removed, there is reason to demand of the latter a reconsideration of the problem.

It is believed to be of utmost importance to observe with great care some reasons which may encourage military or naval opinion to look askance at proposed reductions by the principal maritime Powers of auxiliary naval craft, embracing obviously submarine tonnage. There are two which merit special attention. The first is seen in the broad objectives which a belligerent may not unlawfully seek to accomplish incidental to the successful prosecution of a war. The second is the problem of combatting successfully methods and instrumentalities which the enemy may not unlawfully employ. It is the scope of what the law of nations permits, or differences of opinion as to what that law does not denounce, which necessarily encourage naval advisors of some countries to oppose the abandonment or the limitation of the use of certain instrumentalities of maritime warfare.

Another consideration plays its part. The difficulty which the principal maritime Powers have heretofore encountered in visualizing future wars, as by anticipating the primary activities of belligerents, or the methods by which conflicts are likely to be waged, has made its impression on military

opinion. In 1905, for example, a Royal Commission of Great Britain on Supply of Food and Raw Material in Time of War concluded that in case of war, Great Britain if possessed of a strong fleet would have no reason to fear such interruption of its supplies as would lead to the starvation of its people, and that there was no evidence that there was likely to be any serious shortage.² Just ten years before the destruction of the *Lusitania* and the *Arabic* there was little anticipation that the commerce of England would be attacked by an instrument of naval warfare against which its own fleet, while unaided, might long prove impotent to cope.

In the light of the World War, naval advisors of maritime states may well be reluctant to prophesy concerning what may be the principal uses of an enemy's fleet in a future war. So much must depend upon the potentialities of the opposing belligerents and the exigencies of each, that the naval man is baffled in any attempt to anticipate what may be decisive factors in a conflict still to be fought. He not only confesses great uncertainty as to what the existing laws of maritime war permit, but he is also doubtful whether any influence short of force will serve to constrain a future enemy not to use an available weapon in its own way, or not to pursue any end deemed to be vital to its success. Moreover, he is thoroughly aware of the fact that those who may be responsible for the successful prosecution of a maritime war will find it extremely difficult, if not impossible, to resist the temptation to seize any strategic advantage which may present itself. He fears that restrictions which seemingly retard success will be taken lightly by those whom they would deter. According to his best judgment, there is danger lest the requirements of military necessity be made in some quarters the actual tests of naval endeavor. While he may himself respect the reason for a particular prohibition or restraint, he dreads the action of those who take a different view. Therefore, he is inclined to look askance at proposals designed to limit further the naval armament of the country which he may be called upon to defend. Thus by reason of both what the law permits and of what in his judgment an enemy is likely to do, he may deem it highly unwise to advise his own country to give up anything which it possesses, and still less to attempt to deduce from its existing relative naval strength a sure basis for the diminution of auxiliary craft.

It is logical to assume that an enemy will avail itself of every privilege that the law confers, and that it will interpret the law in its own way in respect to matters on which current opinion is divided. It is, therefore, worth while to take note of the latitude which in the existing state of the law a belligerent may reasonably claim to enjoy. It is extremely important to observe how far the precepts or lack of precepts of international law justify uncertainty as to the efficacy of particular weapons and particular practices, and the extent to which recourse is likely to be had to them.

It is well to observe certain practices to which it may be expected that a

² House of Commons, Sessional Papers, 1905, Vol. 39, p. 35.

belligerent engaged in a maritime war will surely endeavor to resort. Effort will generally be made to cut off and destroy by every available means the seaborne commerce of the enemy. Appropriate means will be utilized to capture the enemy's merchant fleet, to seize and to confiscate all enemy public and private property thereon, regardless of whether it is contraband; and also to capture and condemn all property on neutral ships deemed to be contraband as construed in the broadest fashion. The doctrine of conditional contraband with the important limitations respecting proof of ultimate hostile use as a requisite of condemnation may be in fact swept aside, and all articles deemed susceptible of common use by an army or a fleet, regardless of their possible use for other purposes, may be subjected to condemnation on proof of their ultimate belligerent destination. In the broad lists of articles declared to be contraband there will doubtless be included, in addition to munitions of war, food supplies, clothing, a variety of raw materials, and much that may be of great use for non-hostile purposes and for the support of a civilian population. Regulations may make it clear both to naval commanders and to prize courts that the ultimate hostile destination of contraband articles is the test of the propriety of capture and condemnation; and that neutral channels and routes of transportation are immaterial. Articles consigned to neutral territory in proximity to enemy territory within the broadest limits of contraband will be subjected to scrutiny and interference, embracing sequestration or condemnation, unless there is some satisfactory neutral governmental certification that they have no ultimate hostile destination, or that they will be used or consumed exclusively within neutral territory.

These will be some of the forms which the war against the enemy's commerce is likely to assume. The importance of success to the belligerent which wages it will be measured by the dependence of its enemy on oversea supplies, and success will be deemed to hang upon the ability to isolate it. That ability will in turn depend partly upon the freedom from external repression which offended neutral Powers may be able to exert for the protection of their own interests, and also upon the freedom that is enjoyed to employ every instrumentality appropriate to the end in view. Engagements between capital ships of opposing belligerents may be infrequent. Nevertheless, by blockade of the enemy's coasts maintained at great distances therefrom, by attempts to capture his merchant fleet and his property thereon, and by the endeavor to seize and condemn contraband property on neutral ships howsoever destined to him, the maritime belligerent will resort to commerce destroying as a normal and constant means of achieving victory.

It is not suggested that such belligerent activities would accord with what, according to American opinion, are the existing requirements of international law.³ In the absence, however, of some general arrangement prior to the

³ No attempt is here made to discuss what, according to American opinion, would be deemed the scope of the belligerent right under existing law.

conflict, or of the decisions of an authoritative international tribunal denouncing as illegal various acts to which recourse was had during the last war, the commerce destroying function may be exercised in the next maritime conflict in all of its ramifications, and by measures harshly applied to neutral as well as enemy interests.

Careful thought has been concentrated in various countries on the problem respecting the maintenance of peace and modes of averting war. Various devices have been proposed for the discouragement and prevention of so-called wars of aggression. Commendable efforts have recently been made by treaty to adjust by arbitration or by conciliation prospective differences between the contracting parties. The extent and sincerity of such endeavors in many lands inspire the inquiry whether it is feasible for the principal maritime states to agree that if war ensues among any of them, commerce destroying shall be checked if not eliminated, and the conflict, at least in so far as it involves the use of force, be confined to a contest between essentially armed forces. If it is reasonable to agree to avert war by recourse to amicable modes of adjustment, may it not be also reasonable and perhaps feasible to agree to discourage war by giving up, when it is waged, certain measures which distress the commerce of the world far beyond the limits of the opposing states, and which do not necessarily involve conflicts between fighting forces as such, and yet which form an element in determining the minimum requirements of auxiliary tonnage? It must be obvious that even partial relinquishment of commerce destroying, possibly manifested by a departure from the methods that are now employed, would remove the necessity for the maintenance and replacement of much tonnage. Appropriate undertakings manifested by general agreement might render valueless the basis on which technical advisors now calculate the needs of their respective countries. Fears lest existing tonnage would not afford the basis for further limitations might be removed. If in 1922, the three strongest maritime Powers were willing, at the suggestion of the United States, to scrap more than a million tons of capital ships, embracing more than sixty vessels, and to make equitable arrangement for replacement of tonnage to be retained, interested states may yet deem it worth while to consider whether it is feasible to agree to abandon or modify a mode of warfare which is today one of the causes of the maintenance and unlimited construction of auxiliary naval craft.

It may seem utopian to express belief that maritime Powers which today philosophically await the next recourse to armed conflict by sea which they may be called upon to wage, will be disposed to consider favorably the abandonment of practices now regarded as valuable aids in the work of reducing an enemy. While it may be sheer optimism to anticipate a general disposition on their part to go the whole length of giving up commerce destroying at the present time, it is not unreasonable to consider whether arrangements might not be deemed feasible which would enable them to go

part way. A general desire to ascertain and remove causes productive of the retention and development of unnecessary tonnage would appear to encourage the maritime Powers to deal with the question on its merits.

In this connection it is worthy of note that the United States has long endeavored to bring about the abandonment of one phase of commerce destroying. Benjamin Franklin sought to incorporate in our first treaty with Great Britain a provision that all merchants or traders with their unarmed vessels employed in commerce, exchanging the products of different nations, and thereby rendering the necessary conveniences and comforts of human life more easy to obtain and more general, should be allowed to pass freely unmolested. The plundering of enemy ships by privateers for the enrichment of the captors did not appear to have a close connection with the advancement of a public cause or the performance of a public service. The practice may have encouraged belief that there should be a giving up of what seemed to involve the sacrifice of no substantial military benefit. It began to be felt in the United States that if proper reservations were made with respect to contraband and blockade, enemy private property at sea might be rendered immune from capture. At the Hague Conferences of 1899 and 1907, the American delegates made vigorous but futile efforts to obtain an appropriate agreement. At the Second Conference the American delegation offered the following proposal:

The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the sea by the armed vessels or by the military forces of any of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers.⁴

In pleading for the adoption of this proposal Mr. Choate declared:

The wanton spoliation of noncombatant ships and cargoes not needed for military purposes, for the mere purpose of enriching the captors, or their governments, or of terrorizing the unfortunate owners and their governments and coercing them to submit to the will of the triumphant belligerent, and to accept his terms, is abhorrent to every principle of justice and of right, and ought to be remitted to the same category of condemnation in which similar outrages upon noncombatants on land are now universally included.⁵

The events of the World War indicated that maritime belligerents regard the capture of enemy private property of every sort as one of three effective modes of cutting off the enemy's seaborne commerce. The other two are the establishment of blockades of an extended and novel type, and the broadening of the limits assigned to absolute contraband. Recourse to these two latter modes of action have wrought such havoc with neutral as well as

⁴ *Deuxième Conférence Internationale de la Paix, Actes et Documents*, III, 766.

⁵ *Id.*

with enemy commerce as to lessen the interest of maritime states in any endeavor to exempt from capture unoffending enemy private property. The United States might doubt the wisdom of renewing the proposal which it made in 1907, unless assured of respect for what it regarded as essential limits of blockade and contraband. Again, the present tendency of a belligerent to requisition its merchant fleet for military service, and to acquire title to a large portion of the property carried by sea under its own flag somewhat lessens the reason for interest in the immunity that has been proposed.

The treatment of enemy private property at sea, the scope of limits of contraband, and the processes by which a blockade may be maintained present a single yet a complicated problem respecting the solution of which there does not yet appear to be agreement. Any general understanding with respect to these activities would serve to benefit neutral interests; and the benefit might be considerable if certain restrictions could be agreed upon. If the United States expects to be neutral to, rather than a participant in future wars which may harass the world, it may deem its interests in checking belligerent conduct of greater concern to itself than in retaining or extending rights to destroy commerce when it is obliged to go to war. Thus its sympathies and those of some other maritime Powers may be enlisted on the side of the neutral. It is not sought, however, in the present discussion to present the solid equities of neutral states as the sole or chief reason for much-needed agreements. They are emphasized because of the fact that any general agreement which serves to restrict belligerent practices in relation to commerce must tend to lessen the requirements of an auxiliary naval fleet, and thus to simplify the task of limiting naval construction. The exemption of certain kinds of enemy property from capture, the restriction of the right of blockade, and the safeguarding of neutral property having no hostile destination from treatment as contraband, constitute checks which would serve to lessen recourse to particular instrumentalities the use of which affords excuse, as will be seen later, for the construction of certain forms of naval craft.

Commerce destroying is at best a relic of the days when wars were conducted by private agencies unfettered by public control. To combat it, or to engage in it, arouses the full resourcefulness of a belligerent Power, and puts a premium on the retention of any craft which can play a useful part in the conflict. This circumstance, as has been already intimated, causes the naval advisor to doubt the wisdom of giving up or checking the construction of what he believes may prove to be a useful weapon for offense or defense. Therefore it is not known whether there be any practical basis on which the principal maritime Powers could agree to give up commerce destroying, or to restrict activities that are deemed necessary or appropriate to make it effective. Nevertheless, as the influence of any mutually acceptable restrictions might be decisive upon the willingness of those Powers to limit further the construction of some forms of naval armament, the matter is

entitled to faithful consideration. Any feasible proposal emanating from any one of them would receive the instant moral support of the lesser maritime states and the approval of the world. This circumstance is so obvious that statesmen who sincerely seek to diminish naval expenditures must reckon with it. With the zeal for peace that happily pervades some countries that have lately been at war, it is reasonable to expect a zeal also for the conducting of maritime wars, when they must ensue, by processes which will not cause states in days of amity to stagger under fiscal burdens which they seek to avoid. No self-reliant and peace-pursuing maritime state should allow itself to dread a combat between its regular naval forces and those of its enemy. It ought to be prepared to defend itself against every hostile gun when war is thrust upon it. In calculating those which an enemy might direct against it, it may, however, well seek through appropriate agreements to be free to leave out of its estimate, guns directed against its merchant fleet and fired from the decks of enemy merchantmen. It may consistently use its whole influence to bring about the abandonment of commerce destroying as an end of war, or as a primary mode of reducing a foe. Accordingly it may fairly endeavor to create a situation whereby it may rid itself of the burden of arming with a special view to restricting or controlling by force neutral shipping engaged in commerce with both neutral and hostile countries; for it must ever be borne in mind that commerce destroying necessarily involves interference with and restriction of carriage by sea under a neutral flag. The reasonableness and the possible efficacy of such efforts must inspire resourcefulness on the part of those on whom the peoples of the larger maritime states rely for guidance, and to whom they have entrusted the control of their governments. The moral obligation must be felt by those who bear it; and this fact itself arouses hope of an achievement. Inasmuch as the general problem is a legal as well as a military one, it may not be amiss to point to certain considerations bearing upon its solution.

It is of course desirable that limits should be assigned to contraband, and that there should be general agreement indicating the basis on which a belligerent should be obliged to act in placing articles in such a category. It may be found impossible, however, to obtain requisite consent to any plan which denies to a belligerent the right to treat as contraband any articles shown in fact to be valuable to the enemy in its prosecution of war. If the right to intercept what is bound for an enemy because it is likely to aid him in the conflict is to be admitted, the main problem of vital importance to both neutral and belligerents is the question of proof. Searches of neutral ships diverted into belligerent ports for that particular purpose, adjudications before belligerent prize courts, and kindred acts which harshly oppress neutral commerce and at the same time involve the possession and use of naval craft, ought to be supplanted by simpler agencies. Whether a neutral cargo is bound for belligerent territory, whether any part of it will be used for an essentially military purpose, and what is the nature of the articles of

which it consists, are questions of fact. The determination of them ought to be effected by measures short of force, and the interested belligerent should have within its reach authoritative information submitted by amicable processes. On the other hand, on the submission of information of such a character, neutral shipping should be free from belligerent interference, and acts of force directed against it should be reduced to a minimum. Thus the question presents itself whether there is feasible a general arrangement whereby neutral governmental certifications might be made the substitute for belligerent searches and captures, and even for numerous adjudications. It should be observed, however, that the persuasiveness of an appeal to maritime Powers familiar with existing practices and disposed to extend them for their own advantage when occasion arises, will not be strengthened by assertions that a belligerent should be robbed of the right to prevent its enemy from profiting from the aid that is destined to its shores. The more convincing argument is one which, without denying that contention, merely asserts that as the proof of the requisite facts may be fully established without the use of force, present practices become inequitable and intolerable.

Likewise, the question presents itself whether in dealing with certain articles, such as food-stuffs, appropriate governmental assurance of an essentially innocent use even from an enemy state might not under certain conditions warrant the treatment of them as other than contraband. Thus the question arises whether agreements may be formulated which could equitably apply in practice such a theory. Again, the question should be considered whether, by means of neutral governmental certifications respecting the non-hostile destination of ships and cargoes, the right of blockade should not be confined within narrower limits, and never employed as a substitute for the right of capture, and never made a barrier to free access to neutral territory. Obviously, if agreement can be effected with respect to contraband and blockade, it would be feasible to consider whether it is worth while to propose again arrangement for the immunity of enemy private property other than contraband from capture at sea.

It is not known whether an agreement between the principal maritime Powers is possible with respect to any of these matters. Innumerable difficulties must be anticipated. The influence of political considerations, coupled with knowledge of the vast potentialities of particular Powers under the present system, may present obstacles against which arguments based on the sheer requirements of international justice may be unavailing. It is merely sought to be pointed out first, that the license which today is asserted by maritime Powers in the attempt to destroy commerce affords solid reason for the maintenance of auxiliary naval fleets; secondly, that if it is feasible to substitute the use of neutral governmental certifications for that of naval force as an amelioration of practices notoriously harmful to commerce under every flag, the matter of agreements appropriate to that end should receive the earnest consideration of maritime states; and thirdly, that the actual

conclusion of any agreements productive of such a result would be hailed with approval by the commercial interests of every land.

The next question is this. How far does the use of certain weapons or instrumentalities in a maritime war encourage the maintenance and discourage the limitation of auxiliary naval craft? Incidentally there is the inquiry whether there are feasible restrictions respecting such use, which if adopted, would aid that limitation.

Consider first the conversion of belligerent merchantmen into naval vessels. Some important maritime states are believed to assert the right when at war to convert their merchantmen into naval vessels when on the high seas. In 1913, the Naval War College of the United States concluded that the conversion of a private ship into a vessel of war should not take place "except in the waters of its own State, or of an ally or in the waters occupied by one of these."⁶ It is unnecessary to discuss the arguments for and against conversion on the high seas. It is merely pointed out that the desire to facilitate the capture or destruction of enemy merchantmen immediately on the outbreak of war by means of what are available as commerce destroyers and in what may prove to be localities favorable for their operation as such, is responsible for the belligerent assertion. Unrestricted conversion is the obvious handmaiden of commerce destroying. It is productive of one direct effect which deserves attention. A state which anticipates that its merchantmen will be subjected to predatory attacks by the private ships of its enemy converted on every sea into naval vessels commissioned to engage in offensive operations, is strongly encouraged on its part to arm its own merchant marine as against the contemplated action. There is thus apparent a cause for the arming of fleets of merchant vessels in anticipation of war, and what is worse, a strong temptation to the possessor thereof, when war actually begins, to engage in hostile offensive as well as defensive operations undertaken by private ships unrestrained by public control. The state which advocates unrestricted conversion goads its prospective enemy to have recourse to a bad practice, and this in turn directly causes some other state which fears possible participation in the conflict, to preserve every ounce of naval tonnage by which it can effectively oppose either the armed merchantman or the converted cruiser. Assertion of the right of unrestricted conversion, if there be one, thus directly encourages the retention of submarine or other auxiliary craft. Mr. Sarraut, a French delegate to the Washington Conference on the Limitation of Armament, in the course of a discussion December 28, 1921, asked his colleagues whether it had not been seen how, in the last war, a belligerent had transformed merchant ships into auxiliary cruisers or into privateers to torpedo French transports; and whether this had not been done against all the Allied navies. Moreover, he adverted to the point as proof of the burden of France in safeguarding its communications with its colonies, and that in turn as a reason against

⁶ Naval War College, *International Law Topics and Discussions*, 1913, 148.

abolishing the submarine.⁷ As will be noted later, the assertion of any right, however well recognized, which transforms a merchant fleet into a fighting force, whether privately or publicly controlled, produces a like result.

The right of a belligerent to arm its merchantmen is not to be questioned. The exercise of that right is, however, conducive to the construction of auxiliary naval craft, and particularly of submarines. Incidentally it is associated with evils which maritime states once sought to remove from naval warfare. One of these evils is the commission of offensive operations by private ships oftentimes under private control. Under present conditions a merchant vessel when equipped with guns of long range becomes necessarily itself a valuable weapon of offense. The master is encouraged to engage any enemy ship of inferior defensive strength, whether a surface or a submarine craft, which comes within range, irrespective of whether the latter initiates hostilities. Thus the armed merchantman, whatever be its own ostensible or principal mission, becomes in fact a direct participant in the conflict. Lacking a formal commission from its government, it fails to satisfy the conditions imposed upon a ship converted into a naval auxiliary.

The Advisory Committee to aid the American delegation at the Washington Conference on the Limitation of Armament declared that in the World War "the merchant ship sank the submarine if it came near enough; the submarine sought and destroyed the merchant ship without even a knowledge of nationality or guilt. . . . When merchant ships met a belligerent submarine, with a strong probability of being sunk by that submarine, the law of self-preservation operated, and the merchant ship resisted by every means in its power. Defensive armament was almost sure to be used offensively in an attempt to strike a first blow. The next step was for each to endeavor to sink the other on sight."⁸ Moreover, it was recommended that laws should be made prohibiting the offensive arming of merchant vessels as well as the use of false flags by them. The committee did not intimate that in the World War the arming of merchantmen was the cause of submarine construction and operations. On the contrary, it declared that on account of the vulnerability of the submarine and the probability of its sinking the vessels it captured there was a tendency for all merchant ships, including those of neutrals, to arm against the submarine. It is worth noting in this connection that Admiral Sims has expressed the opinion that the arming of merchantmen for defense against submarine attack proved unsuccessful in the late war. He has said that "those who advocated arming the merchant ships as an effective method of counteracting submarine campaigns had simply failed to grasp the fundamental elements of submarine warfare. They apparently did not understand the all-important fact that the quality

⁷ Conference on the Limitation of Armament, Senate Doc. No. 126, 67th Cong., 2d Sess., 315.

⁸ *Id.*, 274.

which makes the submarine so difficult to deal with is its invisibility."⁹ He added that "in the spring and early summer of 1917, thirty armed merchantmen were torpedoed and sunk off Queenstown, and in no case was a periscope or a conning tower seen."¹⁰

Any maritime state which knows that its neighbor, when at war with it, will instantly arm a merchant fleet of large proportions, is encouraged to maintain itself a strong auxiliary fleet; and this is particularly true if the state known to be committed to the exercise of the right to arm is superior to the other in the amount of tonnage available for such purposes. The state possessed of a smaller merchant fleet regards its prospective adversary as having in fact a potential fighting force which must be guarded against; and so it comes about that a merchant marine is regarded as a unit of naval strength of which cognizance must be taken in formulating ratios expressive of relative naval power.

With appropriate arrangements prohibiting the attack at sight of hostile ships not merely because they happen to be merchantmen, but rather because they are unarmed vessels when there is no reason to believe them to be otherwise, there would be removed a solid ground for the arming of a merchant fleet.¹¹ It is important to note that perhaps the chief reason for the practice which developed in the nineteenth century forbidding ruthless attacks at sight on the enemy's merchant ships, was the fact that as such vessels could not fight successfully against the warship, they gradually made no effort to do so. The modern naval vessel became so superior to the merchant craft that an encounter between the two was certain to result in the destruction of the latter. As it was useless to fight, armament became useless to the merchantman, and ultimately was rarely mounted on its decks. Accordingly, it is not too much to say that absence of conflicts between vessels of the two kinds due to the fact that the merchant vessel was rarely in a position to cause harm to a hostile naval ship, was responsible for the humanitarian treatment which enemy merchantmen and their occupants came to enjoy. No practice or rules demanding such treatment could have come into being if, after the disappearance of privateering, enemy merchantmen persisted in engaging in encounters with hostile public ships, and armed themselves for that purpose.

If satisfactory arrangements could be made by the great maritime Powers for the disarming of merchantmen, strong grounds would appear for demanding the limitation of submarine construction; and even the arguments in favor of abandoning the submarine as a naval weapon might be pressed anew.

⁹ Rear-Admiral William Sowden Sims, U. S. N., *The Victory at Sea*, published by Doubleday, Page & Company, 1920, p. 33.

¹⁰ *Id.*, 34.

¹¹ It will be recalled that the treaty between the United States, Great Britain, France, Italy and Japan relating to the Use of Submarines and Noxious Gases in Warfare, concluded at the Conference on Limitation of Armament, February 6, 1922, did not purport to deal with the special equities of unarmed ships as such.

In January, 1916, when the United States was a neutral, Secretary Lansing proposed to the several belligerent maritime Powers acceptance of a reciprocal arrangement whereby submarines should be caused to adhere to the rules of international law, and merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever.¹² While it proved impossible to obtain an arrangement to such an effect between the opposing belligerents, the endeavor was significant because it emphasized the connection between armed belligerent merchantmen and the enemy's submarine craft. That connection is believed to be a close one, at least in the sense that a merchant fleet is likely to be armed as against hostile submarines, and that such submarines are likely to be utilized offensively or defensively against that fleet. Discussions at the Washington Conference on the Limitation of Armament served to emphasize this point.

It was shown that the chief value of the submarine in the World War was as a weapon against mercantile marines. Mr. Balfour, the head of the British delegation, declared that no less than 12,000,000 tons of shipping had been sunk, of the value of \$1,100,000,000, and over 20,000 non-combatants, men, women, and children, had been drowned through submarine operations. On the other hand, he pointed out that the submarine had wholly failed as an offensive weapon against a hostile naval force. In support of this assertion he called attention to the fact that no less than 15,000,000 British troops had crossed and recrossed the English Channel during the war, and that not one man had been lost from the action of submarines, except on board hospital ships; and also that some 2,000,000 American troops had been brought across the Atlantic which hostile submarines had been powerless to check. He denied, moreover, that submarines were useful for the defense of coast lines and communications with colonies. He went so far as to announce the readiness of his government to abandon submarines.¹³ His colleague Lord Lee contended that the submarine was only to a limited extent a method of defense, and that for offense it was only really valuable when used against merchant ships, and that it constituted "the greatest peril to which the merchant marine of the world was exposed."¹⁴ The delegates of France, Italy, and Japan took a different view, and asserted that the submarine was a valuable defensive weapon even as against hostile naval ships. Mr. Sarraut declared that France must possess submarines in safeguarding its lines of communication with its colonies.¹⁵ The Italian naval experts regarded the submarine an indispensable weapon for the defense of the Italian coasts, and necessary also to protect lines of communication on

¹² Informal and confidential letter from the Secretary of State to the British Ambassador, January 18, 1916, American White Book, European War, III, 162, 164.

¹³ Conference on the Limitation of Armament, Senate Doc. No. 126, 67th Cong., Sess. 2, pp. 266, 267.

¹⁴ *Id.*, 268, 269.

¹⁵ *Id.*, 270, 271.

which Italy largely depended for its supplies by sea.¹⁶ Mr. Hanihara of Japan looked upon submarines as an effective weapon of protection for an insular nation such as his own.¹⁷ The American Advisory Committee expressed the opinion that the submarine as a man-of-war still had a very vital part to play, especially as a scout.¹⁸ Admiral de Bon declared that according to French opinion the submarine had proven its worth as a means of attack against warships as well as in the protection of coasts. He added, however, to quote his words: "the submarine has shown itself especially efficient against the merchant marine." He added later: "The submarine is useful for fighting war fleets; it is useful for fighting merchant vessels. Our opinion is that it is especially the weapon of nations not having a large navy. It is, in fact, a comparatively cheap element in naval warfare which can be procured in large numbers at a cost far below that of capital ships."¹⁹

Such divergence of opinion precluded the adoption by the conference of a resolution to abolish the submarine. It is interesting to note, however, that Secretary Hughes, Chairman of the conference, declared that he was not prepared to say that the suggestions of Mr. Balfour and Lord Lee might not ultimately be successful in inducing the nations to forego the use of a weapon which, as Mr. Balfour had urged, was valuable only as an aggressive weapon, and then only in a form of aggression condemned by humanity and international law.²⁰

France demanded as necessary for her national security an amount of submarine tonnage so largely in excess of the amount to be allotted to her under a proposed ratio of limitation that it was found impossible to reach agreement checking the construction of submarine craft. The conference did, however, frame a treaty respecting the use of submarines (and noxious gases) in warfare.²¹ This treaty had a fourfold end: first, to regulate the seizure, attack and destruction of merchant vessels by submarine craft with a special view to protecting the lives of neutrals and non-combatants; secondly, to secure the acquiescence of other civilized Powers in the regulations prescribed; thirdly, to provide for the punishment of persons violating the regulations; and fourthly, to prohibit the use of submarines as commerce destroyers and to invite all the nations to assent to the prohibition. The treaty has not been accepted by France and is not in force among the states whose representatives signed the agreement.

The discussions at the Washington Conference respecting submarines are illuminating despite the fact that fear of offending the sensibilities of foreign states produced caution in statement and seemed at times to prevent a

¹⁶ *Id.*, 271.

¹⁷ *Id.*, 271, 272.

¹⁸ *Id.*, 273-276.

¹⁹ *Id.*, 278-285.

²⁰ *Id.*, 300, 301.

²¹ *Id.*, 886.

candor in discussion which might have served a useful purpose. It would have been interesting and perhaps highly advantageous, if the French delegates had felt free to state the conditions, if any, on which France was willing to abolish the submarine or limit submarine construction. The various speakers uttered somewhat baffling if eloquent dissertations marked by eulogies of those whose views they most vigorously thwarted. The report of the American Advisory Committee contains statements which with directness and power emphasized certain reasons which have impelled nations to look favorably or unfavorably on the acquisition of submarine tonnage. The following deserve quotation:

A nation possessing a great merchant marine, protected by a strong surface navy, naturally does not desire the added threat of submarine warfare brought against it. This is particularly the case if that nation gains its livelihood through over-seas commerce. If the surface navy of such a nation were required to leave its home waters, it would be greatly to its advantage if the submarine threat were removed. This could be accomplished by limiting the size of the submarine so that it would be restricted to defensive operation in its own home waters. On the other hand, if a nation has not a large merchant marine, but is dependent upon seaborne commerce from territory close aboard, it would be necessary to carry war to her. It would be very natural for that nation to desire a large submarine force to protect the approaches on the sea and to attack troop transports, supply ships, etc., of the enemy. Control of the surface of the sea only by the attacking power would not eliminate it from constant exposure and loss by submarine attacks.²²

The question today is: What price must be paid for the abolishment of the submarine or the limitation of submarine construction? No arguments to the effect that such vessels are not useful for defensive purposes as against enemy ships, whether public or private, will influence statesmen or naval advisors of nations which cling tenaciously to what they now possess. But the Washington Conference has revealed facts that encourage belief that the price can be ascertained and its costliness determined. The first of these facts is, that regardless of its efficacy in other ways, the chief value of the submarine is as a commerce destroyer, concentrating its efforts against merchant craft, which, whether armed or unarmed, are impotent against it. The second is that the exercise of the right to arm merchantmen for whatsoever purpose is a cause of a desire to retain submarines for use against them, and that the extent of that desire is proportional to the size of the merchant marine which is likely to be armed. The third is that incidentally, the conversion of a merchant marine into naval vessels at uncertain places and on the high seas upon the outbreak of war, transforms the merchant craft of a possible enemy into a unit of naval strength against which the possession of a sufficient submarine force is deemed a useful and possibly necessary safeguard. In a word, commerce destroying is the chief objective

²² *Id.*, 276.

of the submarine; and the arming of vessels engaged primarily as vehicles of commerce offers a strong inducement to retain and use an instrumentality with which such vessels cannot cope. The price to be paid for the limitation of submarine construction and possibly for the abandonment of submarines in maritime war is the relinquishment of a legal right—the right to arm a merchant fleet. The question presents itself whether that price is too large a one to be paid by even those states most deeply interested in frustrating submarine activities. It would call for the giving up of a privilege the exercise of which is, as Admiral Sims pointed out, at present of little value against a submarine opponent. It would mean the abandonment of offensive as well as defensive acts of hostility by private ships under private control. It would tend to confine the commission of belligerent acts to the public naval forces of the state. In a word, it would call for a sacrifice which does not appear to involve also the giving up of any substantial military advantage. If commerce seeks freedom from its own destruction through submarine enemies, commerce itself must not permit the vehicles devoted to its service, such as merchant ships, to become instruments of destruction.

It is declared by the treaty respecting submarines prepared by the Washington Conference that the use of such vessels as commerce destroyers shall be prohibited. Although the plan yet remains a proposal, it expresses the consensus of opinion of those who participated in that conference. Possibly one of the Powers may demand further definition of the types of ships against which the prohibition is to be applied before it yields acquiescence. The impressive fact is, however, that the most potent as well as the most ruthless use of the submarine has been justly appraised, and an initial effort made to deal with it accordingly. If it is deemed feasible to abandon the submarine as a commerce destroyer, it ought to be feasible also to forego the right to arm merchantmen against it. If this can be done through appropriate agreement, there are solid reasons to demand reconsideration of the question whether the further construction of submarine tonnage may not be limited or checked.

As a means of encouraging the limitation of further construction of naval auxiliary tonnage generally, and especially the approval thereof by maritime states not possessed of either a large navy or a large merchant marine, it would be obviously helpful to secure agreement checking the freedom of a belligerent to convert merchant craft into naval vessels. As has been noted, an arrangement forbidding conversion on the high seas would be a practical aid; and it might afford a special inducement to some states to limit submarine construction. Although the naval advisors of numerous maritime Powers may remain steadfast to the conviction that the submarine is a weapon which cannot be entirely relinquished despite arrangements which, on the one hand, prohibit it from engaging in commerce destroying, and on the other, safeguard it against armed merchantmen, the

limiting of submarine construction to what may be deemed essential for strictly defensive purposes may still be feasible.

The main point to be observed is that effort should be made by Powers committed to the further limitation of naval armament, to develop a situation by general agreement whereby such limitation is in fact feasible. Through the change of the law there is seen the surest path towards making the world safe with fewer submarines. On the other hand, if despite the profession of a zeal for limiting naval armament, interested governments are indisposed to devise means which encourage their naval advisors to consent to restricting tonnage, it will not be a matter of surprise if there be a recrudescence of old arguments opposing further limitation.

It may be urged that agreements designed to check belligerent Powers from making use of particular weapons or instrumentalities in particular ways will be ignored in the stress of conflict. It may be contended, for example, that despite its undertakings to the contrary a state will surely arm its merchant marine as against its foe when necessity so dictates, or that it will employ its submarines against its enemy's commerce whenever the destruction of it becomes of sufficient importance. It may be urged that the lawlessness of the World War is to be looked upon as a mild precursor of that of the next. This contention is entitled to respectful consideration. A state cannot afford to agree to make sacrifices which serve to offer too strong an inducement to an unscrupulous contracting party to ignore its undertakings. Reasonable safeguards must always protect the country that stands by its agreement, and must save it from being penalized on account of its very faithfulness. Therefore, it is not suggested, for example, that the United States should enter into any convention paving the way for the limitation of naval armament, unless reasonably assured that dangers of a breach of contract which would be injurious to the nation if war arose are remote. It is believed that there are available some deterrents against treaty-breaking which if utilized will fairly safeguard maritime Powers which mutually agree to restrict their freedom of action when war is waged. A few may be noted. It is extremely useful if the prohibition not to do a particular thing is couched in clearest terms, leaving no room for divergent interpretations, and affording no opportunity for the commission of forbidden acts. There should be no intimation that military necessity may excuse any disregard of the injunction. By means of careful drafting much opportunity for evasion may be cut off. There are, however, more effective means whereby a belligerent may be deterred from ignoring its undertakings. If the parties to a general treaty restricting the conduct of each when a belligerent, desire to establish safeguards as against the acts of a covenant-breaker, they may well consider the wisdom of an arrangement whereby neutral states may be free, and perhaps obligated, to withhold from the party which is contemptuous of its agreement all military supplies which it might otherwise obtain from their territory.

It might not be deemed impractical for a treaty to contain provisions that any signatory state, without being charged with unfriendly or unneutral conduct, might forbid the removal from its territory of munitions of war and other forms of military aid which it had reason to believe were destined for the use of any other signatory state which, as a belligerent, resorted to practices or made uses of particular instrumentalities which by the express terms of the agreement were prohibited. A country such as the United States might deem it highly important not to agree to do anything which would necessarily impair its neutral status with respect to a war in which it was not a participant. On the other hand, it might be willing to agree that it itself or any other contracting party should be permitted to enjoy the right to withhold aid from a covenant-breaker, and even possibly agree to exercise that right as against such an offender, on the distinct understanding that such action should in no wise impair the neutrality of the withholding state.

A still larger aspect of the situation presents itself. If the principal maritime Powers are sincerely desirous of further limiting naval armament, and find that their efforts are blocked by fears of what may take place when war breaks out, and that either the latitude or vagueness of the existing law encourages the retention of armament which they do not desire to construct, it is inconceivable that they will allow themselves to be thwarted by obstacles which it lies within their power to remove. Moreover, they must know that the economic and moral grounds which sustain their aspirations produce a lofty and convincing appeal to other and less powerful states. Restrictions which the principal maritime Powers are willing to agree to accept as binding upon each other in the event of war, especially in so far as they accord protection to innocent and unoffending commerce, and safeguard defenseless shipping, and tend to confine hostilities to contests between the essentially fighting ships of opposing belligerents, would be warmly welcomed by maritime countries possessed of small navies and substantial merchant fleets. No lack of approval need be feared by the Powers whose wills determine the mode by which future wars are to be conducted. That the representatives of five of those Powers convening at Washington in 1922, thought it feasible to agree to a prohibition of commerce destroying by submarines is a hopeful sign of the times. Even though the arrangement is not yet effective, it reflects the opinion of a group of statesmen of the first rank, that restrictions to govern the conduct of the most powerful belligerents are worth imposing because there is reason to believe that they will be respected when the conflict arises.

The obstacles that blocked the endeavors of the United States in 1922 to secure limitations on the construction of auxiliary naval craft, indicate those which today are likely to retard steps in the same direction. The naval or military advisor still stands uncontradicted when he points to the practices in which a future belligerent will in all probability indulge, or the uses to which it will put every available weapon. Moreover he is not to be chal-

lenged when he asserts that no generally accepted rule of law forbids much that he anticipates, or that rules which his own country accepts in a particular way are given a widely different interpretation by other countries with which his own may be at war. Therefore, when he invokes these facts as reasons for rejecting proposals for limitation of naval armament, no satisfactory answer can be made.

If there is fresh zeal on the part of interested states to effect a further limitation to which they have heretofore been unwilling to agree, they must obviously be prepared to overcome the reasonable objections of their own technical advisors. If there is failure to do so, the prospect of a substantial achievement is not bright. As has been pointed out, it is highly desirable if not essential that such changes should be wrought in the laws of maritime warfare in so far as they concern the states which attempt to deal with each other, as may justify and compel a reconsideration of the general problem by military and naval experts. Opportunity must be given them to reconsider, on a new set of facts predicated on conditions differing from what have heretofore prevailed, what are the needs of their respective countries, and whether ratios based upon the existing tonnage possessed by those countries in respect to various forms of auxiliary craft, offer fair tests for lessening tonnage.

Effort has been made to indicate some of the matters respecting which agreement by the great maritime Powers would clear the air. Certain belligerent practices and certain uses of belligerent instrumentalities have been noted and their effect upon current opinion observed. It remains by way of summary to indicate briefly those practices and uses concerning which agreement would be appropriate, and also the character of certain undertakings which would simplify the problem of those who seek to bring about further limitation of naval armament.

First. Agreements as to the limits of contraband and the nature and scope of blockade would be not only valuable in themselves, but also a means of determining the feasibility of an arrangement looking to the immunity of enemy private property other than contraband from capture at sea. The difficulties to be anticipated in effecting such agreements cannot be overestimated. They are only equalled by the benefits derivable from an arrangement on the subject.

Second. Despite obstacles that may prevent agreement as to contraband or blockade, the feasibility of an arrangement contemplating neutral governmental certifications concerning the nature, destination and use of cargoes on neutral ships, by way of substitute for belligerent captures and searches in port, should be seriously considered. General agreement which by this process heeded the equities of both neutrals and belligerents, would also lessen the burden now imposed upon auxiliary craft and diminish proportionally the need of such tonnage.

Third. Inasmuch as the transformation of merchant ships at sea into

auxiliary cruisers encourages the enemy to arm its merchant fleet, the feasibility of an arrangement forbidding such conversion on the high seas deserves consideration. An agreement to that end would play its part in the larger endeavor to remove excuses for the maintenance of unlimited submarine tonnage.

Fourth. As relinquishment of the right to arm merchantmen would tend directly to diminish the need of submarine tonnage, and at the same time encourage general acceptance of the principle that submarine vessels should not be employed as commerce destroyers, the practical value of an agreement to keep guns off merchantmen is entitled to most earnest consideration. The influence of such an arrangement is beyond estimate.

Fifth. As the requisite assurance that agreements such as the foregoing would be respected when war ensued might be greatly strengthened by the zealous conduct of neutral states, the reasonableness of a general arrangement conferring the right, and even imposing the obligation upon neutral contracting parties, to prevent their respective territories from ministering to the needs of a covenant-breaking belligerent, merits consideration.

These suggested bases of agreement are merely submitted because they are believed to pave the way for the removal of obstacles that seemingly thwart the further limitation of naval armament. It will be observed that the several proposals are also calculated to save commerce from the ruthless hand of the destroyer or captor, and by processes which also forbid commerce to fight its own battles on the seas. By confining hostile engagements when unhappily they occur, to encounters between forces and instrumentalities dedicated to war, there are not only upheld the chivalrous views of a Roosevelt and a Choate, but also greatly simplified the task of those who seek to relieve maritime states from the burden of maintaining unnecessary naval armament.

THE LEGAL STATUS OF THE PAN AMERICAN UNION¹

BY WALTER SCOTT PENFIELD

Of the Bar of the District of Columbia

Many times inquiry has been made as to the legal status of the Pan American Union. Its friends have often wished that an opportunity might be afforded a court to determine that question. For the first time in its history, a court of the United States recently had occasion to pass on the matter.

A judgment having been secured in the Municipal Court of the District of Columbia against an employee of the Pan American Union, the court, on November 27, 1925, issued a writ of attachment on said judgment, directed to the Pan American Union as garnishee, notifying it of the seizure of the property and credits of said employee in its hands, and requiring the Pan American Union to appear in said court and show cause against such attachment proceedings. The writ and notice were served on the Chief Accountant and Disbursing Officer of the Pan American Union on November 28, 1925, by the Marshal of the District of Columbia.

Upon the request of the Director General, the attorney of the Pan American Union entered a special appearance in said court in its behalf, for the purpose of contesting the jurisdiction of the court, and filed a plea to the jurisdiction; setting out the facts with reference to the proceedings of the five Pan American Conferences, and with reference to the sources, the custody, and the disbursement of the funds of the Pan American Union; and contending that it was not subject to the process of said court by reason of the sovereign status of the members of the Union.

The case was tried on December 16, 1925, before Judge Charles V. Meeham of said court. After hearing the attorney for the Pan American Union, as well as the attorney for the plaintiff in the case, the court found in favor of the Pan American Union, sustained the plea to the jurisdiction, and dismissed the attachment proceedings, without, however, rendering any written opinion thereon.

¹ Substantially this entire article is taken from the author's trial brief, prepared by him for his use as attorney of the Pan American Union in defense of the garnishee proceedings.

In the preparation of the case, the author carefully examined the pertinent provisions of the proceedings of the First International American Conference, held in Washington in 1889, those of the Second International Conference of American States, held in Mexico City in 1901, those of the Third International Conference of the American States, held in Rio de Janeiro in 1906, those of the Fourth International Conference of American States, held in Buenos Aires in 1910, and those of the Fifth International Conference of American States, held in Santiago, Chile, in 1923. But for the purposes of this article, it is only necessary to refer to the material portions of the proceedings of the last Conference, which supersede similar provisions adopted by prior Conferences.

FACTS IN REGARD TO THE PAN AMERICAN UNION

In order to ascertain the legal status of the Pan American Union, the resolutions of the various Pan American Conferences must first be examined. They disclose that "The Union of the Republics of the American Continent" is composed of the following sovereign states, to wit: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, United States, Uruguay and Venezuela. They further show that said "Union of the Republics of the American Continent . . . maintains under the name of the 'Pan American Union', the institution which serves as its permanent organ and has its seat in the building of the American Republics, in the City of Washington."²

The Fifth Pan American Congress provided that the functions of the Pan American Union are:

To compile and distribute information and reports concerning the commercial, industrial, agricultural, and educational development, as well as the general progress of the American countries.

To compile and classify information referring to the Conventions and Treaties concluded among the American Republics and between these and other States, as well as to the legislation of the former.

To assist in the development of commercial and cultural relations between the American Republics and of their more intimate mutual acquaintance.

To act as a Permanent Commission of the International Conference of American States; to keep their records and archives; to assist in obtaining ratification of the Treaties and Conventions, as well as compliance with the resolutions adopted; and to prepare the program and regulations of each Conference.

To submit to the various Governments, at the time of the holding of each Conference, a report upon the work of the institution since the adjournment of the last Conference, and also special reports upon any matters which may have been referred to it.

To perform such other functions entrusted to it by the Conference, or by the Governing Board by virtue of the powers conferred upon it by this resolution.

To carry out the purposes for which this institution is organized, the Governing Board shall provide for the establishment of such administrative divisions or sections within the Pan American Union as may be deemed necessary.³

The same conference provided that "the government of the Pan American Union shall be vested in a Governing Board, composed of the diplomatic representatives of the American Republics accredited to the Government of the United States of America, and the Secretary of State of that country."⁴

² Art. I, Resolution pertaining to the organization of the Pan American Union, Fifth Conference of American States, Santiago, Chile, 1923.

³ Art. II. Same.

⁴ Art. V. Same.

At the same time, the administration was placed in the hands of a Director General, "with power to promote its most ample development, in accordance with the terms of this resolution, with the regulations and with the resolutions of the Governing Board, to which he shall be responsible."⁵

While the Pan American Union is not founded on treaty, the twenty-one sovereign republics, that are a party thereto, have assented to the Union of the American Republics by authorizing the appointment of delegates to the several Pan American Conferences, by providing the necessary appropriations to enable the delegates to attend, and by annually appropriating their proportionate quotas for the support of the Pan American Union.

The method of collection of quotas and disbursement of funds is as follows: All of said Republics, including the United States, send annually to the Pan American Union their respective drafts or checks for their quotas, and thereupon said Pan American Union deposits said drafts or checks as credits with the Treasury of the United States. At various times the Chairman of the Governing Board of the Pan American Union signs a requisition for disbursing funds, addressed to the Secretary of the Treasury of the United States, asking a warrant to issue, chargeable to the Pan American Union quotas, and to the Special Disbursing Agent of the Pan American Union. The Treasurer of the United States then certifies to the Special Disbursing Agent of the Pan American Union that the amount of said warrant has been credited to his account. Thereupon, the Chief Accountant and Disbursing Officer of the Pan American Union issues checks on the Treasurer of the United States for such purposes as have been approved by the officers of the Pan American Union, including the payment of the salaries of employees. Said Chief Accountant and Disbursing Officer is appointed by and gives bond to the Pan American Union. Under said appointment he also gives bond to the United States of America as "Special Disbursing Agent of the Department of State to disburse all funds of the Pan American Union." Pursuant to the regulations of the Governing Board, his accounts are submitted to the General Accounting Office of the United States for audit.

CONCLUSION

Sufficient facts, of a material nature, concerning the organization and functioning of the Pan American Union, have been set forth to enable the question to be considered in the light of three inquiries, namely:

- (a) What is the Pan American Union?
- (b) What is its legal status?
- (c) Is it subject to the jurisdiction of the local courts?

From what has been set forth, it seems clear that the "Pan American Union" is the permanent organ and the administrative agency of an international union, or association, of the twenty-one American Republics. This

⁵ Art. VI. Same.

union, or association, has been named by the parties thereto the "Union of the Republics of the American Continent."⁶

The Pan American Union serves as the agent of this association of sovereign states, has its seat in the building of the American Republics in Washington, and is maintained at the common expense and for the common benefit of the members of the Union. Its functions are as set forth in the resolutions of the Pan American Conferences, and are in the nature of governmental functions, as distinguished from engaging in business enterprises for profit. It is governed by a Governing Board, which is composed entirely of officials of the sovereign and independent states comprising the Union of the American Republics, namely: the Secretary of State of the United States of North America and the diplomatic representatives of the other American Republics accredited to the Government of the United States of America.⁷ As an organization, therefore, the Pan American Union is the common administrative agency of the twenty-one sovereign states which are members of the Union.

What is its legal status as an organization, particularly with respect to the laws of the United States of America, where it is located? The Union is not created by treaty. Its existence is due to resolutions adopted at international conferences, by duly appointed delegates of the various republics of this hemisphere. So far as the United States of America is concerned, such delegates were appointed by the Executive, pursuant to the authorization of Congress, and, presumably, similar action was taken by the other republics. The resolutions, then, are in the nature of agreements between the executive departments of the various governments of said republics. But such agreements have acquired a legal status, by reason of the fact that the legislative authority of each country has assented thereto, by making annual appropriations for their several quotas of the funds required for the support of the Pan American Union.

The one advantage of a treaty over the present arrangement would have been to place the Pan American Union on a permanent basis, rather than for it to continue through voluntary assent of the several governments.

Since its functions are performed within the boundaries of the United States, the question arises as to whether the Pan American Union is subject to the jurisdiction of the courts of the United States. It seems clearly to result from what has been said that the Pan American Union, as an organization, partakes of the same sovereign status which pertains to the members of the Union, and which pertains to the diplomatic representatives who are members of the Governing Board.

The authorities show that neither the United States nor any of the other sovereign nations which are members of the Union, can be sued in the courts

⁶ Art. I. Same.

⁷ Art. V. Same.

of the United States without their consent.⁸ The authorities establish that public property belonging to sovereign states, other than certain vessels, is subject to the same principle, and that there is no difference between suits against a sovereign directly and suits against its property.⁹ Public property of a government, in use for public purposes, is beyond the jurisdiction of the courts of its own or any other state. The exercise of such jurisdiction would be inconsistent with the independence of the sovereign authority of a state.¹⁰

The Attorney General has ruled that on the formation of the Union of American Republics, the sovereign states comprising it neither surrendered any rights or powers nor acquired any.¹¹ The Comptroller of the Treasury has held that the United States of America is only a contributing member of the Union, and has no more control over the expenditures of the Pan American Union than its representation on the Governing Board gives it.¹² Therefore, the funds of the Pan American Union would appear to be the common property of the several sovereign nations composing the Union, which they have voluntarily placed under the control of the Governing Board as their agent. Being the property of sovereign nations, the fact that such funds have been commingled and deposited with the Treasury of the United States as custodian would not deprive them of their sovereign status.

The Supreme Court of the United States of America has held that money in the hands of a disbursing agent is not subject to attachment, because it remains the property of the United States until the recipient of the funds actually receives the money from the Treasury, and because it would be found embarrassing, and, under some circumstances, fatal to the public service, if such funds could be diverted by process of the courts.¹³ On the same line of reasoning, any funds in possession of the disbursing officer of the Pan American Union would continue to constitute funds of the Union and could not be reached by process of the courts while in his hands.

By the statutes of the United States, process against foreign diplomatic representatives is void,¹⁴ and property in which the United States is interested is exempt from attachment.¹⁵

The conclusion is inevitable that the twenty-one sovereign states, which compose the union of American Republics, cannot be sued without their

⁸ Moore's Int. Law Dig., Vol. II, p. 558, with citations; *Schooner Exchange v. McFaddon*, 11 U. S. S. C. Rep. 116; Hyde, Int. Law, pp. 430-31, with citations; *Hassard v. United States of Mexico*, 61 N. Y. 645, affirmed in 173 N. Y. 645; *Mannsing v. Nicaragua*, 14 How. Pr. 517; *Beers v. State of Arkansas*, 20 How. U. S. 527.

⁹ *Stanley v. Schwolly*, 147 U. S. 508; *U. S. v. Lee*, 106 U. S. 196.

¹⁰ *Oliver American Trading Co. Inc. v. Government of the United States of Mexico and National Railways of Mexico*, 5 Fed. Rep. (Second Series), p. 659.

¹¹ XX Ops. Atty. Genl. 558.

¹² XXI Ops. Compt. Treas. 850.

¹³ *McKean Buchanan, Plaintiff in Error v. James Alexander*, 45 U. S. Sup. Court Rep. 19.

¹⁴ Vol. 3, pp. 56 and 57, Secs. 4063 and 4064, Federal Statutes Annotated, Second ed.

¹⁵ Vol. 8, p. 1130, Sec. 3753, same; 24 Ops. Atty. Genl. 679.

consent; that the members of the Governing Board of the Pan American Union cannot be sued without the consent of the members of the Union; and that the funds and property of the Pan American Union cannot be reached by process of the courts of the United States, even though such funds should be in possession of its disbursing officer.

THE BOMBARDMENT OF DAMASCUS

BY QUINCY WRIGHT
Of the Board of Editors

The Syrian insurrection culminating in the bombardment of Damascus in October, 1925, is an incident of a kind which has frequently marred the relations of western Powers with less advanced peoples. Thus it may be of more than passing interest to examine the conduct of the parties concerned from the standpoint of international law.

The principal Allied Powers, in pursuance of various interallied war treaties, authorized France to undertake the mandate for Syria at the San Remo Conference of April 25, 1920. The mandate was drawn up by France, approved by the United States, confirmed by the League of Nations Council on July 24, 1922, and came into force September 29, 1923. Turkey had given up all claim to Syria within the mandate boundaries by the Franklin-Bouillon Treaty of October 20, 1921, confirmed by Articles 3 and 16 of the Lausanne Treaty of July 24, 1923.¹

The King-Crane Commission, sent to Syria by President Wilson in 1919, had reported that of 1863 petitions received, over sixty per cent were expressly opposed to a French mandate and less than fifteen per cent (mostly from the Lebanon) were expressly favorable to France, in spite of considerable propaganda by French forces in occupation of the coastal area.² On March 10, 1920, a congress of 135 notables, claiming to represent all Syria, met at Damascus and proclaimed the independent Kingdom of Syria with the Emir Feisal as king. Damascus and the interior, which had actually been under the Arab administration of Feisal since the withdrawal of General Allenby in 1919, was forcibly occupied by the French on July 25, 1920.³

After this, Syrian complaints against French rule were numerous and were manifested by several petitions to the League of Nations and by several insurrections of slight military significance before 1925. French troops were reduced from some 70,000 in 1920 to about 10,000 in July of 1925, two-thirds of which were Algerians, Tunisians, Senagalese and other Mohammedan colonials.⁴

¹ See Wright, "The United States and the Mandates," *Michigan Law Rev.*, Vol. 23, pp. 11, 22, May, 1925.

² Full text printed in *Editor and Publisher*, Vol. 55, No. 27, 2nd Ser., pp. 1-28, Dec. 2, 1922. See also Baker, *Woodrow Wilson and World Settlement*, Vol. 2, Chap. 34.

³ Chirol, *The Occident and the Orient*, pp. 170-177; *Republique Francaise, Ministere des Affaires Etrangeres, Rapport sur la situation de la Syrie et du Liban*, 1922-23, p. 37 *et seq.*; Buell, *International Relations*, pp. 88-89.

⁴ Wright, "Syrian Grievances against French Rule," *Current History*, Feb. 1926, pp. 687-693.

On the latter date an insurrection broke out in the Jebel Druse attributed to the ineptness of General Sarrail, the French High Commissioner, in handling the Druse complaints against their governor, Captain Carbillet. The Arabs seized the opportunity to attack the French, organized a government in coöperation with the Druses, with Sultan Altrash as Prime Minister and Shahbender as Foreign Minister, sent emissaries to get military assistance from Hedjaz and Nejd, and organized guerilla warfare against the French. Risings seem to have been planned in various cities, and actually occurred in Hama and Homs in September. The French brought in reinforcements, and besides waging active war against the Druses of the Hauran, executed insurgents, whom they designated as brigands, and burned several Arab villages near Damascus accused of harboring them. Early in October the dead bodies of twenty-four such "brigands" were paraded in the streets of Damascus on camels and then exposed in the public square.

Soon after, some Circassians used by the French as irregulars were killed by the insurgents, and on October 17 French troops were attacked in the city by mobs assisted by a hundred or more insurgents from outside. The Azim palace occupied by the High Commissioner was the especial focus of attack. On the 18th the insurgents started looting in the bazaars. Firing began about noon and the French replied by sending tanks which fired at random down several of the main streets. At five p. m. on Sunday the 18th the French began bombardment without warning from the citadel and from the hills north of the city. Blank shells were used at first, but on the 19th all French troops and residents were removed to an entrenched position in the Salahie gate region, and bombardment continued with live shells until noon of the 20th. Fires started, and six or eight square blocks in the center of the city occupied by bazaars and residences of Arab notables between the Street called Straight and the Citadel were wholly destroyed, while occasional buildings were damaged in other parts of the city. Neutral residents of Damascus estimate that 500 to 1000 natives, men, women and children, were killed.⁵ Property losses are placed at four to nine million dollars. Following the bombardment, a rifle and money fine was imposed on the populace. During November and December guerilla warfare by the insurgents continued.⁶

⁵ Arabs of Damascus originally estimated the killed at 5000 or more, while General Sarrail reported 137 killed, including French soldiers and Armenians killed by the insurgents, as well as residents killed by the bombardment.

⁶ This account is taken from a statement by General Sarrail published in *La Syrie* of Beyrut, Nov. 20, 1925; from articles by Henri de Kerillis in the *Echo de Paris*, Sept. 28 to Oct. 6, 1925, severely criticizing General Sarrail for his handling of the Druse revolt; from French official reports to the Mandates Commission of the League of Nations, Oct. 23, 1925 (Minutes of 7th session, p. 81), and Feb. 19, 1926 (seen only in newspaper reports Feb. 19, 1926); from the account by a reporter on the spot in the London Times of Oct. 25, 1925 (said by residents of Damascus to be accurate); from account of bombardment by Rev. Elias Newman of Damascus, an eyewitness, published in *Current History*, Jan. 1926,

What, if anything, does international law have to say with regard to the bombardment of Damascus under these circumstances? The Arabs look upon the situation as one of warfare. They are astonished that the League of Nations, which was organized to prevent war, which successfully mobilized all its machinery to stop an incipient war between Greece and Bulgaria in October, should have done nothing while this more serious war was going on in territory under its special supervision. In any case they think the laws of war should be applicable and that these laws forbid the bombardment of undefended towns.

France, on the other hand, while using the term "insurrection" in connection with the Druses, has described the disorders in other parts of Syria as banditry or brigandage, and apparently looks upon the activity of her forces as police measures outside of international law.⁷

Two theories may be urged in support of this point of view. The first is that which looks upon Syria and other non-European communities as outside the system of international law. Thus Lorimer, writing in 1883,⁸ divides humanity "into three concentric spheres, that of civilized humanity, that of barbarous humanity and that of savage humanity" entitled respectively to "plenary political recognition, partial political recognition and natural or merely human recognition." In the second sphere he puts the states of Asia which are not European dependencies and says, to them the international jurist "is not bound to apply the positive law of nations, but he is bound to ascertain the points at which and the directions in which barbarians and savages come within the scope of partial recognition." Analyzing the jural bases for refusing full recognition, he distinguishes non-age, imbecility and criminality, and points out that on the latter ground "the Barbary States were never recognized by European nations; and the conquest of Algeria by France was not regarded as a violation of international law. It was an act of discipline which the bystander was entitled to exercise in the absence of police; and the justification for the present interference of France in Tunis and our own in Egypt, must be sought in the extremely rudimentary character which still belongs to what is beginning to be called the European concert." Perhaps, however, Syria would come better under the head of "non-age" or immaturity, of which he says: "The right of undeveloped races, like the right of undeveloped individuals, is a right not to recognition as what they are not, but to guardianship—that is, to guidance—in becoming that of which they are capable, in realizing their special ideals." This seems to be precisely the theory of "tutelage" adopted by the League Covenant (Art. 22) for "peoples not yet able to stand by them-

p. 490; and from personal inspection and conversations with residents of Damascus in November, 1925. See also Scheifley, *Current History*, Jan. 1926, p. 484, and Lybyer, *ibid.*, Dec. 1925, p. 447.

⁷ League of Nations, Permanent Mandates Commission, Minutes, 7th session, p. 81.

⁸ Lorimer, *Institutes of the Law of Nations*, Vol. 1, pp. 101, 157, 161.

selves under the strenuous conditions of the modern world" and put into effect for former enemy colonies by the mandate system.

Though Lorimer's position is endorsed by many text writers⁹ and by a number of judicial decisions,¹⁰ few of the authorities consider in detail the modifications of normal international law permitted in dealing with such peoples. Dickinson refers to the usual exercise of extraterritorial jurisdiction, greater rigor in diplomatic protection of resident foreigners, discrimination in admittance of such peoples to immigration, granting of asylum in legations, consulates and public vessels. No mention is made of the non-applicability of the law of war.¹¹

Does international law require the application of laws of war to people of a different civilization? The ancient Israelites are said to have denied the usual war restrictions to certain tribes against which they were sworn enemies, the ancient Greeks considered the rules of war recognized among Hellenes inapplicable to barbarians, and medieval Christian civilization took a similar attitude toward war with the infidel.¹² An English writer in 1906 draws attention to "the peculiarly barbarous type of warfare which civilized Powers wage against tribes of inferior civilization. When I contemplate," he adds, "such modern heroes as Gordon, and Kitchener, and Roberts, I find them in alliance with slave dealers or Mandarins, or cutting down fruit trees, burning farms, concentrating women and children, protecting military trains with prisoners, bribing other prisoners to fight against their fellow countrymen. These are performances which seem to take us back to the bad old times. What a terrible tale will the recording angel have to note against England and Germany in South Africa, against France in Madagascar and Tonquin, against the United States in the Philippines, against Spain in Cuba, against the Dutch in the East Indies, against the Belgians in the Congo State."¹³ Possibly the emphasis, in most accounts of the recent bombardment of Damascus, upon the fact that relatively slight damage was done to Europeans and Americans indicates the existence of this distinction in the moral sense of western communities.

⁹ Bonfile, 8th ed. (Fauchille), Vol. 1, p. 31; Holtzendorff, Elements, p. 50 and *Rev. de droit int.*, Vol. 8, p. 18; Fiore, International Law Codified, Borchard trans., secs. 395, 399; Risley, The Law of War, p. 40; Oppenheim, International Law, 3rd ed. Vol. 1, pp. 35, 180; Dickinson, Equality of States, p. 131 *et seq.*, 223 *et seq.*, who quotes from numerous writers.

¹⁰ Sir William Scott in *The Madonna del Burso*, 4 C. Rob. 169, 172, 1802; *The Hurtige Hane*, 3 C. Rob. 324, 325, 1801; *The Helena*, 4 C. Rob. 3, 6, 1801. See Scott's Cases on International Law, 1st ed. pp. 2-3, 45-48.

¹¹ Dickinson, *op. cit.*, pp. 223-229. Oppenheim holds that states outside the family of nations have no rights at all under international law (*op. cit.*, Vol. 1, p. 36), and that those not recognized on a basis of equality have only such rights as are specified by treaty or may be implied from exchange of diplomatic officers (*op. cit.*, Vol. 1, pp. 35, 180, and *infra*, note 18).

¹² Oppenheim, *op. cit.*, Vol. 1, pp. 50, 53; Walker, History of the Law of Nations, Vol. 1, pp. 41, 124.

¹³ F. W. Hirst, *The Arbitrator in Council*, p. 230.

However, it does not appear that international law recognizes such a distinction. Lieber's code says, "No belligerent has a right to declare that enemies of a certain class, color or condition when properly organized as soldiers will not be treated by him as public enemies."¹⁴ Great Britain, it is true, claimed at the first Hague Conference that experience had shown it was necessary to use expanding bullets against African and Asiatic tribes, but she used this as an argument for refusing to sign the third declaration prohibiting such bullets, apparently with the thought that if the prohibition were recognized it would apply against any enemy.¹⁵ The Hague conventions make no distinction with regard to race or civilization, but are binding in all wars among signatories, which include several Asiatic and African states.¹⁶

It is true, modern international law does not approve the use of "savage tribes or barbarous races" in civilized warfare, but this is on the theory that such troops will not observe the law of war themselves.¹⁷ The law of war recognizes the right of retaliation, consequently if any enemy, whether of European, Asiatic or African civilization, fails to observe the law, a belligerent may, as a measure of retaliation, resort to otherwise illegal methods. Doubtless in wars with people unfamiliar with international law, departures from the law of war may often be justified on this ground. Thus Oppenheim notes that the civilization of certain non-Christian states was essentially so different from that of the Christian states that international intercourse with them of the same kind as between Christian states had been hitherto impossible. And neither their governments nor their populations were yet able fully to understand the law of nations and to take up an attitude which was in conformity with all the rules of this law." They should not, therefore, be considered international persons of the same kind and the same position within the family of nations as Christian states, but so far as they indicate by treaties or exchange of diplomatic officers acceptance of international law they are entitled to its protection. For other parts of international law, he adds, "such non-Christian states remained as yet outside the circle of the family of nations, especially with regard to war, and they were for those parts treated by the Christian powers according to discretion."¹⁸

¹⁴ Lieber's Code, General Orders No. 100, U. S. Army, 1863, Art. 57. See also U. S. Rules of Land Warfare, 1914, Art. 41.

¹⁵ Higgins, *The Hague Peace Conferences*, p. 496.

¹⁶ China, Japan, Liberia, Persia, Siam, and Turkey were members of the Hague Conferences. All of these, except Turkey, are members of the League of Nations, as is Abyssinia.

¹⁷ U. S. Rules of Land Warfare, 1914, Art. 41; Bonfils, 8th ed. (Fauchille), sec. 1083; Morgan, *War book of the German General Staff*, 1915, p. 87; Bordwell, *The Law of War*, p. 140; Garner, *International Law and the World War*, Vol. 1, p. 292; Oppenheim, *op. cit.*, Vol. 2, p. 108.

¹⁸ Oppenheim, *op. cit.*, Vol. 1, p. 180. Westlake points out that in wars against peoples or tribes with no organized government it may be necessary to depart from the usual principle of confining attack to enemy armed forces (see preamble of Declaration of St. Petersburg, 1868), and to direct measures against the whole population. Thus, he says, Article 25 of the Hague convention "cannot be quoted against the attack or bombardment of a town

Thus it does not seem that the different culture or the fact of tutelage would withdraw Syrians from the protection of the law of war if that law were otherwise applicable, and they themselves were prepared to observe it. The latter was certainly to be presumed from the fact that Turkey, of which Syria was then a part, had ratified the IV Hague Convention of 1899.

This leads us to the second theory on which international law would be ruled out of consideration, namely, that French relations with Syria are of a domestic, not of an international character. Theory and practice clearly indicate that mandated territories are not under the sovereignty of the mandatory Power.¹⁹ Communities under "A" mandate, of which Syria is one, are expressly declared by the League Covenant (Art. 22) to "have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by the mandatory, until such time as they are able to stand alone." The mandate for Syria²⁰ requires that within three years an organic law for Syria and the Lebanon shall be framed, in agreement with the native authorities, taking into account the rights, interests and wishes of the population. This organic law has not yet been enacted, and the states of Syria are organized by decrees of the French High Commissioner, but in accordance with the provision that "pending the coming into effect of the organic law the government of Syria and the Lebanon shall be conducted in accordance with the spirit of the mandate," these decrees have organized native governments, which, however, are quite closely controlled by the High Commissioner.

In theory France has no powers in Syria other than those conferred by the mandate. The mandate, however, seems to make France responsible for maintaining order and to confer full power to this end. Thus she may "maintain her troops in the territory for its defense, and until entry into force of the organic law and the reestablishment of public security, may organize such local militia as may be necessary for the defense of the territory and may employ this militia for defense and also for the maintenance of order." After entry into effect of the organic law the militia comes under the local authorities who, however, can not use it for purposes "other than those specified without consent of the mandatory." France may require Syria to help support its troops there and may use ports, railways and other means of communication for the passage of its troops and supplies. The term "maintenance of order" is used only with respect to militia, not with respect to French troops, but it seems a fair assumption that at least prior

not having a government sufficient to be the proper object of hostilities"; but he adds "no humane officer will burn a village if he has any means of striking a sufficient blow that will be felt only by fighting men." (International Law, Vol. 2, pp. 59, 87.)

¹⁹ Wright, "Sovereignty of the Mandates," this JOURNAL, Vol. 17, p. 691 *et seq.*; Vol. 18, p. 306 *et seq.*

²⁰ For text, see this JOURNAL Supp., Vol. 17, p. 177.

to the effectiveness of the organic act and reestablishment of security, France has full authority to suppress disorder and to decide what use of troops is necessary for that purpose.²¹ With this assumption, the most favorable to France, what rights have the native inhabitants under international law?

Domestic violence, according to international law may be, (1) mob violence, brigandage or banditry, (2) insurrection, or (3) civil war. In the first case the measures taken by the government are controlled primarily by domestic law and do not ordinarily come under international law at all.²² Where foreigners are injured, however, the government is responsible if damage resulted from tortious acts by executive, military or police officials within the scope of their powers,²³ or from the acts of individuals which could have been prevented by "due diligence" on the government's part.²⁴ Even when foreigners are not injured, international responsibility may be involved in case repressive measures are so barbarous as to invite humanitarian intervention. Some writers deny the justifiability of such interventions altogether, unless authorized by the whole body of civilized states, and in practice they have seldom taken place unless barbarous conduct has been engaged in or condoned by the government for a long period of time. Isolated acts of brutality have seldom given rise to such interventions.²⁵

²¹ This has been recognized under the class "C" mandate of Southwest Africa, which, however, gives the mandatory considerably more power than the class "A" mandate for Syria. Thus Kotze, J., of the Supreme Court of South Africa in the case of *Jacobus Christian v. Rex*, 1923 (British Year Book of Int. Law, 1925, pp. 211, 219), which arose in connection with the Bondelzwart rebellion of 1922, said: "As the obligation to maintain law and order rests in the mandatory, it is its duty to suppress all disturbances of these, and to provide for the public safety, as well as to punish offenders." The Permanent Mandates Commission expressed a similar opinion in its inquiry into this rebellion: "As regards the conduct of the military operations, it is not disputed that the administration, when it became evident that hostilities were inevitable, acted wisely in taking prompt and effective steps to uphold government authority and to prevent the spread of disaffection." (League of Nations, Permanent Mandates Commission, Minutes, 3rd session, p. 294.) See also, this JOURNAL, Vol. 18, p. 306.

²² This flows from territorial sovereignty, the basic principle of modern international law. The state, writes Hall, "asserts authority as a general rule over all persons and things and decides what acts shall or shall not be done within its dominions." (Higgins, ed., 8th p. 56.)

²³ Borchard, *Diplomatic Protection of Citizens Abroad*, p. 185 *et seq.*; *supra*, note 50.

²⁴ *Ibid.*, p. 213 *et seq.*

²⁵ "Humanitarian intervention," writes Stowell in an exhaustive and careful study of the subject, "is an instance of intervention for the purpose of vindicating the law of nations against outrage. For it is a basic principle of every human society and the law which governs it that no member may persist in conduct which is considered to violate universally recognized principles of decency and humanity. . . . However, the presumption in favor of the rectitude and legality of the action of the sovereign will not be impaired by an occasional abuse and instance of inhuman action. . . . In the absence of an effective sanction under international law to remedy these occasional abuses, we might not be justified in classing them as violations of international law." (*Intervention in International Law*, pp. 51-52.) Of very different opinion is Hall who writes: "In giving their sanction to inter-

If we accepted the view that the native violence about Damascus were mob violence, brigandage or banditry, it would appear that the burning of villages and bombardment of Damascus was in excess of any police requirements. Thus the question might be raised whether humanitarian intervention would not be justified.²⁶

In fact, however, the violence in Syria seems to have had the character of insurrection. The insurgents were organized for political purposes, and war in the material sense existed. Insurrection is a question of fact, not of recognition.²⁷ Publicists generally agree that insurgents are entitled to the benefits of the law of war in their relations with the armed forces of the *de jure* government. "If", writes Rolin, "the insurgents have constituted a government regular in form, if they are masters of a part of the territory, if they act as in a regular war, if they are waging a war having the character of a war of independence and not only of a struggle having for its object the substitution of one form of government for another, the laws of war, which are for the most part only the recognition of principles of humanity, equity and loyalty, will be applicable in their relations with the legal government, even in the absence of recognition."²⁸ It is not clear why revolutionists

ventions of the kind in question jurists have imparted an aspect of legality to a species of intervention, which makes a deep inroad into one of the cardinal doctrines of international law; of which the principle is not even intended to be equally applied to the cases covered by it; and which by the readiness with which it lends itself to the uses of selfish ambition becomes as dangerous in practice as it is plausible in appearance. It is unfortunate that publicists have not laid down broadly and unanimously that no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as between states has taken place, or unless the whole body of civilized states have concurred in authorizing it." (*Op. cit.*, pp. 343-344.) It will be noticed that the final qualification would justify many humanitarian interventions, and the preceding one would justify all such interventions if Stowell's theory were accepted.

²⁶ "When the authorities of an independent state," writes Stowell, "persist in administering the law with injustice and cruelty so excessive as to constitute an intolerable abuse and to shock the opinion of other states, it has led in certain instances to intervention on what we may properly designate as the ground of denial of justice." (*Op. cit.*, p. 139.) It is interesting to recall that one of the humanitarian interventions most generally supported is that which France herself undertook at the request of the European Powers in 1860 on account of Turkish toleration of the massacre of Maronites in Syria by the Druses. (*Ibid.*, p. 63.)

²⁷ "Insurgents are organized bodies of men who for political purposes, are in a state of armed hostility to the established government. There may be war in the 'material sense' which, because belligerency has not been recognized, has not become war in the 'legal sense,' nevertheless those engaged may have legal status." Wilson and Tucker, *International Law*, 8th ed., p. 63. See also, Lieber's Code, Art. 149; *The Three Friends*, 166 U. S. 1; *The Lucy H.*, 235 Fed. Rep. 610, 1916; *Montoya v. U. S.*, 180 U. S. 261, 1901; Lawrence, *Principles of International Law*, sec. 142; Higgins, in *Hall's International Law*, 8th ed., p. 46.

²⁸ Rolin, *Le Droit Moderne de la guerre*, Vol. 1, p. 143. "When insurgency exists, the armed forces of the insurgents must observe and are entitled to the advantages of the laws of war in their relations to the parent state." (Wilson and Tucker, *op. cit.*, p. 64.) *Infra*,

struggling to get control of the whole government should not be treated as insurgents if they conform to the other conditions, and in fact they generally have been.²⁹ In the present case, however, the objective was to make real the independence "provisionally recognized" by the mandate, so Rolin's definition would seem to apply. Apart from the opinion of text-writers, the right of insurgents to treatment according to the law of war is evidenced not only by the usual practice of states³⁰ but by the many cases of intervention by third states where this right has been denied.³¹

Civil war only exists where hostilities are recognized as such by the parent state or by third states.³² This had not happened in Syria. It is true, Syria by the Covenant and the mandate was provisionally recognized as independent. Oppenheim and others hold that hostilities begun by a state of a federal union against the central government, by a state under protectorate against the protecting state, or by a vassal state against the suzerain, constitute war *ipso facto*.³³ With this view, if the native parliaments of Syria and the Lebanon had authorized hostilities against France, it would seem that war would exist. But in the present case the native authorities were under French control. Though the insurgents had the sympathy of most of the population, they were in law revolting against the native governments as well as the mandatory.

Assuming that the condition in Syria was insurgency, and that consequently the law of war was applicable against the insurgents, did French forces violate that law in bombarding Damascus?

note 30. Westlake's observations, *supra*, note 18, would not apply to insurgents who are politically organized.

²⁹ "Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the Government." Lieber's Code, sec. 149. The revolutionary movements in Colombia, 1885, Chile, 1891, Brazil, 1893, Haiti, 1902, were treated as insurrections in American state papers and by such text writers as Wilson, *International Law*, 1910, pp. 43-49; Lawrence, *op. cit.*, sec. 142; Hyde, *International Law*, Vol. 2, sec. 826. The United States has treated the revolutionary factions in Mexico since 1912 as insurgents. *Ex parte Toscano*, 208 Fed. Rep. 938, 1913.

³⁰ With reference to the Philippine insurrection of 1899, Magoon, legal adviser of the War Department, reported: "While engaged in suppressing such insurrection the government may properly exercise the rights of a belligerent. . . . As long as the United States is authorized to exercise the rights of a belligerent, there are no limitations on such exercise excepting those imposed by the laws and usages of war." (Magoon, Reports, pp. 211, 216.) See also Lieber's Code, Art. 152 *et seq.*; *The Prize Cases*, 2 Black, 635, 670.

³¹ Stowell, *op. cit.*, p. 125 *et seq.*; *infra*, note 54.

³² *The Three Friends*, 166 U. S. 1; Hyde, *op. cit.*, Vol. 1, p. 77. "In this connection, I am constrained to call your attention to the obvious fact that since there is now no recognized state of belligerency in Mexico, the rules and laws governing warfare and the conduct of neutrality are not involved." Acting Sec. of State Wilson to the Mexican Ambassador, March 8, 1912, U. S. For. Rel., 1912, p. 740. See also Wright, "Changes in the Conception of War," this JOURNAL, Vol. 18, p. 759.

³³ Oppenheim, *op. cit.*, Vol. 1, pp. 163, 167; Vol. 2, pp. 69, 75.

The Hague conventions as such were not binding because the insurgents were not a party,³⁴ but they, together with national regulations and practice, may be cited as evidence of the customary law of war.³⁵ All seem to agree that the bombardment of undefended places is prohibited;³⁶ that even when places are defended preliminary notice should be given, except in case of assault;³⁷ and that so far as possible noncombatants should be allowed to depart,³⁸ and private houses, hospitals, educational and religious institutions and other nonmilitary objects should be spared.³⁹

Was Damascus defended? According to the American rules of land warfare (Art. 214), defended places certainly include the following: "(a) A fort or fortified place. (b) A town surrounded by detached forts is considered jointly with such forts as an indivisible whole, as a defended place. (c) A place that is occupied by a military force or through which such force is passing is a defended place. The occupation of such place by sanitary troops is not sufficient to consider it a defended place." Damascus had no modern fortifications, and the citadel was occupied by French forces; in fact some of the shells were fired from it. The only possible grounds of bombardment among those named would be (c), but it is difficult to consider the hundred or more insurgents in the city a defense against the French, who were themselves in control of the strategic points of the city.

The Institute of International Law suggests⁴⁰ that the definition should not be places "which are undefended" (*qui ne sont pas defendus*), but places "which do not defend themselves" (*qui ne se defendent pas*), and this distinction is accepted by the French official manual (Art. 63) which says, "The test of the liability of a place to bombardment is not whether it is fortified but whether it actually offers resistance. The moment it opens its gates to the enemy it ceases to be liable to bombardment, whether it is

³⁴ IV Hague Convention, 1907, Art. 2; *Oetjen v. Central Leather Co.*, 246 U. S. 297, 1918.

³⁵ "According to the views of the High Contracting Parties these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relation with the inhabitants. . . . Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." Preamble to Hague Conventions on Laws and Customs of War on Land, 1899, 1907, Higgins, *Hague Peace Conferences*, p. 209.

³⁶ Hague Regulations, 1907, Art. 25; U. S. Rules of Land Warfare, 1914, Art. 212.

³⁷ Hague Regulations, 1907, Art. 26; U. S. Rules, Arts. 216, 217.

³⁸ U. S. Rules, Art. 217, 218.

³⁹ Hague Reg. 1907, Art. 27; U. S. Rules, Art. 225; Garner, *op. cit.*, Vol. 1, p. 424. See also similar rules with respect to naval bombardment, IX Hague Convention, 1907, Arts. 1, 5, 6, and aerial bombardment, XIV Hague 1907 and proposed Hague rules of aerial warfare, 1922, Arts. 22-26, Moore, *International Law and Some Current Illusions*, pp. 241-247.

⁴⁰ *Annuaire*, 1913, pp. 533-534.

fortified or not."⁴¹ This interpretation would create a strong presumption against the legality of the bombardment of Damascus by the French, who were in actual occupation of the city at the time.

The provisions with regard to notice, removal of noncombatants and exemption of nonmilitary buildings are not absolute. In the present instance it is difficult to describe the French action as "assault," yet no notice was given even to foreign consuls.⁴² Apparently no effort was made to spare private residences; in fact, they were the very objects of attack, and several mosques were struck.

The French object, in fact, was not that of an ordinary bombardment. They were not trying to occupy the city, but were in occupation and afraid the insurgents might drive them out. In fact, French forces in Syria as a whole were at the time inadequate to hold the country against a determined native rising. Consequently a policy of terrorism seems to have been adopted. Terrorism has been used in warfare and has been justified, especially by some German writers,⁴³ but the majority opinion and practice do not recognize the propriety of overstepping positive restrictions of law in order to weaken the enemy's morale or even for a more material military objective. "Military necessity," say the American rules, "justifies a resort to all the measures which are indispensable for securing the object of war and which are not forbidden by the modern laws and customs of war."⁴⁴ Thus as a normal military measure the bombardment of Damascus can not be justified.

May it be justified as a measure of reprisal or penalty? Reprisals or acts of retaliation are recognized by the law of war, but only after a demand for discontinuance of ascertained breaches of the law has been ignored by the enemy, and they must not be out of proportion to the original offense, and must be discontinued when the enemy discontinues his offenses.⁴⁵ The United States rules expressly state that an enemy is liable for reprisals, not only on account of offenses by the government or military commander, but also by "a community or individuals thereof whom it is impossible to ap-

⁴¹ See Garner, *op. cit.*, Vol. 1, p. 421; Westlake, *International Law*, Vol. 2, pp. 87-89; Bonfils, 8th ed. (Fauchille), Vol. 2, secs. 1094-1098.

⁴² U. S. Rules, Art. 219, especially insists on notice and opportunity to leave to neutral consuls and diplomatic officers.

⁴³ See quotation from Von Moltke, note to U. S. Rules, Art. 10, and discussion of views of Clausewitz, Hartmann, Von Moltke, Lueder, and others in Garner, *op. cit.*, Vol. 1, pp. 178-183; Westlake, chapters on the Principles of International Law, pp. 238-244. The latter recognizes that terrorism may be necessary against uncivilized and unorganized populations in certain circumstances, *supra*, note 18.

⁴⁴ U. S. Rules, Art. 11, and *supra*, note 43. Wright, "The Effect of the War on International Law," *Minnesota Law Rev.*, Vol. 5, pp. 522, 529-536. The proposed Hague rules of aerial warfare, 1922, declare in Art. 22: "Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring noncombatants, is prohibited." Moore, *op. cit.*, p. 241.

⁴⁵ U. S. Rules, Arts. 379, 380, 381, 385, 386; Wright, *Minn. L. R.*, Vol. 5, pp. 524-529.

prehend, try and punish," and that reprisals may properly fall on wholly innocent persons.⁴⁶

Doubtless, members of the insurgent forces were engaged in criminal acts contrary to the law of war, such as brigandage, prowling or marauding.⁴⁷ In case it was impossible to apprehend and punish the guilty individuals, reprisals would be justified under the restriction stated. It does not appear, however, that the bombardment was preceded by any formal demand for discontinuance of such practices, and it certainly was far out of proportion to such offenses.

Apart from reprisals, collective penalties are recognized for certain offenses by the law of war. Hostilities by the inhabitants of an occupied city have frequently been the occasion for such penalties, and it was on this ground that the Germans sought to justify the burning of Louvain in 1914. The Hague convention, which in this respect seems to reflect customary law, says, "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they can not be regarded as jointly and severally responsible." The American rules add to this: "Collective punishments may be inflicted for such offenses as the community has committed or permitted to be committed. Such offenses are not necessarily limited to violations of the laws of war. Any breach of the occupant's proclamations or martial law regulations may be punished collectively. For instance, a town or village may be held collectively responsible for damage done the railways, telegraphs, roads, and bridges in the vicinity. The most frequent form of collective punishment consists in fines."⁴⁸

There were undoubtedly acts of an illegal character committed in Damascus. Some were probably participated in and more supported by townsmen. A case for collective penalty might be made out, but the penalty applied, bombardment followed by a money and rifle fine, seems grossly out of proportion to the offense. Thus Garner says of the burning of Louvain, which was a somewhat parallel case:⁴⁹

The burning of certain quarters of a city in which acts of hostility have taken place could be justified in an extreme case, if no other form of retribution were adequate. But even this doubtful procedure should never be resorted to by a military occupant unless he is absolutely certain of being able to control the spread of the conflagration thus started and prevent the destruction of sacred edifices, historic monuments, libraries, art galleries, and the like, the sanctity of which is established not only by the customary law of nations but by international convention. To apply the torch indiscriminately to a whole city filled, as Louvain was, with rare artistic and historic treasures was an act of vandalism for which there can be no valid defense.

⁴⁶ U. S. Rules, Arts. 382, 386.

⁴⁷ U. S. Rules, Arts. 371-374, citing *Curry v. Collins*, 37 Mo. 324, 328.

⁴⁸ Hague Reg. 1907, Art. 53; U. S. Rules, Arts. 353, 354, 386.

⁴⁹ Garner, *op. cit.*, Vol. 1, p. 441. See also Westlake's observation, *supra*, note 18.

Damascus was the center of Arab civilization, and the bombardment destroyed many of the choicest examples of art and domestic architecture.

French forces in Syria, it is believed, violated international law in bombarding Damascus. This being the case, there can be no doubt but that France was responsible. In principle, a state is always responsible for tortious acts committed within the scope of discretion by military officers,⁵⁰ and the IV Hague Convention of 1907 recognizes this principle by declaring, "A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for the acts committed by persons forming part of its armed forces."⁵¹

Assuming that France is responsible, what remedies exist? Had the insurrection been successful and established a wholly independent state, or gained a new mandatory, doubtless the new régime⁵² could have presented to France a diplomatic claim for compensation of injured persons and for punishment of officers responsible for the illegal act, if the matter were not settled in the treaty of peace.⁵³ But, in the absence of such success, precedents indicate that third states have the right to protest or even to intervene in order to prevent further violations of the law of war against the insurgents, though usually there have been political reasons for such interventions in addition. Thus, in 1835 Great Britain protested against the atrocities committed by the Carlists in Spain. In 1849, Great Britain and France intervened to procure an armistice after the bombardment of Messina and Palermo during the Sicilian revolt against Naples. In 1875 the harsh methods of Turkey in suppressing the Bulgarian insurrection resulted in the Berlin memorandum of Russia, Austria, Germany, Italy and France, to which, however, Great Britain refused assent. Further barbarities in

⁵⁰ Borchard, *op. cit.*, pp. 187-188; Oppenheim, *op. cit.*, Vol. 1, pp. 255-258. "Foreigners have a right to compensation when they are injured as to their persons or as to their property in the course of a riot, of an insurrection or of a civil war: . . . (c) when the injury is the result of an act contrary to the laws, committed by a government official, or (d) when the obligation to compensate is established by virtue of the general principles of the law of war." Rules of Institute of International Law, 1900, *Annuaire*, Vol. 18, p. 254; Oppenheim, *op. cit.*, Vol. 1, p. 262.

⁵¹ IV Hague Convention, 1907, Art. 3; U. S. Rules, Art. 363.

⁵² With the well-recognized principle of retroactivity of recognition, the new status would date from the beginning of the insurrection, and the new régime would enjoy whatever rights a belligerent state would have had from that time. *Oetjen v. Central Leather Co.*, 246 U. S. 297, 1918; *Luther v. Sagor*, Ct. of Appeal, 1921, 37 Times L. R., 777.

⁵³ The Treaty of Versailles imposed such requirements on the defeated party (Arts. 228, 232), and the report of the peace conference committee on responsibility considered these provisions declaratory of existing law. Senate Foreign Relations Committee, Hearings, 66th Cong., 1st Sess., Sen. Doc. 106, pp. 325-334. The United States Treaty of Peace with Germany imposed pecuniary responsibility on Germany for American civilian losses, and these have been adjudicated by an arbitral commission. Borchard, this JOURNAL, Vol. 19, p. 133, Vol. 20, p. 69. See also, IV Hague Convention, 1907, Art. 3, and Wright, *Minn. L. R.*, Vol. 5, pp. 536-539.

suppressing the Serbian and Montenegrin insurrections in 1876 led to Russian intervention. In 1898 the United States intervened to stop Spanish barbarities against the Cuban insurgents.⁵⁴ Though intervention to prevent flagrant violations of international law seems to be justifiable,⁵⁵ the question of compensating the Syrians who suffered losses would seem to be a domestic question for France and the *de jure* Syrian Government in case the insurrection is suppressed.

Third states, however, clearly have a right to demand compensation for any of their nationals who may have been injured,⁵⁶ though, according to the American contention on the occasion of French claims arising from the Greytown bombardment of 1852, these claims would be against the territorial sovereign under whose protection the person or property is placed. In illustration were cited the bombardments of Copenhagen in 1807, of Antwerp in 1830, and of Canton in 1856. In the Greytown case the bombardment was claimed to be legal. The same was asserted of the bombardment of Valparaiso by Spain in 1866, but the Secretary of State and Attorney General of the United States were of the opinion that had it been illegal third states would have had good claims.⁵⁷ In the present case the bombardment seems to have been illegal, and France, as mandatory and responsible for keeping order, would seem liable.

Are special remedies available through the League of Nations? The clauses of the League Covenant (Arts. 10-19) designed to settle disputes and prevent war are all subject to two important limitations. In the first place the League can consider the matter only on the initiative of a League member.⁵⁸ This has limited its ability to act in case of insurrection or civil

⁵⁴ These cases are discussed by Stowell, *op. cit.*, pp. 120, 125-136.

⁵⁵ "The existence of a right to oppose acts contrary to law, and to use force for the purpose when infractions are sufficiently serious, is a necessary condition of the existence of an efficient international law. Hall, *op. cit.*, p. 342. See also, Grotius, *De Jure Belli ac Pacis*, book II, c. i. sec. 2, par. 2; c. 20, sec. 40, pars. 1, 4; c. 25, sec. 6 and Prolegomena, sec. 18; Vattel, *Droit des Gens*, prelim. sec. 22; Westlake, *op. cit.*, Vol. 1, p. 318; Stowell, *op. cit.*, p. 455; Wright, this JOURNAL, Vol. 19, p. 92; *supra*, note 25.

⁵⁶ *Supra*, note 50.

⁵⁷ Moore, *International Law Digest*, Vol. 6, p. 928 *et seq.*, 940 *et seq.* Several cases before the British-American Claims Commission in 1924 were decided on the basis that compensation would be due neutral states for losses from belligerent action contrary to the law of war. See this JOURNAL, Vol. 18, p. 835.

⁵⁸ This is specific in Arts. 11 and 15. Article 17 reads: "In the event of a dispute between a member of the League and a state which is not a member of the League, or between states not members of the League, the state or states not members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just." Though it is not expressly stated that the invitation must be first suggested by a League member, this seems to be implied. The effort of Egypt to get her controversy with Great Britain after the Sirdar's murder in 1924 before the League failed because no League member suggested an invitation under this article. The Secretary-General looks upon his duties as limited to executing requests of League members or resolutions of League organs. He would not invite an outside state to

war, because the rebellious community in the cases which have arisen has not been a League member,⁵⁹ and the state revolted against, because it has considered its *amour propre* affected or for other reason, has not appealed to the League.⁶⁰ Similar considerations have heretofore caused third states to refrain from bringing the matter up, and will probably continue to do so, except in circumstances which in the past have induced third states to interpose in insurrection or civil war.⁶¹ In the case of Syria, neither France nor any other League member raised the question, consequently the League could not proceed under any of these articles as it did in the Greco-Bulgarian case.

Even if a League member presents the matter, the League can not consider it unless it affects international relations.⁶² This does not mean that all insurrections and civil wars, though normally domestic questions, are excluded. The Japanese amendment to the Geneva protocol and the discussion over it clearly indicate a general opinion that the League is competent to consider under Article 11 of the Covenant some situations which arise from domestic matters.⁶³ It seems clear that if domestic hostilities have

submit a case to the Council or Assembly on his own initiative. In any case, Article 17 refers only to outside "states," so it could not apply to insurgent bodies.

⁵⁹ It might be, as the British Dominions are members, and by Article 1 of the Covenant other self-governing dominions or colonies may be voted in.

⁶⁰ There have been a number of insurrections in territory under control of League members since the League began, as in Ireland, Morocco, Southwest Africa, China, and several Latin American states.

⁶¹ *Supra*, note 54.

⁶² The general competence of the Council and Assembly is described as "matters within the sphere of action of the League or affecting the peace of the world" (Arts. 3, 4). Apart from articles relating to special matters, such as armaments (Art. 8), mandates (Art. 22), and international coöperation (Arts. 23, 24), this "sphere of action" seems to be as follows: The Council can advise on sanctions in case of "external aggression," "threat or danger of such aggression" against a League member (Art. 10), or violation of League Covenants (Art. 16), and it can propose steps to give effect to arbitral awards or judicial decisions between League members (Art. 13). The "whole League" is declared concerned with "any war or threat of war whether immediately affecting any of the members of the League or not," and may take action "to safeguard the peace of nations" (Art. 11, par. 1). The assembly may consider "any circumstance whatever, affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends" (Art. 11, par. 2), and may "advise the reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world" (Art. 19). The Council or Assembly may request advisory opinions of the court (Art. 14), and may consider disputes between members (Art. 15), between members and outside states or between outside states (Art. 17) unless they are found "to arise out of matters which by international law are solely within the domestic jurisdiction of a party" (Art. 15). Thus, every phrase seems to be carefully qualified to exclude political matters not affecting international relations (*Infra*, note 64).

⁶³ "If the question is held by the Court or by the Council to be a matter solely within the domestic jurisdiction of the state, this decision shall not prevent consideration of the situa-

reached a stage justifying their recognition as civil war, international relations are affected, and in fact Article 11 expressly gives the League competence to consider any war which presumably would include civil war.⁶⁴ However, even when not recognized as civil war, insurrection may affect international relations, and if it does, League action under the second paragraph of Article 11 would seem possible. In the present case, Hedjaz, Nejd and the British mandated territories of Palestine and Iraq, may have been dangerously affected by the propaganda, if not by the military action of the Syrian insurgents. Furthermore, breaches of international law are recognized as affecting the interest of all states.⁶⁵ As has been noted, international law requires respect for the law of war in dealing with insurgents, and in practice third states have occasionally intervened to prevent violations of this rule. Thus there were apparently grounds under Article 11 upon which any member of the League might have seised the League of the Syrian situation after the Damascus bombardment.

In fact none did so, and it must be confessed that League action in insurrection or civil war would practically be much more difficult than in international war, because there is no permanent responsible body on one side of the controversy and by the nature of things there can not be. The right of the insurgents or belligerents to exist is denied by the *de jure* authority. Consequently the procedure of compulsory suspension of hostilities, supported by guarantees from each side while inquiry and mediation pends, so successfully employed in the Greco-Bulgarian affair,⁶⁶ is inapplicable. The insurgents whose existence depends on their military success, clearly can give no effective guarantees even if they are organized under a responsible authority, which is often not the case. League action to be immediately effective in stopping hostilities would either have to assist the *de jure* authority to destroy the insurrection, which would render it liable to the criticisms levelled at the alliances of 1815, or else accept guarantees of peace from both which would amount to treating them as equals, thus prejudicing the case in favor of the insurgents before investigation. Thus, even if the

tion by the Council or by the Assembly under Article 11 of the Covenant." (Geneva Protocol, Art. 5, par. 3.)

⁶⁴ The term "threat of war" occurs in Art. 11, but insurrection can hardly be considered a threat of civil war because the insurgents do not have power within themselves to convert insurrection into civil war. Achievement of belligerency depends upon recognition of that status by the parent state or third states. (*Supra*, note 32.) Furthermore, an interpretation which considered insurrection as a threat of civil war would logically have to consider all resistance to domestic law in the same light. This would extend the League's competence to practically all domestic administration and police, which clearly was not intended by the Covenant. The same consideration suggests that the phrases "peace of the world" (Arts. 3, 4) and "peace of nations" (Art. 11) do not include domestic peace.

⁶⁵ *Supra*, note 55.

⁶⁶ For procedure in Greco-Bulgarian affair, see League of Nations, Monthly Summary, Vol. 5, pp. 256-262, Oct. 1925.

question had come up under Article 11 of the Covenant, the League could have done little more than conduct an investigation while hostilities proceeded. It seems to the writer that in case of violation of the law of war in insurrection or civil war, such investigations preferably on the spot, though admittedly difficult and to a considerable extent dependent on coöperation of the *de jure* authority, might be advisable.

In the present case another article of the Covenant was applicable, that relating to mandates. This gives the Council power to supervise the execution of the mandates, to advise the mandatory of infractions of the mandate, and apparently in extreme cases to remove or transfer the mandate.⁶⁷ It would seem a fair assumption that as a necessary means to carry out these powers, the Council can send an investigating commission to the spot to see whether the mandate is being observed.⁶⁸ But the Council's powers are limited to enforcing the mandate. The mandate for Syria holds France responsible for maintaining order. Consequently, measures for suppressing disorder and insurrection would normally be a fulfillment rather than a violation of the mandate.⁶⁹ However, as the Covenant under which the mandates are given expressly recognizes international law in its preamble, and as the principle of trusteeship for the well-being and development of these people could hardly be carried out by depriving them of rights under that law, it would seem that measures in violation of international law would come under the Council's censure. In fact, the report on the South African conduct in the 1922 Bondelzwart rebellion in its Southwest African mandated territory indicated the Council's conviction that it is bound to prevent barbarities by the mandatories in maintaining order.⁷⁰ Thus, in a case like the present, in the writer's opinion the Council under Article 22 and the mandate for Syria would be competent to hold an immediate investigation on the spot if necessary.

The practical objection to such investigations, mainly on the ground that they impair the mandatory's prestige and capacity to administer, have been noted in the Mandates Commission,⁷¹ and certainly they should be reserved for complaints of gross violation of the mandate or international law. There have, however, been no suggestions that such investigations were

⁶⁷ Covenant, Art. 22; Wright, this JOURNAL, Vol. 17, pp. 701-703.

⁶⁸ Council investigations on the spot in political disputes, as the Mosul boundary and Greco-Bulgarian commissions of 1925, would be precedents. The Permanent Mandates Commission has considered itself incompetent to send a commission on its own authority, though it might recommend such action to the council. Minutes, 3rd meeting, p. 291; 7th meeting, p. 125.

⁶⁹ *Supra*, note 21.

⁷⁰ Report of Permanent Mandates Commission, Minutes, 3rd session, p. 290 *et seq.*, and resolution of the Council, Dec. 13, 1923 (Official Journal, Vol. 5, pp. 340-341). See also debate and resolution of Assembly, Sept. 26, 1923 (Records of Fourth Assembly, Plenary meetings, pp. 89-93).

⁷¹ *Ibid.*, 3rd meeting, p. 291; 7th meeting, p. 124.

beyond the power of the Council. In fact, such a commission was sent to Iraq to investigate the Mosul boundary question.⁷²

In fact, the Mandates Commission, which was sitting when the bombardment took place, did not suggest such an investigation. Instead it recommended that the Council invite France to submit a written report on the situation by January 15th, set a special meeting of the commission at Rome in February, and informed the French representative that on this occasion the commission was "anxious to know the causes which had given rise to the unfortunate state of affairs and the measures which the mandatory Power had been obliged to take in order to find a remedy."⁷³ This method of procedure is slow, but experience has shown that it may be effective in reforming the conduct of a mandatory.⁷⁴

⁷² *Supra*, note 68.

⁷³ Permanent Mandates Commission, Minutes, 7th meeting, pp. 16, 132. The Commission sat from Feb. 19 to March 6, 1926.

⁷⁴ As in the Bondelzwart affair.

AMERICAN EXTRATERRITORIAL JURISDICTION IN CHINA

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In 1903 the United States, by treaty with China, agreed to give China every assistance in the reform of her judicial system, and stated that it would also be prepared "to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant it in so doing."

As a result of the deliberations of the Washington Conference, 1921-1922, a resolution was passed providing for the appointment of a commission to enquire into the subject of the abolition of the extraterritorial jurisdiction enjoyed by the Treaty Powers in China. Appointments to this commission having now been made on behalf of the United States by the President, the question arises as to what is the nature and the extent of the jurisdiction which it is proposed to relinquish.

ORIGIN AND HISTORY OF EXTRATERRITORIALITY

The exercise of judicial authority over American citizens in China and the application of American laws to the determination of their personal and property rights rests upon treaty. The earliest of these, the Treaty of Wang Hiya, signed on July 3, 1844, provided (Article XXI) that "citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul, or other public functionary of the United States thereto authorized, according to the laws of the United States." This covered the subject of criminal law. Another article (XXV) provides for civil jurisdiction in these terms: "All questions in regard to rights, whether of property or persons, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own Government."

The Honorable Caleb Cushing, the Commissioner of the United States who negotiated this treaty, said respecting it, in a letter of September 29, 1844, to Secretary of State Calhoun, that he had "obtained the concession of absolute and unqualified extraterritoriality." The jurisdiction, it is true, is conferred in terms of generality, but this was done purposely in order, as Cushing says, "to leave to Congress full and complete direction to define, what officers, with what powers, and in what form of law, shall be the instruments for the protection and regulation of the citizens of the United States."

The treaty of 1844 between the United States and China and the documents accompanying it were submitted by President Tyler to Congress with

his messages of December 10, 1844, January 9 and 22, 1845. In the last of these the President said:

By the 21st and 25th articles of the treaty, citizens of the United States in China are wholly exempted, as well in criminal as in civil matters, from the local jurisdiction of the Chinese Government, and made amenable to the laws and subject to the jurisdiction of the appropriate authorities of the United States alone.¹

Legislation by Congress in 1848 as amended in 1860 (now embraced in Revised Statutes Secs. 4083-4130)² provided for these matters. These sections are a codification of the laws enacted by Congress to define the judicial authority conferred upon ministers and consuls in conformity with the provisions of the treaties with China and the other countries in which extraterritorial jurisdiction was to be exercised. Section 4086 specifies the body of law to be administered by the Consular Courts and is as follows:

Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries and over all others to the extent that the terms of the treaties respectively justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the statutes of the United States furnish appropriate and sufficient remedies the Ministers in those countries respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

In an opinion rendered to Secretary of State Marcy on September 19, 1855, the Hon. Caleb Cushing, then Attorney-General, thus describes the system of law extended to American citizens in China:

1. The Laws of the United States comprehending the Constitution, treaties, Acts of Congress, Equity and Admiralty law, the law of nations, public and private, as administered by the Supreme Court, and Circuit and District Courts of the United States, and, in certain cases, regulations of the Executive Departments.

2. The "Common Law." In this respect, the statute furnishes a code of laws for the great mass of civil or municipal duties, rights and relations of men, such as within the United States are of the resort of the courts of the several States.

The deficiencies in the common law are to be supplied by decrees and regulations of the Minister. In pursuance of this power, Consular Court Regulations for China have been promulgated from time to time, the most important being the General Regulations of 1864.³

¹ Richardson, Messages and Papers of the Presidents, Vol. IV, pp. 352, 358.

² See Hinckley, American Consular Jurisdiction in the Orient, pp. 226-236.

The provisions of the treaty of 1844 were reaffirmed in the treaty of 1858 (Arts. 11, 27 and 28) with some amplification. The treaty of 1880 (Art. IV) contains the latest and most detailed provisions for the exercise of extraterritorial jurisdiction by American Consular Courts.

The extraterritorial treaties and the Acts of Congress of 1848 and 1860 were first construed by the Supreme Court of the United States in 1875 in the case of *Dainese v. Hale* (91 U. S. 13). This case, which was one in error to the District of Columbia Supreme Court, arose from an attachment issued by order of the United States Consul General in Egypt in 1864. The court, in its opinion, referred to the instructions to consular officers exercising judicial functions, contained in the Consuls Manual issued by the Department of State in 1862, as being "entitled to the highest respect in construing the statutes and treaties upon which their powers depend." This Manual embodied the opinion of Attorney-General Cushing (11 Op. Atty. Gen. 474). The case of *Dainese v. Hale*, while referring primarily to the extraterritorial jurisdiction in Turkey, is also of authority in certain respects in regard to China.

The second case to come before the United States Supreme Court was *In re John M. Ross* (140 U. S. 183), decided May 25, 1891. This case arose from a sentence of death pronounced upon the appellant by the Consul General at Kanagawa, Japan, for the crime of murder of which he was convicted in that consular court. The case was brought on appeal from the Circuit Court of the United States in the Northern District of New York (44 Fed. Rep. 185). It was held in this case that the "Constitution of the United States can have no operation in another country," and that "the guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."

CONSULAR COURTS

This body of law was administered by consuls acting in their judicial capacity and presiding over consular courts. The regulations governing these courts were promulgated by the Ministers, with the approval of the consuls, and transmitted to Congress by the Presidents of the United States. An example of such submission is the message of President Buchanan of December 27, 1858, to Congress "submitting a decree and regulation" for such revision as Congress may deem expedient. Other decrees and regulations were likewise transmitted on December 12, 1856,³ February 6, 1860,⁴ March 22, 1882,⁵ and January 14, 1889.⁶ These decrees and regula-

³ Richardson, V, 418.

⁴ *Id.*, V, 580.

⁵ *Id.*, VIII, 88.

⁶ *Id.*, VIII, 803.

tions of the Ministers to China, it was provided in the Acts of Congress, should be "binding and obligatory until annulled or modified by Congress." Hence it resulted that the Commissioners and Ministers legislated for citizens of the United States in China. For, though the law required the transmission of the decrees to Congress, it required no affirmative action by the latter to make them binding.

The necessity for the establishment of the consular courts, following the signing of the treaty of 1844, was stated by President Polk in his third annual message to Congress on December 7, 1847.⁷ On August 11, 1848, Congress passed the Act establishing the consular courts which has been discussed above.

In 1887 there was published at Tokio a collection of decisions of the Consular Courts of Japan by Consul General G. H. Scidmore. As the jurisdiction in Japan was founded on the same statutes of the United States and similar treaties as those with China, these decisions throw light on the jurisdiction exercised by consular courts in the latter country.

But the system of consular courts was not altogether satisfactory. In his annual message of December 8, 1885⁸ President Cleveland said: "I deem it expedient, that a well-devised measure for the reorganization of the extraterritorial courts in oriental countries should replace the present system, which labors under the disadvantage of combining judicial and executive functions in the same office." In 1881 such a suggestion for the organization of a Federal Court in Shanghai was made by Secretary of State Blaine, and bills were introduced in 1882 and 1884, but it was not until 1906 that a bill, introduced by Congressman Denby, was finally passed.

THE UNITED STATES COURT FOR CHINA

By the Act of June 30, 1906, a new court was created to be known as "The United States Court for China." This court took over the jurisdiction formerly exercised by United States Ministers to China, and left to the consuls jurisdiction in civil cases where the value involved does not exceed \$500 and in criminal cases where the punishment for the offense charged cannot exceed by law \$100 fine or 60 days' imprisonment, or both. The right of appeal was granted in all cases from consular courts to the United States Court for China and from the latter to the Circuit Court of Appeals of the 9th judicial circuit.

The jurisdiction of the new court, as provided in section 4, "shall in all cases be exercised in conformity with the treaties and laws of the United States now in force in reference to the American consular courts in China. But when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by decisions of the courts of the United States shall be applied."

⁷ *Id.*, IV, 550.

⁸ Richardson, VIII, 338.

In 1920 the Hon. Charles Sumner Lobingier, then Judge of the United States Court for China, compiled and edited a volume entitled *Extraterritorial Cases*,⁹ which contained the decisions of the United States Court for China from its beginning and those reviewing the same by the Court of Appeals. Although none of these cases has been carried to the Supreme Court of the United States, the court of last resort, yet they stand, until reversed, as the law of the extraterritorial jurisdiction.

THE "COMMON LAW" AS APPLIED IN CHINA

Attorney-General Cushing in discussing the term "common law" referred to the difficulty involved in deciding what common law to apply. Judge Wilfley, the first judge of the United States Court, in the case of *United States v. Biddle*,¹⁰ defined it to mean "those principles of the common law of England, and those statutes passed in aid thereof, including the law administered in the equity, admiralty and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies at the date of the transfer of sovereignty, as modified, applied and developed generally by the decisions of the State courts and by the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States." This definition was followed by his successor, Judge Thayer,¹¹ and received confirmation by the Circuit Court of Appeals.¹² Under this definition, the law of the administration of estates was held to have been extended to China as fully as the law of crimes,¹³ and the insolvency provisions of the common law were also held applicable.¹⁴ In another case¹⁵ it was found that nearly all the States of the Union had enacted statutes which made trading on the stock exchange in margins, or for future delivery, or with a view to a settlement on differences, gambling contracts, and hence illegal and void. Hence this was held to be a rule of American common law and so extended to China.

FEDERAL STATUTES APPLICABLE IN CHINA

In the leading case of *Biddle v. United States* (Ex. Cases, 100), the Circuit Court of Appeals held that the Criminal Codes of Alaska and the District of Columbia were applicable in China, and that a person committing an act defined as a crime under those Acts of Congress could be punished by the United States Court for China. This was an epoch-making decision for the China jurisdiction. It was rendered October 28, 1907. Theretofore, it had been assumed by the bar that the laws extended by Congress were the

⁹ Cited herein as *Ex. Cases*.

¹⁰ *Ex. Cases*, 84; this *JOURNAL*, Vol. 1, p. 793.

¹¹ *Shekury v. Brooks*, *Ex. Cases*, 228.

¹² *Biddle v. United States*, *Ex. Cases*, 123; this *JOURNAL*, Vol. 1, p. 793.

¹³ *Re Probate of Will of John Pratt Roberts*, *Ex. Cases*, 106; this *JOURNAL*, Vol. 2, p. 233.

¹⁴ *Re S. H. Comstock*, United States Court for China leaflet.

¹⁵ *Toeg & Read v. Suffert*, *Ex. Cases*, 112.

general laws of the United States and not those of any particular district or territory. The law respecting crimes and criminal procedure was felt to be uncertain and incomplete as there was believed to be no penal code available.

This decision has been cited and followed in numerous subsequent cases, and is now the doctrine regularly applied by the court in all cases. In the case of *United States v. Allen* (Ex. Cases, 308) the court said that the "extension results quite independently of the Acts themselves. Thus Congress may enact a law for a limited area under its exclusive jurisdiction, such as Alaska or the District of Columbia. By its terms it may have no force whatever outside of such area; but if it is necessary to execute such treaties with China, and suitable to carry the same into effect, it becomes operative here by virtue of the Act of 1860."

But general Acts of Congress, such as the Federal Penal Code, will be applied in preference to those intended for a particular area.¹⁶ The White Slave Traffic Act, also a general Act, has been held operative in China.¹⁷

It has been held that an Act of Congress is not unsuitable for extension merely by lack of an institution wherein the penalty for its violation may be served. An act defining vagrancy¹⁸ was held applicable though it provided for confinement in a workhouse as a punishment. The court sentenced the accused in this case to Bilibid Prison at Manila, which had been designated by the Attorney General in 1915 (30 Op. Atty. Gen. 462) as a place of confinement for long-term prisoners under sentence of the United States Court.

The United States Court for China has not taken a narrow construction of the decision in the Biddle case. Although that decision was rendered in a criminal case, the court has logically applied it to cover civil cases as well. For, as the court states, "there can be no half way adoption of that doctrine; it includes all such laws or none. It is just as applicable to civil laws as to criminal; just as necessary in respect to corporations as to procedure."¹⁹ Accordingly it was held by Judge Lobingier, in a decision rendered in 1917, that the Corporation Act of Congress of March 2, 1903, providing a corporation law for Alaska, was in effect in China.

The same doctrine has been applied to cover cases of statutes relating to divorce, and to wills and the administration of estates. The Federal Bankruptcy law (Act of Congress of July 1, 1898) has been held applicable in China.²⁰

It will be seen from the foregoing that there is now available to the American citizen in China a complete body of law defining his rights and

¹⁶ *U. S. v. Diaz*, Ex. Cases, 784.

¹⁷ *U. S. v. Thompson*, Ex. Cases, 261.

¹⁸ Ex. Cases, 541.

¹⁹ *Ex rel. Raven v. McRae*, Ex. Cases, 655.

²⁰ Ex. Cases, 896.

liabilities in every relation. It is more complete than that governing the resident of Alaska or the District of Columbia.

NATURE OF EXTRATERRITORIAL COURTS

The United States Court for China, like the consular courts, having been created by virtue of the provisions of the treaties, is a court of limited jurisdiction. It possesses only such powers as are expressly conferred upon it by Acts of Congress in conformity with the provisions of existing treaties.²¹ All jurisdictional facts must be alleged in the libel or petition, otherwise it would be insufficient.²² Moreover, since the extraterritorial courts were not created by virtue of the Constitution of the United States but in pursuance of the treaty-making power, the Constitutional restrictions do not apply.²³ And they have no power or authority resting upon custom. "The practice of extraterritoriality in China and Japan began with and rested upon the treaties and did not originate in custom as it did in the Ottoman dominions."²⁴

The consular courts in China, however, are courts of record, and their judgments are enforceable in the courts of the States at any time within twenty years, in the same manner as the judgments of State or Federal courts outside of their jurisdiction.²⁵

The extraterritorial courts have jurisdiction over crimes committed on the high seas²⁶ as well as in the territory of China. They have jurisdiction over seamen serving on board American vessels, whether national vessels of war or merchant vessels, and even though such seamen are citizens of another country than the United States.²⁷ The Consular Regulations (1896) provide that "the judicial authority of the Consuls of the United States over American citizens extends over all persons duly shipped and enrolled upon the articles of any merchant vessel of the United States, whatever the nationality of such person." And all offenses which would be justiciable by the consular courts of the United States where the persons so offending are native-born or naturalized citizens of the United States, employed in the merchant marine thereof, are equally justiciable by the same consular courts in the case of seamen of foreign nationality, and so likewise as to seamen serving on board public vessels of the United States who have committed offenses on shore.

The jurisdiction of American extraterritorial courts is not dependent on residence of parties in China. It is sufficient, if the controversy forming the subject matter of the action arose in China, even though the defendant

²¹ Moore, Digest of Int. Law, II, 597.

²² Sawyer, 713.

²³ *In re Ross*, 140 U. S. 479.

²⁴ Moore, *op. cit.*, VII, 802; *Hahn v. Kelly*, 34 Cal. 391.

²⁵ *Newman v. Basch*, Ex. Cases, 469.

²⁶ *In re Ross*, 140 U. S. 453.

²⁷ Moore, Int. Law Digest, II, 610.

reside in the United States.²⁸ Also in proceedings—such as a simple action for divorce without alimony or other personal relief—the United States Court for China has jurisdiction to entertain a petition by an American citizen regardless of the residence or the nationality of the defendant.²⁹

HOW FAR LOCAL LAWS ARE ENFORCED IN THE EXTRATERRITORIAL COURTS

Chinese legislation is not enforceable against Americans by criminal prosecution.³⁰ But Chinese law has been applied by British extraterritorial courts in China as regards land, on the principle that the *lex loci rei sitae* governs incidents of land.³¹ Chinese anti-opium legislation, concurred in by the British Government has been held enforceable against British subjects.³²

In an instruction by Secretary of State Bayard to Minister Denby in 1887³³ the municipal ordinances of the International Settlement at Shanghai were considered as enforceable against Americans by action in the consular courts.

In 1903 the United States agreed by treaty to the prohibition by China of the importation of opium into that country and of morphia and instruments for its injection. American citizens who violated Chinese Government regulations enacted in pursuance of this treaty might be prosecuted in the consular courts or the United States Court. A foreigner may likewise be prosecuted in his consular court for violations of the Chinese Maritime Customs Regulations.

The United States Court for China has not followed the British decisions in regard to land. In a case involving a mortgage of real property located in the International Settlement at Shanghai, the title deeds to which were registered in the Spanish Consulate at Shanghai, Judge Thayer held, in an opinion rendered in 1910, that Spanish law applied. "The peculiarity," he says, "that the same real property situate in Shanghai may, by reason of the existence here of seventeen Powers, and the fact that extraterritorial jurisdiction of real property follows that of the owner's person, be subject now to the jurisdiction of one Power, and again to that of another, does not affect the operation of the principles of private international law involved in the present action."³⁴

A different situation is, however, presented in the case of land located outside of any foreign settlement or treaty port. Missionary societies are, for example, by treaty permitted to rent and lease in perpetuity, as the property of the society, buildings or lands in all parts of the Republic of China.

²⁸ *Swayne and Hoyt v. Everett*, Ex. Cases, 617.

²⁹ *Richards v. Richards*, Ex. Cases, 484.

³⁰ *U. S. v. Donohoe*, Ex. Cases, 347.

³¹ Ex. Cases, 66, 80.

³² *Rex v. Lee Ki-Lung*, Ex. Cases, 351.

³³ Moore, Int. Law Digest, II, 648.

³⁴ *Brown v. Sexton*, Ex. Cases, 211.

of the law of extraterritoriality inconsistent with or repugnant to the application of the American law of domicile to American citizens residing in countries with which the United States has treaties of extraterritoriality." Therefore, given the fact of residence and the intention of remaining, an "extraterritorial domicile may be acquired in China." This decision was quoted and followed by the Supreme Court of Maine.⁴² The Maine court held that there was nothing to prevent the acquisition of a domicile in China by an American. Since China has by treaty conceded to the United States the application of American laws to its citizens residing there, the law governing the distribution of estates will be American law.

It is quite evident from the reasoning of the Maine court, that were extraterritoriality abolished, Chinese law would be applied in the given case.

These cases have been followed by the British House of Lords,⁴³ which overruled the dicta of Chitty, J., in the case of *In re Tootal's Trusts*, and *Abd-ul-Messih*, which had been the leading British cases theretofore, and which held the contrary view. The dictum of Justice Chitty in regard to an Englishman acquiring a Chinese domicile was, "The difference between the religion, laws, manners and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile." The House of Lords, in taking a different position, by following the American decisions, are now in accord with the views of Sir Francis Piggott, Chief Justice of Hongkong, who says:⁴⁴ "The law which regulates a man's personal status must be that of the governing power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing power as to be in fact the law of the land." Hall,⁴⁵ another British authority, holds the same views.

The rule thus established that an American citizen may have a domicile, whether of origin or of choice, in the extraterritorial jurisdiction of China, has important consequences, for in all questions of personal status, where the domicile determines the law to be applied, that domicile is now fixed and certain.

LAW GOVERNING WILLS AND ADMINISTRATION OF ESTATES

This rule is invoked in connection with the probate of wills and the administration of estates. In 1907 Judge Wilfley held⁴⁶ that the United States Court had jurisdiction to probate wills and administer estates of Americans decedent in China. Under the treaties and the Acts of Congress, China, in so far as the administration of the estates of Americans decedent therein is concerned, is a separate, distinct and complete jurisdiction,

⁴² *Mather v. Cunningham*, 105 Me. 392; 74 Atl. 809; Ex. Cases, 136.

⁴³ *Casdagli v. Casdagli*, A. C. (1919) 145; Ex. Cases, 104.

⁴⁴ *Exterritoriality*, p. 232.

⁴⁵ Hall, *Foreign Jurisdiction of the British Crown*, *passim*.

⁴⁶ *Re Probate of the Will of John Pratt Roberts*, this JOURNAL, Vol. 2, p. 233.

similar to that of an unorganized territory belonging to the United States. American citizens may become domiciled there and their estates administered in the Consular Courts and the United States Court.

Since the decision in the Biddle case referred to above, the court has held that it is authorized to apply any suitable Act of Congress. In the distribution of personality of an intestate, the court applied the Act of 1901, intended for the District of Columbia, as being the latest expression of Congress.⁴⁷

The Consular Court Regulations of 1864 recognized the authority of the consular courts to probate wills and in matters concerning the administration of estates by providing that consuls should continue to exercise their former lawful jurisdiction and authority. The United States Court held that this authority was embraced in the extension of the "common law" by Act of Congress to the extraterritorial jurisdiction.⁴⁸

Certain provisions of the laws of the United States⁴⁹ charge American consuls with administrative powers and duties relative to the estates of American citizens dying in foreign countries. The later laws conferring judicial powers on consuls in China contain no specific provision of repeal or amendment of these earlier laws. Judge Thayer of the United States Court held⁵⁰ that consular officers in China, having been given full power of probate jurisdiction, such powers as were previously exercised under these earlier statutes as partake of a judicial character must be assumed to have been merged in the probate jurisdiction conferred by the later laws. But the purely administrative duties therein charged upon them may still be exercised.

As these administrative powers are exercised in non-extraterritorial countries, they would survive the abolition of extraterritoriality in China.

In 1907 the then Consul General at Shanghai was sued by the administrator of the estate of an American decedent, appointed by the courts of the State of Maine, because he had administered the estate of the deceased, who died at Shanghai, in his judicial and not in his administrative capacity under Sections 1709-1711 of the Revised Statutes. The question was not then settled as the case went off on a plea in abatement, the plaintiff being held to be without capacity to sue as administrator, since he had not taken out letters in the China jurisdiction.⁵¹ But there can be no doubt that a similar suit would now be decided adversely on the merits.

Even if a decedent had no domicile in China, but left part of his estate there, an ancillary administration could be had there of his realty and personality in the jurisdiction.⁵²

⁴⁷ *In re Will of Thacher*, Ex. Cases, 524.

⁴⁸ *In re Robert's Will*, Ex. Cases, 106.

⁴⁹ Rev. Stats. Secs. 1709-1711.

⁵⁰ *In re Cons. Gen's. Report*, Ex. Cases, 292.

⁵¹ Ex. Cases, 109; Wash. L. Rep. XLVIII, 216.

⁵² Ex. Cases, note, p. 296.

Prior to the decision in *Re Probate of the Will of Young John Allen*, holding that an American extraterritorial domicile may be acquired in China, it seems to have been the official view of the United States State Department⁵³ that the China administration was a mere ancillary one, the principal one being in the courts of the home State of the deceased.

SUPERVISION OF CONSULAR ADMINISTRATION OF STATES

By Section 2 of the Act of June 30, 1906, the judge of the United States Court is given supervisory control over the discharge by consuls of their duties relating to the estates of decedents in China. This is in addition to the ordinary appellate jurisdiction of the United States Court over estate actions originating in the consular courts, and includes supervision over both administrative and judicial acts of the consuls. Thus, a consul may not pay any claims against the estate, or make sale of any of the assets of the estate, without first obtaining the written approval of the judge of the United States Court. The latter is furthermore empowered to require reports from consuls in respect to all their acts relating to a decedent's estate.

In pursuance of this authority, Judge Lobingier, in a circular dated June 1, 1917, addressed to consular officers in China, on the subject of consular court rules, advised them that under the decision of the appellate court in the *Biddle* case, treating as extended to China all applicable Acts of Congress regardless of the locality for which they were first intended, it seemed probable that certain procedural provisions enacted by Congress for Alaska and the District of Columbia were in force in China, particularly those concerning probate and administration proceedings, concerning which the Consular Court Regulations had little to say.

In addition to the supervision exercised by the Judge of the United States Court, the Consular Regulations (Art. 20, par. 60) provide: "that a consular officer, charged with judicial functions, will make a semi-annual report to the Department of State in the case of each estate of deceased American citizens that has come within their probate jurisdiction."

Where a residue of an estate is left, and no heirs are known to the court to whom the same may be lawfully distributed, said residue is required to be remitted to the Treasury of the United States.

Prior to the creation of the United States Court, consuls were required to report and render accounts of the assets of any deceased seamen which might come into their hands to the proper District Judge in the United States.⁵⁴ But the United States Court for China has since held that the effect of the passage of the Act of 1906 creating the court was to confer upon it the authority as regards the settlement of the estates of American seamen dying in China previously exercised by courts in the United States, although

⁵³ See letter from Secy. Evarts to Mr. Woodward, Moore, II, p. 626.

⁵⁴ Rev. Stats. Secs. 4541, 4545.

in other respects the procedure prescribed by the Act of June 7, 1872, remains in force.⁵⁵

EXTRATERRITORIALITY AND CITIZENSHIP

It has been stated above that the United States Court has held that the extraterritorial jurisdiction is similar to that of an unorganized territory of the United States. This has important consequences in connection with the Act of 1907 regarding citizenship and expatriation.⁵⁶ In two cases which have been decided in the United States Court,⁵⁷ it has used language that would indicate that, for purposes of citizenship, residence in a country over which the United States retains extraterritorial jurisdiction will be considered as residence in the United States. The Act of 1907, Section 4, provides:

That any foreign woman who acquires American citizenship by marriage to an American, shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof, before a court having jurisdiction to naturalize aliens; or, if she resides abroad, she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

The United States Court held in a case where she is residing in territory in which, though foreign she is still subject to the laws and jurisdiction of the United States, the requirement of registration is logically not necessary." This is in accord with the ruling of the Department of State that the limitations of permitted residence abroad do not apply to countries in which extraterritoriality prevails.⁵⁸

The treaty of 1868 between the United States and China while recognizing the right of expatriation, also provides⁵⁹ "that nothing herein contained shall be held to confer naturalization upon citizens of the United States in China nor upon the subjects of China in the United States." Consequently an American citizen is practically precluded from changing his allegiance by mere residence in China. Whether residing temporarily or permanently, he remains as much under the jurisdiction of his government as if he were residing at home. Hence no amount of residence in China, even though accompanied by the intention of remaining permanently in China and never returning to the United States, can work a forfeiture of American citizenship, or create any presumption of an intention to abandon it.

As to whether residence in China could be counted toward the period required for naturalization by United States Courts of aliens, or whether the United States Court for China has power to naturalize, has not been passed upon.

⁵⁵ *In re Corrigan's Estate*, Ex. Cases, 717.

⁵⁶ 34 U. S. Stats. at Large, Sess. II, Pt. I, Ch. 2534.

⁵⁷ *In re Lee's Will*, Ex. Cases, 710, and *In re McGhee's Estate*, Ex. Cases, 423.

⁵⁸ Ex. Cases, 423; Moore, III, 459.

⁵⁹ Ex. Cases, 711.

While a Chinese citizen who goes to the United States to reside retains his citizenship and cannot expatriate himself, or become an American citizen by naturalization,⁶⁰ yet a Chinese minor may become an American citizen by adoption, and the United States Court for China has jurisdiction to issue a decree of adoption in such a case.⁶¹

LAW GOVERNING MARRIAGE AND DIVORCE OF AMERICANS IN CHINA

The general rule that the *lex loci celebrationis*, governs with respect to the validity of a marriage so far as the ceremonies are concerned, requires the application of extraterritorial law to marriages celebrated in China. In 1800 Congress authorized the solemnization of marriages and the attendance of consular officers as witnesses, and provided that if valid according to the laws of the District of Columbia, such marriages would be recognized as valid in territory over which the United States has jurisdiction.⁶² The attendance and certificate of the consul are of evidential value only and not requisite to the legal validity of the marriage.

The United States Court has held ⁶³ that the laws relating to the validity of a marriage and the grounds for annulment are contained in the laws passed by Congress for the District of Columbia. This follows from the decision of the Court of Appeals in the Biddle case heretofore cited.

That consular courts had jurisdiction in divorce cases is evident from the language of Attorney General Cushing. He stated in an opinion⁶⁴ in 1855 that "matters of . . . divorces, etc., and other matters of equity, admiralty and ecclesiastical law are for the most part of local nature, and requiring prompt interlocutory action of judicial authority: and therefore seem to be fit subjects for the original jurisdiction of the consuls, with proper regulations for appeal to the Commissioner."

The Consular Court Regulations of 1864 contained provisions relating to procedure and relief in divorce actions, but did not prescribe the grounds of divorce. Although consular courts had not infrequently exercised jurisdiction in divorce actions,⁶⁵ it was held in the first action to come before the United States Court for China⁶⁶ by Wilfley, that that court was without authority to grant such relief, the Minister to China not having issued regulations prescribing grounds on which divorce or judicial separation might be granted. In later cases, however, coming before Judge Lobingier, jurisdiction both in cases of annulment and divorce, *a mensae thoro* and *a vinculo* was taken.⁶⁷ But it was held that the consular courts would no longer have

⁶⁰ Estate of Ben Hope Lee, Ex. Cases, 701.

⁶¹ In re adoption of Wu, Ex. Cases, 753.

⁶² Rev. Stats. 4082.

⁶³ Cavanagh v. Worden, Ex. Cases, 321.

⁶⁴ Op. Atty. Gen. 503 *et seq.*

⁶⁵ Ex. Cases, 369, and instances there cited.

⁶⁶ McDermid v. McDermid, Ex. Cases, 369; this JOURNAL, Vol. 2, p. 225.

⁶⁷ Cavanagh v. Worden, Ex. Cases, 317, 365.

jurisdiction since their civil jurisdiction was limited to cases where the amount involved does not exceed \$500, while divorce cases involve a status whose pecuniary value cannot be estimated.

As a result of the decision of the United States Court, the Act of Congress of March 3, 1901, being the latest expression of Congress,⁶⁸ is held in force as fixing the grounds for divorce. But the consular court regulations prescribe the penalty. These provide that "divorce releases both parties and they shall not remarry." These latter prevail, and consequently an absolute divorce will be granted, even though the District of Columbia Code only allows a legal separation for certain causes.⁶⁹

LEGISLATION FOR THE EXTRATERRITORIAL JURISDICTION

Since the Act of 1906 creating the United States Court for China, no Act of Congress has been passed specifically intended for the extraterritorial jurisdiction, with the exception of the China Trade Act. Prior to the creation of that court the American Minister had power to decree rules and regulations for consular courts. This power, in the view of both the State Department and the United States Court, was limited to regulations governing procedure and did not include the power to enact substantive law.⁷⁰ Section 5 of the above Act provided that the procedure of the court was to be in accordance with the existing procedure provided for the consular courts in China, with authority in the Judge to modify and supplement the said rules. This authority has since been exercised by Judge Lobingier, who promulgated rules for the court.⁷¹ In 1917 the State Department, in an instruction to the United States Minister to China, announced "that the Department is clearly of the opinion that Section 5 should be construed as effecting a transfer of the authority to modify and supplement existing rules of procedure from the Minister to the United States Court for China."

With respect to legislation in matters of substantive law, the court is authorized to apply any Act of Congress, whether a general law or a special act intended for a particular territory, which is "suitable" and "necessary to execute the treaties."⁷² As to whether a given law fulfills those conditions is for the judge in each case to decide. Thus, the Federal Bankruptcy Act of July 1, 1898, has been held⁷³ in force in China, even though other courts were given exclusive jurisdiction elsewhere. Likewise the voluntary assignment Act of Congress of March 3, 1901.⁷⁴ These cases, decided by Judge

⁶⁸ U. S. Stats. at Large, Sess. II, Ch. 854.

⁶⁹ *Roberts v. Roberts*, Ex. Cases, 918.

⁷⁰ Moore, Int. Law Digest, II, 617; U. S. v. Engelbracht, Ex. Cases, 169; *McDermid v. McDermid*, Ex. Cases, 369; this JOURNAL, Vol. 2, p. 225.

⁷¹ Extraterritorial Remedial Code, Ex. Cases, 180.

⁷² Ex. Cases, 638.

⁷³ *In re Bankruptcy Petition*, Ex. Cases, 897.

⁷⁴ *In re Assignment of Fobes*, Ex. Cases, 950.

Lobingier, were contrary to decisions by his predecessors, Judges Wilfley⁷⁵ and Thayer⁷⁶, but in view of the decisions of the Circuit Court of Appeals in the Biddle case, there can be no doubt as to the applicability of the Act in question.

There is, therefore, now available to American citizens in China a more definite and more extensive body of law than was the case in Japan at the time of the abolition of extraterritoriality in that country. The commercial and financial interests of Americans in China are also greater. The system of extraterritoriality in China, which had its origin at about the same time as that in Japan, has now had a quarter of a century of development since the latter was abolished. The system of jurisprudence as developed under the Act of 1906 and the decisions of the United States Court in the past 20 years of its existence, is more complete than that of any body of extraterritorial law. An American citizen in China has all the rights and remedies that a citizen of the District of Columbia, for example, would have. For all legal purposes his position is the same as though he were in the Federal District.

THE ABOLITION OF EXTRATERRITORIALITY

The extraterritorial jurisdiction of the United States over its nationals in Japan was abolished by treaty in November, 1894. This came as the result of long negotiations between Japan and the United States and other Western Powers for the revision of the treaties. As early as December 4, 1883, President Arthur had said, in his annual message to Congress: "This Government is disposed to consider the request of Japan to determine its own tariff duties, to provide such proper judicial tribunals as may commend themselves to the Western Powers for the trial of causes to which foreigners are parties, and to assimilate the terms and duration of its treaties to those of other civilized states."⁷⁷ At first Japan endeavored to treat with the Powers jointly in 1880 and to "accomplish the recovery of both judicial and tariff autonomy by degrees, according to a graduated scale."⁷⁸ This policy was later abandoned for one of treating separately with the Powers, and in 1888 the first treaty abolishing extraterritoriality was signed with Mexico. In return for the relinquishment of extraterritorial rights, Japan agreed to open the Empire to foreign trade and residence.

China's efforts to secure the abolition of extraterritoriality resulted in a treaty with Great Britain in 1902 (the Mackay Treaty), Article 12 of which contained a provision similar to that of the American treaty of 1903, already quoted at the beginning of this article, and repeated in the Sino Japanese Treaty of the same year.

At the Paris Peace Conference, the Chinese delegation sought to secure

⁷⁵ *Ex parte* C. A. Biddle (1907).

⁷⁶ *In re* S. H. Comstock, Insolvent.

⁷⁷ Richardson, *Messages of the Presidents*, Vol. 8, p. 175.

⁷⁸ Dennett, *Americans in Eastern Asia*, p. 523.

the surrender by the Powers of their extraterritorial privileges upon the fulfillment by China of the following conditions:⁷⁹

(1) The proclamation of a Criminal, a Civil and a Commercial Code, a Code of Civil Procedure, and a Code of Criminal Procedure.

(2) The establishment of new courts in all the districts which once formed the chief districts of the old prefectural divisions, that is to say, in fact in all the localities where foreigners reside.

When the Government of China was approached by the representative of the newly created Powers after the World War for the negotiation of treaties, it gave them to understand that China would not grant any extraterritorial jurisdiction.

China, like Japan, followed the policy of dealing with the Powers separately. In her treaty with Sweden in 1908, it was provided that "as soon as all other Treaty Powers have agreed to relinquish their extraterritorial rights, Sweden will also be prepared to do so."⁸⁰ Bolivia agreed, in an exchange of notes, that the "most favored nation" clause in Article II of the treaty of 1919 does not include extraterritorial rights. Persia, in Article IV of her treaty of 1920 agreed that "in all civil and criminal cases to which Persian subjects are parties, they shall be subject to Chinese law and jurisdiction."

Germany and Austria-Hungary lost their extraterritorial rights when China declared war on the Central Powers in 1917. This was sanctioned in the case of Germany by the Sino-German agreement of May 30, 1921.

In September, 1920, the Chinese Government by a presidential mandate, suspended the Russian extraterritoriality privileges, and on May 31, 1924, the Soviet Government expressly agreed to relinquish the rights of extraterritoriality.

In the meantime a Law Codification Commission, composed of eminent Chinese jurists, with the assistance of foreign counsel, has been engaged in the work of revision of the draft codes prepared during the Manchu régime, and in compiling new codes. The final drafting has been completed of the Penal Code, the Penal Procedure Code, the Civil Procedure Code, and it is now engaged in drafting commercial laws. Prison reform has also engaged the attention of the government since 1906. A system of modern courts, presided over by officials having purely judicial functions, was established in 1910. In 1918 there was promulgated a law embodying "Rules for the application of Foreign Laws," which dealt with matters of private international law and under which foreign laws may be applied in certain cases.

THE WASHINGTON CONFERENCE RESOLUTION

At the first meeting of the Committee on Pacific and Far Eastern Questions of the Washington Conference on November 16, 1921, Mr. Sze of the Chinese delegation enumerated certain principles he desired adopted, the fifth of

⁷⁹ Bau, M. J., *The Foreign Relations of China*, p. 304.

⁸⁰ *China Year Book* of 1925, p. 606.

which was that "immediately or as soon as circumstances will permit, existing limitations upon China's political, jurisdictional and administrative freedom of action be removed." The subject was discussed at the sixth meeting on November 25th, at which a subcommittee was appointed to draft resolutions. This subcommittee met on November 28th and adopted three resolutions, which were subsequently adopted as Resolution No. 4 by the Conference at the fourth plenary session on December 19, 1921.

This resolution provided for the appointment of a commission composed of one representative from each of the Powers, and a representative from China, which should meet to inquire into the present practice of extraterritorial jurisdiction in China, and into the laws and judicial system and the methods of judicial administration of China, with a view to reporting their findings of fact and their recommendations as to such means as they may find suitable to improve the existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality.

In pursuance of this resolution, the Extraterritorial Commission convened at Peking on January 14, 1926. It is presided over by Mr. Strawn, the American Commissioner, as Chairman, the Honorary President of the Commission being the Minister of Justice of China, Mr. Ma Chung Wu. The Chinese Commissioner, Dr. Wang Chung Hui, was one of the Chinese delegates at the Washington Conference, and has been the President of the Law Codification Commission of China, charged with compiling the modern codes of China, modeled on the western systems of jurisprudence.

This commission is required to submit its report within one year from the date of its first session or by January 14, 1927. Each of the Powers shall be free to accept or reject all or any portions of its recommendations. But in no case shall any of the Powers make the acceptance of all or any portion of such recommendations depend either directly or indirectly upon the granting by China of any special concession, favor, benefit, or immunity, whether political or economic.

This would seem to prevent the requiring of the opening of the whole of China to trade as a *quid pro quo* for the relinquishment of present treaty rights. In the end it would appear that China will be required to negotiate individually and not collectively with the several Powers.

SPHERES OF INFLUENCE: AN ASPECT OF SEMI-SUZERAINTY

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Austen Chamberlain, British Secretary of Foreign Affairs, declared in the House of Commons, December 15, 1924, that Great Britain would "regard as an unfriendly act any attempt at interference in the affairs of Egypt by any other Power, and would consider any aggression against the territory of Egypt as an act to be repelled with all the means at their command." Similar statements have frequently been made by the responsible ministers of the Powers when discussing "spheres of influence." It is probably not possible to give a precise meaning to the phrase "sphere of influence" because, as Hall says, "perhaps in its indefiniteness consists its international value."¹ Nevertheless, the phrase has been applied specifically to characterize the control of portions of Asia and Africa, certain islands in the Caribbean, and of regions in Central America. In these regions are to be found in operation arrangements, some secret and some public, stipulated either by treaty, diplomatic declaration, "gentlemen's agreements," or effected, oftentimes, by military or economic penetration, varying greatly in degree and intensity, which enable Powers and their citizens to enjoy advantages in these regions without exercising, necessarily, sovereign control.

This discussion proposes to consider: I. The characteristics or privileges of an influencing Power in an influenced region; II. The comparison between spheres of influence and other types of semi-suzerainty.

The characteristics or privileges which a Power exercises over a sphere of influence may be considered as *positive* and *negative*. On the one hand, in that an influencing Power may employ a variety of devices which attempt to prevent other Powers from getting a foothold in the influenced region, the term, in the words of Ilbert, "has merely a negative meaning."² On the other hand, the establishment of a sphere of influence over a region may be tantamount to the establishment of superior control, such control usually "being manifested through native agencies and by way of influence rather than by direct administration."³

Turning first to the negative aspects which spheres of influence may possess, we may note that they may take one or more of the following forms:

¹ Hall, W. E., *Foreign Powers and Jurisdiction of the British Crown*, p. 28. The American Secretary of State, in commenting on the Franco-Moroccan treaty (1912), stated "that it is not sufficiently detailed and concrete in its provisions to permit of submission to this country's treaty-making power." *Foreign Relations of the United States*, 1914, p. 906.

² Ilbert, C., *Government of India*, 3d ed., p. 369, n. 1.

³ Naval War College, *International Law Situations*, 1902, p. 35.

1. The territories or regions under influence may come under the principle of exclusion. This principle was expressed by former Secretary Lansing upon the occasion of the purchase of the Virgin Islands by the United States, as follows: "The Caribbean is within the peculiar sphere of influence of the United States, especially since the completion of the Panama Canal, and the possibility of a change of sovereignty of any of the islands now under foreign jurisdiction is of grave concern to the United States."⁴ The principle is stated somewhat more explicitly in the communication (1921) sent by the British Government relative to the renouncing of the British Protectorate of Egypt in 1914: "The immunity of Egypt from the dominant influence of any other great Power is of primary importance."⁵

The principle of exclusion may be effected in devious ways: First, many understandings amount to "an agreement between two states that one of them will abstain from interfering or exercising influence⁶ within certain territories, which, as between the contracting parties, are reserved for the operations of the other." Secondly, the principle may be effected between the state over which the influence is to be established and the Power exercising the influence by treaty or convention.⁷ Finally, the principle of exclusion may be attained by the unilateral act of one state. Examples of this method may be found in the following statements. Lord Knutsford, Secretary of State for the Colonies in 1890, said: "'Spheres of action' is a term I do not wish to define but it amounts to this: we should not allow the Portuguese, Germans, or any foreign nation or republic to settle down and annex territory" (certain portions of Africa.)⁸

As Lord Knutsford's announcement applies the principle of exclusion to Africa, so the Monroe Doctrine might be thought of as applying it to the Americas by a unilateral act. "We declare that we should consider any attempt on their part (European Powers) to extend their system to any portion of this hemisphere as dangerous to our peace and safety." The dominant idea in these announcements, whether achieved through bilateral or unilateral arrangements, is the exclusion of the activities of other Powers, the consequent reservation by the privileged state of certain privileges and, in some cases, obligations, and a determination, on the part of the Power exercising the influence, to enforce, if need be, these stipulations by military measures. It should be observed, however, that these announcements do not necessarily, to use the words of Reinsch, "refer to any positive exercise of authority. . . ."⁹

⁴ U. S. Sen. Doc. 686, 64th Cong. 2d Sess., p. 5.

⁵ 114 Br. and For. State Papers, p. 207.

⁶ Ilbert, C., *op. cit.*, p. 399, n. 1.

⁷ For example, the Franco-Moroccan treaty, 1912, 106 Br. and For. State Papers, 1027; the Platt Amendment, 1907, 31 U. S. Stat. at Large, p. 897; and the treaty between the United States and Haiti, 1915, Foreign Relations of the United States, 1915, p. 451.

⁸ Keane, A. H., *Stanford's Compendium of Geography and Travel (Africa)*, Vol. I, p. 20.

⁹ *Colonial Government*, p. 103.

2. Spheres of influence, although, for the most part, only representing alienation in disguise—this particular form often being adopted merely to “spare the susceptibilities of the ceding state”—not infrequently are the result of agreements which stipulate non-alienation. In the first place, a state over which the influence is to be exercised may agree not to alienate territory to any other Power. An example of this is the treaty between the United States and Haiti (1915) by which Haiti engaged “not to surrender any territory . . . by sale, lease, or otherwise . . . to any foreign government.”¹⁰ A second form which non-alienation may take is that in which a Power pledges itself to an equal not to alienate to another equal either the territories of an influenced state or the privileges which it exercises in such territories. Thus, in the convention between France and Spain regarding Morocco the fifth article stated that: “L’Espagne s’engage a n’alienir ni ceder sous aucune forme, même a titre temporaire, ses droits dans tout ou partie du territoire composant sa zone d’influence.”¹¹

3. The country over which the influence is exercised releases its control over foreign affairs and this control is transferred to the influencing state, although this is not always the case; for in the pursuance of her Nicaraguan policy, the United States “has exerted her influence . . . ; but she has not taken over the foreign relations of Nicaragua . . . ”¹²

Two important observations are to be made at this juncture. In the first place, the *extent* to which influenced states lose jurisdiction over their foreign affairs is determined by the stipulations fixed in treaties and other arrangements, and differ widely. I shall later examine the various gradations of control in considering the positive privileges enjoyed by an influencing Power in the influenced state.¹³ Secondly, the loss of control over foreign affairs by influenced states gives rise to divergences of opinion in regard to the status of such states as international personalities. These divergences may now be properly examined.

Baty is of the opinion that “loss of control over foreign affairs is . . . an almost conclusive criterion of the loss of existence as an international personality.”¹⁴ Consequently, spheres of influence, protectorates, etc., have,

¹⁰ 39 U. S. Stat. at Large, Part II, p. 1658, Art. XI; Supplement to this JOURNAL, Vol. 10, p. 234.

¹¹ 106 Br. and For. State Papers, p. 1027.

¹² Percy, Lord Eustace, *The Responsibilities of the League*, pp. 90–92.

¹³ *Infra*, pp. 305–307.

¹⁴ Baty, T., “Protectorates and Mandates,” *The British Year Book of International Law*, 1921, p. 110. Ilbert thinks that “the arrangement on which a ‘sphere of influence’ is based has, of itself, no international validity,” for it depends on the individual circumstances. *Op. cit.*, p. 369, n. 2. On the other hand, Snow states that “it was by the ‘Hay Proposals’, apparently, that the term ‘sphere of influence’ first received international recognition as a term describing a legitimate international institution.” See “The Shantung Question and Spheres of Influence,” in his *The American Philosophy of Government: Essays*, p. 350; also *the Nation* (N. Y.), International Relations Section, Sept. 20, 1919.

in his opinion, no international status outside of that possessed by the influencing or protecting Power. On the other hand, Cobbett leans to the view that spheres of influence have not necessarily lost separate status. Semi-sovereign states, of which spheres of influence are possibly a type, are "for certain purposes and under certain limitations . . . recognized as possessing a separate status or personality."¹⁵ Thus according to the treaty between the United States and Cuba (1903), Article I provides that: "The Government of Cuba shall never enter into any treaty or other compact with any foreign Power or Powers which will impair or tend to impair the independence of Cuba."¹⁶ In other respects, Cuba continues to enjoy full rights of diplomatic intercourse with other states, *e.g.*, the right to send and receive ambassadors, immunity from suit in the courts of a foreign state, the right to be represented at formal international conferences; and it is subject to the obligations of a sovereign state.

4. Spheres of influence sometimes "appear in the form of areas from which one Power seeks to exclude the influence of another without manifesting any intention of advancing a future claim on its own account."¹⁷ The establishment of buffer states¹⁸ (as, for instance, those located on the northern Indian frontier), results from the attempt of the influencing Power to check the ambitions of a rival; beyond the attainment of this object the influencing Power does not go. In other cases, however, "a sphere of influence is the phrase vaguely used to describe an area which the Power enjoying it wishes to possess but is not prepared immediately to occupy."¹⁹ In short, the influencing Power might be thought of as entitled to exercise a "claim of first option to the exercise of commercial, industrial, and possibly political rights within the region in question,"²⁰ without that Power complying with all the requirements of effective occupation. It is true, of course, that the Act of Berlin (1885) stated that "The signatory Powers . . . recognize the obligation to assure, in the territories occupied by them . . . the existence of an authority sufficient to cause acquired rights to be respected . . ."²¹ Great Britain contended for this principle of effective occupation on the occasion of the Anglo-Portuguese dispute in 1887, concerning rival claims of the two Powers respecting certain African spheres of influence. Nevertheless, in the absence of effective occupation, the doc-

¹⁵ Cobbett, *Leading Cases and Opinions*, 2d ed., p. 10.

¹⁶ *Foreign Relations of the United States*, 1904, p. 243.

¹⁷ Fenwick, C. G., *Wardship in International Law*, p. 33.

¹⁸ See agreement between Great Britain and Russia respecting Persia, Afghanistan, and Thibet (1907), Mowat, R. B., *Select Treaties and Documents*, p. 12; 100 Br. and For. State Papers, p. 557.

¹⁹ Smith, F. E., *International Law*, 4th ed. by J. Wylie, p. 71; see also *Collected Papers by John Westlake on Public International Law*, ed. by L. Oppenheim, pp. 171-177.

²⁰ Willoughby, W. W., and Fenwick, C. G., *Types of Restricted Sovereignty*, p. 10.

²¹ U. S. Sen. Misc. Doc. 1st Sess. 49th Cong. Vol. 2, No. 68, p. 13; 112 Br. and For. State Papers, p. 906.

trine of proximity has been "stated," to use the words of Wright, "as grounds for territorial claims, especially in the modern 'hinterland' and 'sphere of influence' theories."²² The Anglo-French Declaration (1904) concerning Morocco recognized the doctrine in the following language: "His Majesty's Government . . . recognize it appertains to France, more particularly as a Power whose dominions are conterminous for a great distance with those of Morocco, to preserve order in that country, and to provide assistance for the purpose of all administrative, economic, financial, and military reforms which it may require."²³ Most frequently, however, do spheres of influence exist as areas in which the influencing Power has "the right to exercise possible future control."²⁴ Such areas will be considered under the positive characteristics of spheres of influence.

5. Spheres of influence, whether effected by bilateral or unilateral arrangements, are not considered as binding on Powers not parties to such arrangements. Indeed, Baty considers that "the only important thing to notice about them is that such arrangements cannot bind third parties." In view of the principle of exclusion, however, which, in the words of Smith, "is in fact to say, 'hands off' to possible competitors," it is somewhat difficult to believe that rivals would not be required to recognize the principle, unless, perchance, they possessed the military means to make good their claims.²⁵

The positive characteristics of spheres of influence are next to be considered. In discussing the negative characteristics²⁶ of spheres of influence, the statement was made that spheres may consist of areas from which one Power seeks to exclude the influence of another without manifesting any intention of advancing claims on its own account. Usually, however, the establishment of spheres of influence is but one of the steps in the evolution of territorial control. "The evolution of colonial empires . . . follows a well-known *processus*. . . First, travelers, missionaries, and traders; then treaties of commerce and friendship; then a kind of protectorate half-concealed under the form of an unequal alliance; afterwards the delimitation of spheres of influence and the declaration of a right of priority; then a protectorate properly so-called, the establishment of tutelage, the appointment of Residents and all that follows in their train; and finally annexation, pure and simple."²⁷ In short, spheres of influence may be looked upon as regions in which, according to the language of the unapproved agreement between Great Britain and Persia (August, 1919), "the essential and mutual in-

²² Territorial Propinquity, this JOURNAL, Vol. 12, p. 522.

²³ 97 Br. and For. State Papers, p. 39.

²⁴ Fenwick, *op. cit.*, p. 33.

²⁵ "Although considerations of comity or fear may induce (non-contracting powers) to respect such arrangements; yet this is a matter of policy and not of law." Cobbett, Cases and Opinions, 3d ed., Vol. 1, p. 114.

²⁶ *Supra*, p. 301.

²⁷ Quoted from the Paris Temps (March, 1903), by Lugard, F. D. "Dual Mandate in British Tropical Africa," p. 17.

terests" of the influenced and influencing states "in future" may be "cemented."²⁸

In considering, then, the positive features of spheres of influence, first will be examined those characteristics which appear to flow naturally from the negative characteristics possessed by influenced regions; secondly, I shall treat of certain additional features which appear to be independent in their origin.

The positive characteristics which arise naturally from the negative aspects of spheres of influence are those relating to foreign relations and those having to do with the nature of the future control of influenced regions.

1. The observation has been made that a state under influence, frequently, if not usually, releases its control over its foreign affairs, the exercise of this function being taken over by the influencing Power. The *extent* to which influenced states surrender their control over foreign relations differs, it has been suggested, very widely, indeed, almost with each instance.

(a) In the first place, the influencing Power acts as an intermediary in the relations which the influenced state has with other states. In some cases, the state under influence agrees to allow influencing Powers to act as an intermediary with third parties, reserving, however, for itself, the privilege of using or not using the offices of the influencing state. Thus, by the Treaty of Ucciali (1889), the King of Italy was made an intermediary for Abyssinia's foreign relations: "His Majesty the King . . . of Ethiopia consents to make use of the Italian Government for any negotiations which he may enter into with other Powers or governments."²⁹ In interpreting this article, the King of Abyssinia successfully insisted, in spite of Italy's view to the contrary, "that Article XVII of the Treaty of Ucciali differed in the Amharic and Italian texts: in the former the clause was merely in the permissive form, *i.e.* 'may make use of' and not (as in the Italian text) 'consents to make use of.'"³⁰ In other cases, a third party agrees, without reservations, to carry on its relations with the influencing Power through the auspices of the government of the influencing state. For example, in the agreement between Great Britain and Russia respecting Persia, Afghanistan, and Thibet (1907) Russia engaged "that all their political relations with Afghanistan shall be conducted through the intermediary of His Britannic Majesty's Government."³¹

(b) A still firmer type of control of foreign relations by influencing Powers than that just considered is this: The influenced state retains all formal diplomatic privileges; but, at the same time, it obligates itself not to enter into any treaty negotiations which may impair its sovereignty. The in-

²⁸ 112 Br. and For. State Papers, p. 760.

²⁹ 81 Br. and For. State Papers, p. 735.

³⁰ 20 Br. Peace Handbook, Spanish and Italian Possessions, No. 129, p. 32; Gooch, G. P., *History of Europe, 1878-1919*, p. 278.

³¹ Mowat, *op. cit.*, p. 12; 100 Br. and For. State Papers, p. 557. *

fluencing Power, either explicitly or by implication, is given the right to see that this obligation is complied with. By virtue of Article I of the treaty between the United States and Cuba, quoted above, the American Government, somewhat by implication, pledges itself to see to it that Cuban sovereignty is not impaired by treaties with other states. In the light of this stipulation, "undoubtedly," says Professor G. G. Wilson, "the United States . . . has acquired a certain control over Cuba."³² A similar provision was embodied in the Haitian treaty of 1915.³³

(c) A considerably more rigorous degree of control over the foreign relations of an influenced state by the influencing Power exists in those arrangements by which acts of an international import, before becoming effective, are subject to negotiations and understanding between the influenced state and the influencing Power. In the treaty of peace between France and Tunis (1881) Article VI reads: "His Highness the Bey undertakes to conclude no act having an international character without having communicated it to the Government of the French Republic, and without having previously come to an understanding with them."³⁴

(d) Another form of control, even more specific and more drastic, by the influencing state, of the foreign relations of the influenced state is found in those arrangements by which all engagements, no matter what their content, are subject to the supervision of the influencing state. An instance is found in the treaty between Johore and Great Britain (1886), in which Article VI stipulated that: "the Maharajah of Johore . . . undertakes . . . that he will not without the knowledge and consent of Her Majesty's Government negotiate any treaty, or enter into any engagement with a foreign state . . . or enter into any political correspondence with any foreign state."³⁵

(e) A fifth type of control over the foreign relations of a sphere of influence is the obligation which an influencing state assumes to enforce treaty or other diplomatic arrangements entered into by the influenced state. The Franco-Tunisian treaty (1881) stated that: "Le Gouvernement de la République Française, se porte garant de l'exécution des Traités actuellement existant entre le Gouvernement de la Régence et les diverses Puissances Européennes."³⁶

(f) A state under influence may completely renounce its control over

³² Naval War College, *International Law Situations*, 1912, p. 104.

³³ 39 U. S. Stat. at Large, (Part II), p. 1654.

³⁴ 3 Hertalet, *Map of Africa by Treaty*, 3d ed., p. 1185; 72 Br. and For. State Papers, p. 248.

³⁵ 76 Br. and For. State Papers, p. 93. A similar provision is to be found in the treaty between the Rajah of Sarawak and Great Britain (June 14, 1888). In this treaty it was further stipulated that "if any difference should arise between the Government of Sarawak and that of any other state, the Government of Sarawak agrees to abide by the decision of Her Majesty's Government and to take all necessary measures to give effect thereto." *Ibid.*, Vol. 79, p. 239. Exactly the same stipulations were agreed to by the Sultan of Brunei in the treaty between himself and Great Britain (1886). *Ibid.*, p. 240.

³⁶ 72 Br. and For. State Papers, p. 248.

foreign affairs in favor of the influencing Power. First, the interest of the influenced state may be put in charge of the diplomatic officers of the influencing state. By Article III of the Franco-German convention respecting Morocco (November 4, 1911), it was provided that "The Sultan of Morocco should entrust to the diplomatic and consular agents of France the representation and protection of Moorish subjects abroad . . . " ³⁷

Secondly, either the selection of the foreign minister and of the administrative personnel of the foreign office may be dictated by the influencing Power, or the foreign office may be administered by the influencing state. An example of the former is to be found in the letter written by Lord Granville to Sir Evelyn Baring (Lord Cromer) in 1884, when the Khedive of Egypt seemed to be somewhat disinclined to follow British counsel: "It should be made clear to the Egyptian Ministers . . . that the responsibility which for the time rests on England, obliges her Majesty's Government to insist on the adoption of the policy which they recommend, and that it will be necessary that those Ministers . . . who do not follow this course should cease to hold their offices." ³⁸ An instance of the latter is found in the position of the French Resident in Morocco who "holds the appointment . . . of Minister for Foreign Affairs." ³⁹

(g) Finally, the influencing Power, because of the character of the degree of control which it exercises over foreign relations, often does not distinguish with meticulous care between the foreign and the domestic affairs of the influenced state. "If the native government is not solvent or does not preserve order, responsibility for financial and foreign affairs compels interference with internal administration." ⁴⁰ Consequently, the way is open, perhaps, for affirmative jurisdiction over the internal administration of the influenced state. This process, in effect, reduces the influenced region, by quick or gradual steps, "to a mere administrative division of the guardian state." ⁴¹

2. Very closely, if not indistinguishably, associated with control over foreign affairs, which an influencing Power exercises, are the agencies of diplomacy that may be employed to make its control felt. First, "diplomatic sparring" consisting of *pourparlers*, announcements, warnings, threats, agitation by the press, indeed, all the resources of diplomacy, may be employed by two equals, as against each other, to establish spheres of influence. Second, diplomatic intervention may be resorted to. Third, the consular agents of the influencing state, resident in the influenced region, may be given superior or special diplomatic jurisdiction. Fourth, "legislation by diplomacy" may be employed.

³⁷ British Parliamentary Paper, Cd. 8010, Morocco, No. 4 (1911), p. 1.

³⁸ Quoted from Beer, G. L., *African Questions at the Peace Conference*, p. 336.

³⁹ Keltie, J. S., *Statesman's Year Book*, 1924, p. 1105; 106 Br. and For. State Papers, p. 1027; *Foreign Relations of the United States*, 1914, p. 451.

⁴⁰ U. S. Tariff Commission, *Colonial Tariff Policies*, p. 7.

⁴¹ Fenwick, *op. cit.*, p. 9.

(a) Around special privileges which the Powers desired to exercise in Morocco, have occurred diplomatic duels, often bitter, and, on occasion, threatening war. The Act of Algeciras (1906) definitely recognized the special position of France in Morocco. It was succeeded, albeit not entirely, in 1909, by the Moroccan pact which increased France's freedom of action, although Caillaux observed that "Germany does not recognize our full liberty of action."⁴² The execution of the pact, consequently, gave rise to variant interpretations which were sometimes colored by a good deal of ill-feeling. Subsequent to the 1909 pact, Kiderlen, the acting German Foreign Minister, remarked that although "influence is not protectorate," he agreed with the German Chancellor that "French influence was growing." The reason for the increase of French influence was based, Cambon stated, on the fact that it was not easy in dealing with a barbarous authority to fix how far influence should go. Finally, the Moroccan agreement (1911), after a series of diplomatic crises, was reached. It recognized, to use the words of the German Chancellor, that "Morocco was destined to pass more and more into your (French) sphere of influence; but we distinguish," he went on to add, "between political influence (as recognized by us in 1909) and direct authority."⁴³

(b) Diplomatic intervention may be resorted to, on the one hand, by two equal Powers who may engage to lend each other the support of their diplomacy in order to secure compliance with the stipulations affecting their respective spheres of influence. Thus, in the declaration (1904) between Great Britain and France respecting Morocco, the two governments agreed "to afford one another their diplomatic support in order to obtain the execution of the clauses of the present declaration . . ."⁴⁴ On the other hand, diplomatic intervention may consist of the unilateral act of the influencing state, and may be in the nature of a "formal and emphatic request"⁴⁵, or it may comprise a declaration announcing that the influencing Power will have "to consider what measures it must take in pursuance of its obligations"⁴⁶ in influenced regions; or it may assume the form of an ultimatum, oftentimes supported by military measures.⁴⁷

⁴² Quoted from Gooch, *op. cit.*, p. 462.

⁴³ *Ibid.*, p. 483.

⁴⁴ 97 Br. and For. State Papers, p. 41.

⁴⁵ See, for instance, the protest of the American Minister to Costa Rica in 1914 against the presence of certain Nicaraguan revolutionists who threatened to disturb the peace of Central America, a region "in which the United States is deeply interested." *Foreign Relations of the United States*, 1914, p. 183.

⁴⁶ As, for example, the diplomatic representations made to the Cuban Government in 1913 by the United States, in conformity with its rights and obligations under the Platt Amendment, when Cuba was threatened by a veterans' war of independence. *Foreign Relations of the United States*, 1912, p. 240.

⁴⁷ The British ultimatum to Egypt, on the occasion of the assassination of the Sirdar, Nov. 19, 1924, was supported by military measures.

(c) In addition to diplomatic intervention, the consular agents of an influencing state, because of their special or superior position, are employed to make its control felt in influenced regions. This control may be effected in a variety of ways. In pagan regions capitulations⁴⁸ which, in many cases, may be considered as "somewhat one-sided treaties . . . in the nature of concessions, privileges, and exemptions . . ." ⁴⁹ are administered by consuls. Following hard upon capitulations, "little by little, further powers and duties have fallen to the lot of consuls. . . . Notable among the powers is a system extending the consular jurisdiction, in certain cases, to natives; and among the duties are the care of public health and most of the ordinary municipal services. . . ." ⁵⁰ In some regions, as in Damascus, "the consular district constitutes a semi-autonomous state with a native government, under the guidance of French advisors . . ." ⁵¹ In Egypt, before the war (1914-1918), the Consul General "was the actual ruler of the country." ⁵²

(d) "Legislation by diplomacy" refers to the recourse of influencing Powers to treaties, diplomatic notes, *pourparlers*, etc., which, in effect, determine the character of the laws enacted by the influenced government. ⁵³

In addition to the positive characteristics which may be considered as arising somewhat naturally from the negative aspects are other somewhat independent features of spheres of influence: (1) military, (2) economic, (3) political.

1. Military intervention in a sphere of influence by an influencing state may assume chiefly one of four forms: First, the influencing Power may use its military establishment to prevent a rival from gaining a foothold in the sphere of influence. Secondly, it may employ military agencies, when diplomatic intervention fails, to force the sphere of influence to recognize what the influencing Power considers to be its obligation either to itself (the influencing Power) or to other parties. Third, the influencing Power may take a hand in the military administration of the sphere of influence. Fourth, the military establishment and the defenses of the influenced Power are progressively brought under the control of the influencing state until they are ultimately absorbed.

(a) Influencing Powers have not hesitated to enforce the principle of exclusion and the accompanying one of paramount interest in influenced regions by arms or threat of arms, even by war. Fashoda, Agadir, the British naval demonstration in the Persian Gulf in 1903, are examples of

⁴⁸ The "hampering effect of these foreign immunities" has been given as a reason, at times, for not applying capitulations to spheres of influence, e.g., Sudan, Beer, *op. cit.*, p. 314.

⁴⁹ 14 United States Commerce Report (1920), p. 816.

⁵⁰ Manchester Guardian Weekly, June 29, 1923, p. iii.

⁵¹ 25 United States Commerce Report (1922), p. 790.

⁵² Beer, *op. cit.*, pp. 334-335.

⁵³ *Infra*, notes 73, 74, 85-90.

the enforcement, by military measures, of the principles of exclusion and of paramount interest.

(b) Military missions, punitive expeditions, naval demonstrations, all these, in turn, have been resorted to by the influencing Power to force an influenced state to recognize and meet its obligations. The American Government, for instance, has not hesitated to use these instrumentalities to induce Caribbean and Central American Republics to meet their obligations, as, for example, to balance their budgets or to repress domestic violence. Accordingly, military and naval missions were sent to Nicaragua in December, 1909,⁵⁴ July, 1912, January, 1913, and a legation guard during the election campaign in October, 1924, was maintained. Likewise, American marines were dispatched to Panama in August, 1921, and to Honduras in February, 1924. In Haiti a constabulary is organized and officered by Americans, its function being "to prevent factional strife and disturbances."⁵⁵ By virtue of Congressional joint resolutions the President is permitted, under "such limitations and exceptions" as he may prescribe, to export arms or munitions of war to "any American country, or in any country in which the United States exercises extraterritorial jurisdiction."⁵⁶ In compliance with this resolution, provisions were made, February 25, 1925, by the United States Government for the exportation of rifles, machine guns, and ammunition to the Government of Honduras.

(c) Besides military missions, punitive expeditions, naval demonstrations, military occupation of the influenced region may be resorted to in order that an influencing Power may be able "to exercise an effective control,"⁵⁷ to use the words of the convention of September 8, 1919, between France and Great Britain relative to their spheres of influence in the Niger region in Africa. In China, foreign nations are granted the right to station troops within her borders at certain points and to employ "armed guards" on and alongside of railway lines.⁵⁸ Admiral Knapp issued a proclamation, in 1916, that the Dominican Republic was to be occupied by United States marines. The object of the military occupation was stated to be to restore and maintain order and to force the Dominican Government to meet the stipulations of the convention of 1907. According to Colonel George C. Thorpe, Chief of Staff of Marines in Occupation of the Dominican Republic,

⁵⁴ Foreign Relations of the United States, 1911, pp. xvii, 455.

⁵⁵ Treaty between the United States and Haiti (1915), 39 U. S. Stat. at Large, 1658; Supplement to this JOURNAL, Vol. 10, p. 234.

⁵⁶ Proclamations of the President of the United States (1924), Nos. 1689, 1693.

⁵⁷ British Parliamentary Paper, Cd. 1239, Treaty Series (1921), No. 6, p. 164.

⁵⁸ At the Washington Conference on the Limitation of Armament a resolution was agreed to whereby, upon the request of the Chinese Government, a commission should undertake a full, and impartial inquiry concerning the presence of armed forces in China. However, it was further provided that the Powers agreeing to the resolution should be deemed free to accept or reject any or all the findings of fact or opinion of the commission. See Supplement to this JOURNAL, Vol. 16, p. 78.

these objects were to be accomplished by the military administration promoting education, building roads, creating an effective police force, cultivating a regard for law and order, placing property rights on a firmer basis, stabilizing finance, and, at the same time, respecting Dominican institutions and sentiments "as far as may be."⁵⁹

(d) Lastly, the influencing Power may assume control, more or less attenuated, over the military establishment and defenses of the influenced region. An elementary form of such control is found in the agreement (1906) between the German Government and the Bondelzwart Hottentots by which the tribe agreed to "deliver up all weapons and such ammunition as still remained in their possession."⁶⁰ Again, advisors may be sent to officer the army of the influenced state, as in Persia where, in 1921, "twenty-five British officers" were sent "as instructors for the army" in order to effect its "reform and reorganization."⁶¹ In the Sudan and in Morocco the military and naval command are vested in a Governor-General, appointed by the nominal ruler on the recommendation of the influencing governments, Great Britain and France respectively. Spanish Morocco, ordinarily, is under the control of a Spanish General.⁶² In Egypt, the declaration of February, 1922, provided for the independence of Egypt, but reserved to Great Britain the control, amongst other things, of defense.⁶³

2. The Powers, in the establishment of spheres of influence, have not failed in attempts to achieve economic advantages somewhat comparable to that announced by the German Government which, in 1884, "contemplated placing under the protection of the Empire such territories as through the predominating extension of German trade, or in consequence of preparation for the same, should appear suitable for such purposes."⁶⁴

The economic control which a Power exercises in a sphere of influence may be effected through: (a) Tariff arrangements; (b) Financial stipulations; (c) Control over economic resources and public works.

⁵⁹ Blakeslee, G. H., *Mexico and the Caribbean*, p. 233.

⁶⁰ 3 Hertalet, *op. cit.*, p. 210.

⁶¹ 97 United States Commerce Report (1921), p. 520.

⁶² Because of severe defeats suffered by Spanish troops in Spanish Morocco in 1923, the military administration of the zone has been under the direct control of the Spanish War Office. This control, as well as that exercised by France in her zone of influence in Morocco, at present (1925) is being hotly contested by the native tribes under the leadership of Abdel-Krim.

⁶³ *London Times Weekly*, Nov. 27, 1924, p. 584.

⁶⁴ 76 Br. and For. State Papers, p. 783. Hershey and Willoughby suggest that the phrase "sphere of influence" possesses a political, "sphere of interest" an economic significance. Secretary Lansing, when testifying before the Senate Committee on Foreign Relations in regard to the Lansing-Ishii Agreement (relative to Japan's interests in China), stated that the phrase "special interests" meant political interests. See Hearings before Senate Committee on For. Rel. Treaty of Peace with Germany, U. S. Sen. Doc. 106, 66th Cong. 1st Sess., pp. 223-224. The delegates attending the Conference on the Limitation of Armament used the phrases 'sphere of influence' and 'sphere of interest' interchangeably as applying alike to economic and political privileges in China.

(a) *Tariff Arrangements.* In the first place, the "open door" principle, not infrequently, is an accompaniment of spheres of influence. This principle is given recognition, for example, in the declaration between Great Britain and France (1904) respecting spheres of influence in Egypt and Morocco. "The two governments . . . being equally attached to the principles of commercial liberty both in Egypt and Morocco, declare that they will not, in these countries, countenance any inequality either in the imposition of customs duties or other taxes, or of railway transportation charges."⁶⁶ In the second place, however, special tariff privileges are often asserted in open door districts under influence, and such rights are not, it is contended in some quarters, contrary to the open door principle. It is not possible to suggest here all the forms which tariff privileges, in influenced open door regions, may assume; my purpose rather, is to point out some aspects. For instance, as in the arrangements between Great Britain and Germany (1885), relative to their respective spheres of action in portions of Africa, the influencing Power may engage to establish "no differential treatment . . . as to access to markets, subject to administrative dispositions in the interests of commerce and order."⁶⁶ Although, in the interpretation of this article, Lord Granville stated "that there should be absolute equality of treatment," it is obvious that in conforming to the stipulations, a good deal of discretion and latitude is allowed in the establishment of rates.

Furthermore, even though the open door principle is given nominal recognition by the influencing Power in its fixing the tariff schedule of the influenced state, methods are not wanting which, in effect, give the influencing Power priority of commercial benefits. On the one hand, such benefits may be enjoyed through indirect methods. For example, in spite of the fact that Articles 105-110 of the Act of Algeciras (1911) seemingly recognized the open door in Morocco, the American Government, in 1914, protested to the French Government that free and open competition "without preference of nationality" was not always possible because "the specifications do not always disclose the rate of duty of materials, machinery, and tools so that bidders unacquainted with local conditions, are placed at a great disadvantage in formulating bids."⁶⁷

Again, geographical factors, for instance, may result in an influencing Power enjoying special tariff privileges in the influenced territory. Thus, by the Anglo-French agreement (1896), Great Britain assumed control over the drainage basin of the Menam River in Siam. The Marquis of Salisbury, in explaining the reasons for the establishment of a sphere of influence in that region, stated that one of them was that Great Britain had a "very considerable trade with Siam which passes almost entirely through this region . . . Any alteration of ownership which should carry with it

⁶⁶ 97 Br. and For. State Papers, p. 39.

⁶⁶ 3 Hertslet, *op. cit.*, p. 873; 76 Br. and For. State Papers, p. 777.

⁶⁷ Foreign Relations of the United States, 1914, p. 912.

tariffs of a highly restrictive order would be a heavy blow to our commerce in that part of the world."⁶⁸

Likewise, although the open door principle, in respect to China, has been subscribed to since 1900 by the Powers, the principle has not been considered as retroactive. Furthermore, such a factor as territorial propinquity has been advanced as establishing a "vested" or "peculiar" interest in spite of the absence of differential duties. Said Baron Shidehara to the Conference on the Limitation of Armament in regard to Japan's securing in China preferential or exclusive economic rights: "Why should we need them? Favored by geographical position, and having fair knowledge of the actual requirements of the Chinese people, our traders and business men can well take care of themselves . . . in China."⁶⁹

On the other hand, it is argued, at times, that commercial treaties, providing for the open door, should be waived by Powers in favor of the influencing state when there is a "fundamental change in the situation." Accordingly, as in the relations existing between France and Morocco, "the large expenditure in men and money for the pacification and development" of the country is alleged to give the influencing state the "right to special privileges."⁷⁰

With the open door is found associated oftentimes the most-favored-nation principle. But modifications to the most-favored-nation arrangements are attached which enable an influencing Power either to tighten its commercial control; or else, by indirection, possibly, to increase its supervisory influence over the influenced state party to the most-favored-nation agreement. Instances of both these methods are to be found in the form of provisos in the notes which effected the agreement (1924) between the United States and the Republic of Guatemala. These provisos stipulated that the most-favored-nation clauses were not to affect: (1) "the treatment which the United States accords or may hereafter accord to the commerce of Cuba;" and (2) "prohibitions or restrictions of a sanitary character or designed to protect human, animal or plant life or regulations for the enforcement of police or revenue laws."⁷¹

Finally, the influencing Power may assume control over the tariff administration. According to Article IX of the treaty between the United States and Haiti (1915) "the Republic of Haiti will not without a previous agreement with the President of the United States, modify the customs duties."⁷² In 1910 the American Government protested to the Dominican

⁶⁸ 88 Br. and For. State Papers, p. 571.

⁶⁹ Conference on the Limitation of Armament, p. 380.

⁷⁰ U. S. Tariff Commission, *op. cit.*, p. 208.

⁷¹ U. S. Treaty Series, No. 696, p. 1. Similar arrangements have been concluded with the Dominican Republic, Treaty Series, No. 700; and with Nicaragua, Treaty Series, No. 697. Printed also in Supplement to this JOURNAL, Vol. 19, pp. 135, 145, 168.

⁷² 39 U. S. Stat. at Large (Part 2) p. 1657; Supplement to this JOURNAL, Vol. 10, p. 234.

Government because the Dominican Congress had adopted certain duties on foreign and domestic letters of exchange and on foreign lottery tickets, without having previously consulted the American Government, which that government alleged were prescribed in the stipulations agreed to by these nations.⁷³ The Dominican Government contended, however, that the change in rates was one which affected domestic taxation alone; the American Government took exception to such an interpretation, but did not pursue its protest further.⁷⁴ In other cases, the rates of duty are established in the treaty creating the sphere of influence as, for instance, in the various agreements between China and the Powers.⁷⁵

(b) *Financial Characteristics.* Influencing Powers resort to a considerable variety of means of establishing spheres of influence through financial control. Such control, amongst other methods, may be accomplished through loans, either on the part of the influencing Power or of its nationals; it may consist of participation in the financial administration of the influenced region; it may include a monopoly or priority of control of the banking system and rate of exchange. Whatever the method of financial supervision "such advantages have been sought by governments, both directly in the form of general conventional stipulations, and indirectly, in the form of special grants to particular banks or industrial organizations . . ."⁷⁶

A few examples of the various types of control, without any attempt to exhaust them, may properly be indicated. Thus in the unaccepted Memorandum of Clauses of the suggested convention between Great Britain and Egypt (1921) it was proposed that "no external loan shall be raised nor the revenue of any public service be assigned by the Egyptian Government without the concurrence of the Financial Commissioner,"—an officer appointed by the Egyptian Government in consultation with the British Government.⁷⁷ Over Haiti and Santo Domingo the United States has established receiverships, the object of which is to administer the fiscal system of those countries so that their debts may be written off. That the establishment of spheres of influence may be effected by control of banking and exchange is illustrated by the position of the Bank of Persia, a British institution, which "is the official bank of the Persian Government and has the sole right to issue bank notes"; and since it is "the only commercial institution in Persia

Also Agreement between Great Britain and Johore, 1914, 107 Br. and For. State Papers, (Part 1), p. 519.

⁷³ Foreign Relations of the United States, 1911, p. 141 ff.

⁷⁴ *Ibid.*

⁷⁵ Conference on the Limitation of Armament, pp. 1152-1160.

⁷⁶ 1 MacMurray, *Treaties with and Concerning China*, p. xiv.

⁷⁷ 114 Br. and For. State Papers, p. 295. In Johore, "the collection and control of revenues" are "regulated under the advice of the General Advisor" (a British Officer). 107 Br. and For. State Papers, (Part 1), p. 519.

... the main bank and its twenty-five branches ... might be said to have ... a monopoly over foreign exchange ..."⁷⁸

(c) *Control over Economic Resources and Public Works.* In addition to the application of the open door principle to tariff schedules in spheres of influence, it has been applied also to the development of economic resources and public works of influenced regions. As in the case with tariff adjustments, so in connection with economic resources and public works, the open door principle may be given a limited interpretation and application. In China; for instance, although the open door policy was affirmed, with some reservations, by the Powers in 1900, it is evident that there have existed in China "spheres of interest" or "spheres of influence," terms which have implied "that the Powers making such claims in China are entitled, within their respective 'spheres,' to enjoy reserved, preferential, exclusive, or special rights and privileges of trade, investment, and for other purposes."⁷⁹

The Chinese Delegation attending the Conference on the Limitation of Armament submitted a series of stipulations to the conference which the delegation said were out of character with the open door principle. The question of removing these restrictive stipulations was discussed at the conference, but no definite action was taken. However, Article IV of the Treaty relating to Principles and Policies concerning China provided that "the Contracting Powers agree not to support any agreements by their respective nationals with each other designed to create Spheres of Influence or to provide for the enjoyment of mutually exclusive opportunities in designated parts of Chinese territory."⁸⁰ In interpreting the meaning of this article it was observed by the delegates, in the first place, that it was not retroactive. Secondly, in the words of Secretary Hughes, the treaty including the above article, "is not to be construed as to prohibit the acquisition of such properties as may be necessary to the conduct of a particular commercial or industrial undertaking." Mr. Hughes further observed that "the distinction between general superiority of rights and the right to conduct a particular enterprise was ... quite apparent." Accordingly, he supposed that the agreement did not propose to interfere with "patents, trade-marks, copyrights, and mining permits" which represented a phase of monopolistic endeavor. Mr. Balfour concurred with this interpretation, adding that railway, telegraph, and telephone systems which possessed a "monopolistic flavor" did not come under the meaning of the treaty. Finally, "the consideration of the scope, duration or geographical extent ... of an enterprise might be very important in determining its essential character in the light of the open door principle."⁸¹

Other means, besides those mentioned above, enable influencing Powers

⁷⁸ 272 United States Commerce Report (1919), p. 1002; 3 *ibid.*, (1921), p. 167.

⁷⁹ Conference on the Limitation of Armament, pp. 1152-1160.

⁸⁰ *Ibid.*, p. 1626.

⁸¹ *Ibid.*, pp. 1218-1234.

to occupy a favored position in respect to economic resources and public works in influenced territories. Thus Lord Curzon, in reply to the American Ambassador to Great Britain concerning the alleged preference given British interests in awarding oil concessions in Mesopotamia, observed that "it is notable that the United States . . . have on various occasions used their influence in territories amenable to their control with a view to secure the cancellation of oil concessions previously and legitimately obtained by British persons or companies (*e.g.* Haiti and Costa Rica)." ⁸²

In other cases, as in the zone of French influence in Morocco, the influencing Power makes real competition in bidding for government contracts more or less difficult, if not impossible, in that the method of dividing them "into allotments too small to attract any but nearby contractors," ⁸³ prevents foreign enterprises from participating. Again, an influencing Power may assure for itself and its nationals an effective control over the public works of the influenced region by reserving the right "to see that concessions for roads, railways, ports, etc., are only granted on such conditions as will maintain intact the authority of the state over these great undertakings of public interest." ⁸⁴

3. The establishment of jurisdiction by the leading states of the world over remote regions, in which "such attenuated rights, as those claimed under the doctrine of 'spheres of influence' and 'spheres of interest' have been enjoyed," is to be accounted for, in part, by the expansion of the political interests of these states. The character of the control referred to here is described by Lugard as "the right to exercise political influence," but, such arrangements says Cobbett, "are merely political, and involve no legal consequences other than those arising out of the compact."

The political jurisdiction asserted in influenced regions varies, of course, very greatly. Generally, however, spheres of influence are thought of as regions where the distinction between "political influence and direct authority" is made, although such a distinction is not always observed. Influenced regions, where political influence, but not direct authority, is exercised, may be under arrangements by which the influencing Power is restricted to a controlling supervision over such matters, amongst others, as succession to the throne, ⁸⁵ or conditions under which the executive head of the influenced state is to be selected or removed, ⁸⁶ control over the sanitary

⁸² International Conciliation, No. 166 (Sept. 1921), p. 314.

⁸³ Foreign Relations of the United States, 1914, p. 912.

⁸⁴ Quoted from the Anglo-French Agreement concerning Egypt and Morocco (1904), 97 Br. and For. State Papers, p. 39.

⁸⁵ Agreements between Great Britain and Sarawak (1888) and Brunei (1888) provided that the British Government had power to determine any question that might arise as to succession to the throne. 79 Br. and For. State Papers, p. 239.

⁸⁶ During the incumbency of Huerta as President of Mexico, President Wilson announced that it was "his immediate duty to require Huerta's retirement from the Mexican Government" and that the American Government would "employ such means as may be necessary

administration, supervision and direction of elections,⁸⁷ introduction of judicial reforms,⁸⁸ the establishment of a system of inspection, or the giving of advice "upon all matters affecting the general administration of the country."⁸⁹ Whatever the method or degree of control, however, it is Fiore's belief that it "en réalité . . . n'est qu'un mode occupation déguisé, qui permet, au moyen d'une simple notification diplomatique, d'acquérir des territoires et d'absorber par une attraction progressive les populations protégées."⁹⁰

Spheres of influence will now be compared and contrasted with other types of semi-suzerainty, such as protectorates, leases, and mandates.

Spheres of Influence and Protectorates. To draw a sharp line of distinction between a sphere of influence and a protectorate is not feasible and, for practical purposes, not particularly essential. Furthermore, as in the case with spheres of influence, so in regard to protectorates, each one must be treated according to the facts covering it; the character of the jurisdiction exercised must be decided from the basis of the individual treaty of protectorate.

Nevertheless, the term protectorate has been distinguished from a sphere of influence in the following respects: In the first place, a protectorate probably requires or, at least, suggests recognition. This recognition has been accorded to the establishment of two somewhat recent protectorates: Morocco (1912) and Egypt (1914). To the Franco-Moroccan treaty of 1912, which formally established the French protectorate over Morocco, Great Britain, Spain, and Germany, Austria, Hungary, Bulgaria, and Turkey gave their adherence. The French Government also asked of the United States its adherence to the instrument. Protracted negotiations followed,⁹¹ during which the United States State Department announced that it "must refrain from any expression of opinion for or against" the political clauses of the treaty, and that, because of the general character of the treaty's stipulations, the Department could not submit them to the United States Senate for ratification. On January 17, 1917, however,

to secure this result." Foreign Relations of the United States, 1915, p. 856. "Zaghul Pasha, twice exiled from Egypt by direct British action, is now kept out of office by indirect British influence." This is the view expressed by Dr. A. H. Lybyer in Current History, May, 1925, p. 326.

⁸⁷The existing electoral scheme in Egypt is described by Dr. Lybyer as resting "upon the scarcely concealed support of the British garrisons in Cairo and Alexandria." Current History, May, 1925, p. 326.

⁸⁸See reference to judicial reforms in Morocco instituted by virtue of the provisions in paragraph 2 of Article 9 of the Franco-German treaty, November, 1911. 104 Br. and For. State Papers, p. 948.

⁸⁹101 Br. and For. State Papers, p. 519.

⁹⁰*Du Protectorat Colonial et de La Sphère D'Influence* (Hinterland), 14 *Revue Générale de Droit International Public*, p. 152.

⁹¹Foreign Relations of the United States, 1914, pp. 905-923.

the United States recognized the French protectorate in Morocco, but such recognition did not involve ratification of the protectorate treaty of 1912 nor accession or adhesion to its stipulations. At the same time, the United States, in the case of Morocco, appeared to comply substantially with Oppenheim's view in regard to the relation existing between recognizing states and a protectorate. "As the protectorate . . . is recognized by third States, the latter are legally prevented from exercising any political influence . . . and, failing special treaty rights, they have no right to interfere if the protecting state annexes the protected state and makes it a mere colony of its own."⁹²

In respect to Egypt, Great Britain announced in a declaration, made in 1914, the establishment of a protectorate. To the declaration, the Allied Powers and Spain gave their adherence; and by the Treaty of Versailles the Central Powers gave it recognition. In a declaration, made February 28, 1922, the British protectorate was terminated, and Egypt was declared to be "an independent and sovereign state." The declaration stipulated, however, that pending the conclusion of agreements on matters vital to the British Empire, "the *status quo* on all these matters shall remain intact."⁹³ The *status quo* meant, in the language of the Note sent by the British Government to the Council of the League of Nations, that "certain questions were absolutely reserved to the discretion of His Britannic Majesty's Government until such time as an agreement might be reached regarding them with the Egyptian Government."⁹⁴

The stages of control, then, through which Egypt has passed might be summed up as follows: (1) Up to 1914—a sphere of influence under British dominance, a dominance becoming increasingly all-embracing over Egyptian and internal administration;⁹⁵ (2) 1914–1922—the establishment of a formal protectorate; (3) 1922–1925—(a) the formal discontinuance by Great Britain of her protectorate over Egypt and the return of Egypt to a status tantamount to a sphere of influence, *i.e.*, the announcement by Great Britain that "the welfare and security of Egypt are necessary to the peace and safety of the British Empire which will endeavor always to maintain as an essential British interest, the special relations between itself and Egypt."⁹⁶ (b) Recognition by Great Britain of Egypt "as an independent sovereign state," the actual achievement of which to be conditioned upon: (1) the application of the policy announced by Great Britain in (a) above; (2) the "conclusion of agreements" in regard to matters vital to the interests

⁹²Oppenheim, *International Law*, Vol. 1, pp. 139–140.

⁹³British Parliamentary Paper, Egypt, No. 1 (1922), pp. 8, 19–22, 24.

⁹⁴New York Times, Friday, Dec. 5, 1924, p. 10.

⁹⁵It should be noted that this process was not continuous, for, at times, England lessened her grip on Egypt very considerably. Beer, G. L., *op. cit.*, p. 338.

⁹⁶New York Times, Friday, Dec. 5, 1924, p. 10.

of the British Empire, such as security of communications of the Empire and the Sudan, "by free discussion and friendly accommodation."⁹⁷

The second quality possessed by a protectorate, usually of pagan character, namely, the surrender of capitulary rights by third states in favor of the protecting Power, is not very clearly established. On the one hand, several Powers, including Italy, Japan, and Sweden in recognizing the French protectorate over Morocco, consented to the abrogation of the capitulations. On the other hand, the American Government, in harmony with its traditional policy, refused to renounce extraterritoriality until the accomplishment of suitable reforms.⁹⁸

In contrast to protectorates, influenced regions, outside the family of nations, are, as was pointed out above, under the régime of the capitulations with the dominant Power occupying, usually, a more favored position under them than third states.

Third, the contrast between a sphere of influence and a protectorate consists in making a distinction between control with and without attending responsibilities. In influenced regions, the influencing Powers, to use the language of Lord Lyons (1879) respecting the British status in Egypt, "want to have some control" such control taking "the form of inspection" without their desiring "to assume any overt responsibility."⁹⁹ In a protectorate, however, the protecting Power adheres to the stipulation laid down in Secretary Knox's reply (January 22, 1913) to the request of the French Ambassador that the United States give its accord to the Franco-Moroccan Protectorate Treaty of March 30, 1912: "The Government of the French Republic practically assumes all the powers of government in Morocco; and as a natural corollary thereto it assumes also the obligations of the Moroccan Government in its relations with foreign governments."¹⁰⁰

In view of these qualities which protectorates usually possess and which are considered as distinguishing them from spheres of influence, the query arises whether it is precisely correct to think, as some writers and statesmen have thought, that the United States has assumed protectorates over certain Caribbean and Central American Republics; or whether the control is not essentially in the nature of influence. If the tests given above be substan-

⁹⁷ *Ibid.* It has been observed (*supra*, n. 47) that the British ultimatum of Nov. 19, 1924, had the effect of considerably stiffening the degree of control exercised by England in Egypt. At the same time, the London Times Weekly (Apr. 23, 1925, p. 458), contained an account of the discussion between the Italian and Egyptian Governments on the delimitation of the frontier between Egypt and Libya. The statement continues: "The British Government, though in recognizing Egyptian independence they retained a large measure of control over Egyptian foreign affairs, decided some time ago that the settlement of the frontiers with Libya might well be made the subject of direct negotiations between the Egyptian and Italian Governments."

⁹⁸ Foreign Relations of the United States, 1914, p. 915; *ibid.*, (galley proof), 1917.

⁹⁹ Quoted from Gooch, *op. cit.*, p. 75.

¹⁰⁰ Foreign Relations of the United States, 1914, p. 906.

tially correct and be applied, these republics are hardly to be classed as protectorates.¹⁰¹

However, another test may be employed: A comparison has been made by Professor G. G. Wilson¹⁰² between the character of the control once exercised by Great Britain over the Ionian Islands and the nature of the jurisdiction enjoyed by the United States over Cuba. The status of the Ionian Islands was determined by Great Britain in the treaty of 1815. This treaty provided that although the islands were to be thought of as "single, free, and independent states," their "military, naval, and diplomatic power" were "*all* vested in the protecting state."¹⁰³ By the terms of the convention between the United States and Cuba, however, only certain *specified* rights, formerly exercised by the Cuban Government, passed under the jurisdiction of the American Government. In effect, then, "the relations between the United States and Cuba are *far less close* than those between Great Britain and the Ionian States."¹⁰⁴ That is, certain rights, general in their character, which Great Britain exercised over the Ionian States were in the nature of "extreme rights,"¹⁰⁵ amounting, it would appear, to the "exercise of full power within the four corners" of the treaty. In regard to Cuba, it was thought that the stipulations of the convention should not be subject to the narrow interpretation desired by the Cuban Government, and that "the United States . . . is entitled to the privileges" of the stipulations, but is prohibited from the enjoyment of exceptional advantages.¹⁰⁶

Spheres of Influence and Leases. Clear-cut distinctions between spheres of influence and leases cannot be established, although the status of leases in international law is somewhat more generally recognized and ascertainable than the status of the spheres of influence. It is true, nevertheless, that to some authorities, like Roxburgh and Lawrence, the establishment of leases gives rise to the creation of rights and duties in favor of lessee Powers at-

¹⁰¹ In a supplemental preface to Alvarez's Monroe Doctrine, Dr. J. B. Scott takes issue with the *Almanack de Gotha* for 1924 for endowing the United States with a series of protectorates (Cuba, the Dominican Republic, Haiti, Liberia, and Panama) "contrary to the express and solemn declarations of the authorities of the United States." See in this connection Secretary Lansing's statement, *supra*, p. 301.

Some difference of opinion has arisen in regard to whether the United States, by virtue of the Monroe Doctrine assumes responsibility over these Caribbean and Central American countries where her control is felt. Mr. Root, when Secretary of State, took the view that since the United States, under the Monroe Doctrine, asserts no control over any American nation, the Doctrine "imposes upon the United States no duty . . . to exercise such control." On the other hand, President Roosevelt, in 1904, asserted that "chronic wrongdoing" or "impotence" in America might "force the United States . . . to exercise an international police power."

¹⁰² Naval War College, *International Law Situations*, 1912, p. 106.

¹⁰³ *Ibid.*, p. 107.

¹⁰⁴ *Ibid.* Italics mine.

¹⁰⁵ *Ibid.*, pp. 106-107.

¹⁰⁶ *Ibid.*

tributable not so much to the legal operation of leases as such, as to change in sovereignty, either partial or complete, which may be "considered as almost equivalent to a transference of sovereignty by treaty of cession." Other authorities, however, like Wilson and Oppenheim, incline to the view—a view which found support amongst the Chinese delegates to the Conference on the Limitation of Armament at Washington—that a Power which obtains a lease over territory exercises state authority but not sovereignty; the distinction is made between sovereignty and jurisdiction.¹⁰⁷

It is likely that these alternatives relative to leases are not to be regarded necessarily as opposing each other; they are to be associated rather with a process of evolution through which the regions affected go and by which possibly they "may, at some future time, more easily pass under the actual ownership and sovereignty of the lessee."¹⁰⁸ Force is also added to the observation which Mr. Koo made to the delegates attending the Conference on the Limitation of Armament at Washington to the effect that leased territory may be "utilized with a view to economic domination over the vast adjoining regions, as *points d'appui* for developing spheres of interest. . . ."¹⁰⁹ That the special or prior privileges or jurisdiction enjoyed by lessee Powers in leased regions bear a strong resemblance to those exercised in influenced regions and that they may, indeed, be the basis for giving the lessee a dominant influence in the *hinterland* is further suggested in the somewhat analogous position of Great Britain in the Aden consular district. The entire Red Sea district, including the Aden *hinterland*—which extends eastward a considerable distance along and beyond the Gulf of Aden and includes the Makalla Sultanate—"is more or less under the commercial influence of Aden."¹¹⁰

In still other leaseholds, especially in China, the several Powers have, in the opinion of Mr. Koo, "hampered her (China) work of national defense by constituting in China a virtual *imperium in imperio*. . . ."¹¹¹ Again, "in certain cases, in Asia and Africa . . . coaling stations have become the centers of spheres of influence which have developed into actual territorial possessions."¹¹² The effect of these arrangements according to President Wilson is that "states that are obliged, because their territory does not lie within the main field of modern enterprise and action, to grant concessions are in this condition, that foreign interests are apt to dominate their domestic affairs."¹¹³

To conclude, however, that no distinguishing characteristics mark off leases from spheres of influence would be quite erroneous. It is true that the

¹⁰⁷ Naval War College, *op. cit.*, 1907, p. 9, *ibid.*, 1902, p. 32, *ibid.*, 1912, p. 95.

¹⁰⁸ *Ibid.*, 1912, p. 96.

¹⁰⁹ Conference on the Limitation of Armament, 1922, p. 1062.

¹¹⁰ 10 United States Commerce Report (1925), p. 593.

¹¹¹ Conference on the Limitation of Armament, p. 1060.

¹¹² Naval War College, *op. cit.*, p. 96.

¹¹³ U. S. Sen. Doc. 266, 63d Cong. 1st Sess., p. 4.

practical effects of the agreements determine the real nature of these two forms of control, but their legal implications are not without importance. In the first place, the creation of a lease is not considered as establishing rights which did not exist before the lease was granted; whereas, in the creation of a sphere of influence, the rights or privileges to which it gives rise must be determined by the facts, intrinsic and extrinsic, which were connected with the agreement, and which were before the negotiators at the time of the negotiations.

Secondly, the rights conferred on a lessee state in a leased territory do not go beyond those specified in the agreement, and frequently, such rights are strictly if not narrowly construed. In respect to spheres of influence, however, the influencing state may adopt a variety of standards of interpretation. These standards are not fixed by recognized principles of international practice, but are employed by the influencing state to suit or promote its interests. Accordingly, the words of the agreement may be interpreted by the influencing Power in a technical sense, in a colloquial significance, or in a sense known only to itself. Whatever interpretation the influencing Power employs, the cogency of Hall's observation is recalled: "There is no place for the refinements of the courts in the rough jurisprudence of nations."

Third, the location of sovereignty in leased areas is approximately *legally* fixed: it remains, as we have seen, with the lessor and does not pass to the lessee. Jurisdiction, however, depending upon the conditions of the lease, is transferred to the lessee. Whatever the degree of jurisdiction enjoyed by the lessee state, its authority is complete to the extent stipulated in the agreement. In those leased areas which form part of a state in which extraterritorial jurisdiction is enjoyed, the lessee Power loses extraterritorial privileges in the leased region.

In some cases of spheres of influence, however, we have what Wright terms "divided or suspended sovereignty."¹⁴ One effect of this condition is, for example, that in those influenced areas in which extraterritorial privileges exist, the consular jurisdiction of the influencing Power is not terminated by the establishment of an influenced region. The relation, then, between an influenced and an influencing state is exactly the reverse, it would appear, of that existing between the lessor and lessee state. In the former case, the legal consequences which flow from a sphere of influence, so far as the legal effects can be ascertained, are such as follow the transfer of sovereignty, with the result that, in the words of the British Foreign Jurisdiction Act of 1894, the influencing Power may "hold, exercise, and enjoy any power or jurisdiction . . . in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory." In the latter case, however, a lease is made for a specific purpose, a purpose which does not involve the surrender of sovereignty by the lessor; if the leased territory is established merely for the ob-

¹⁴Wright, "Sovereignty of the Mandates," this JOURNAL, Vol. 17, p. 694.

ject of establishing a naval coaling station, of erecting a scientific experiment centre, of locating a hospital, or of building a lighthouse, the jurisdiction it enjoys is complete to the extent required for these purposes and its responsibility corresponds in direct proportion.

Spheres of Influence and Mandates. The status of mandates is still in the developmental stages. The view commonly accepted is that expressed in the Covenant of the League of Nations, that the mandates are under "the tutelage of advanced nations which, by reason of their resources, experience, or geographical position could best undertake the responsibility." There is, nevertheless, the greatest difference of opinion regarding the import of this responsibility.

In view of the responsibility thus created, what is the relation, actually as well as legally, between the mandatory Power and the mandate? It is sufficient to examine this question here only in so far as it may shed light on the distinguishing characteristics between spheres of influence and mandates. On this basis, then, two answers, generally speaking, have been set forth. On the one hand, Lord Balfour stated to the Assembly of the League of Nations in 1920 that "it would not conduce to the final success of this experiment if the only view of the League of Nations was that the mandatory Powers should have all the responsibility and all the trouble and none of the profits."¹¹⁵ This view was re-emphasized by Sir Edgar Walton, representing South Africa at the League Assembly in 1922; and he expressed his agreement with General Smuts that the 'C' mandates, in any case, were "virtually annexation," because "they are put under the same rules, the same regulations, and the same laws as the people" of South Africa. On the other hand, the interpretation of Sir P. S. Sivaswamy Aiyer finds wide support, namely, that the mandates cannot be thought of as "annexed to the territories, with which they are administered," that "they are regarded as a sacred trust to civilization," that "they are all to be administered as trust estates," and that all of them "possess the indestructible potentiality of independent existence."¹¹⁶

To ascertain with any degree of accuracy whether the mandates in their actual operation are tending in the direction of the first or second interpretation is difficult to determine, for the evidence is somewhat conflicting. For instance, General Sarrail, French High Commissioner for Syria, before leaving France for Syria to take up his appointment recently stated (1925), to use the words of Professor Lybyer, "that he regarded Syria as neither a colony or a protectorate, but a country under a mandate which could be summarized in two words: aid and advice. This does not mean, however,

¹¹⁵ The Journal of the League of Nations, Third Assembly, 1922, No. 65, p. 12.

¹¹⁶ *Ibid.*, p. 12. Lord Robert Cecil expressed his agreement with Sir Edgar as follows: "From the point of view of administration, the point of view of the unity of the administration between South West Africa and South Africa, it is, in that sense equivalent to annexation."

that Syria was to have autonomy. The first duty of France should be to assure for Syria external and internal security."¹¹⁷ In the early part of 1925 the Secretary for the French High Commissioner for the Syrian Mandate appeared before the League Council and gave an account of France's trusteeship. This action was taken in compliance with the view frequently expressed in the Assembly and in the Council that the chief administrator or his representative appear in person before the Council. These recent developments lend added support to Lord Robert Cecil's conception of the mandates, namely, "that these territories are to be administered on behalf of the League and that the sanction for their good administration is to be the public criticism and canvass of the way in which they are administered."¹¹⁸

On the other hand, there are statements which indicate possibly that the accountability of the Mandatory to the League Council for its administration of the mandate may become somewhat nominal and that, in essence, the destinies of the mandate rest with the Mandatory alone. For instance, Mr. Ormsby-Gore, Under Secretary for the Colonies in 1923, in answer to a parliamentary question relative to the British mandate over Palestine, while observing that "the Assembly (of the League) has nothing to do with the mandate" and that "the Council is final" went on to say that "we conquered this country with our troops and arms and we have been collecting taxes ever since."¹¹⁹

These instances, amongst others, suggest that to make precise statements about the status of mandates is, for the present, impossible. Nevertheless, as Wright properly insists, "the Mandatory's powers fall short of sovereignty . . . of which confederacies, federations, protectorates, spheres of influence . . . all suggest such a situation."¹²⁰ The question which follows is: Have the mandates lost control over their internal and external affairs comparable to that of spheres of influence? The answer to this query gives rise to conflicting evidence. By differential duties introduced in Southwest Africa by the South African Government, and "by discriminations of other kinds," Australia and South Africa have "effectively monopolized the trade of the territory entrusted" to their control. In addition, "only in territories of Class B does Article 22 of the Covenant explicitly require the maintenance of the open door, and even in this, the benefit is guaranteed only to other members of the league."¹²¹

Furthermore, as regards non-alienation, control over external relations, and the direction of domestic administration, it is probable that difficulty will arise in maintaining a clear distinction between the administration of

¹¹⁷ *Current History*, May, 1925, p. 327.

¹¹⁸ *The Journal of the League of Nations*, Third Assembly, 1922, No. 65, p. 12.

¹¹⁹ *London Times*, July 3, 1923.

¹²⁰ Wright, *op. cit.*, this JOURNAL, Vol. 17, p. 694.

¹²¹ *United States Tariff Commission*, *op. cit.*, p. 12.

these regions primarily in the interests of the resident population as *trustees rather than possessors*, and looking upon them, as influenced regions are looked upon, as equivalent to *creation by title deed*. This difficulty, it is believed in some quarters, will be increased by the fact that the Commission on Mandates recently announced (early in 1925) that it was charged only with applying the terms of the mandates as laid down by the Council of the League of Nations. The question of whether these terms conformed to Article XXII of the League Covenant, it considered as outside its jurisdiction.

On the other hand, there is evidence that the trustee character of the mandates and the expectation of their ultimate independence and sovereignty is receiving official recognition, not only through announcements by the responsible ministers of state of the several governments which have assumed mandates, but also through treaties. A conspicuous example of this tendency is found in the Anglo-Iraq Military Agreement (1924) by which Iraq, four years from date, will accept full responsibility both for the defense of Iraq from external aggression and for the maintenance of internal order, with the proviso that a British garrison is to be "maintained by His Britannic Majesty's Government."¹²²

¹²²The provisions of the military agreement are printed in the Manchester Guardian Weekly, May 9, 1924, p. 380.

EDITORIAL COMMENT

THE RELATION OF THE UNITED STATES TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE

On January 27th the Senate of the United States, by a majority of 76 to 17, passed a resolution consenting to the President's proposal to sign the Protocol of Signature of December 16, 1920, adopting the Statute of the Permanent Court of International Justice established by the League of Nations.

For more than five years this Protocol had been open to signature by the United States, because it was one of three nations "mentioned in the Annex" to the Treaty of Peace as "original members of the League of Nations" who had not yet ratified the treaty, but were still expected to do so.

On March 19, 1920, the Senate, by a majority of 49 to 35, had failed to ratify the Treaty of Versailles with the reservations proposed in the Senate. Twenty-three Democrats and 26 Republicans voted or were paired in favor of ratification, and 24 Democrats and 15 Republicans voted or were paired against ratification. The treaty was therefore sent back to the Executive.

At Geneva it was expected that the treaty would be again sent to the Senate, and in the summer of 1920 Mr. Root assisted in preparing the Project of a Statute for the Court provided for in Article 14 of the Covenant of the League of Nations constituting Part I of the Treaty of Peace. When, on December 16th of that year, the "Protocol of Signature relating to the Permanent Court of International Justice," was "drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920," the Protocol was left "open for signature by the members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League." The reason is obvious. The United States was expected to ratify the Treaty of Peace and, with certain reservations, to become a member of the League.

This expectation was not realized. The treaty of Versailles remained in the hands of President Wilson until the end of his term of office, on March 4, 1921. On August 25, 1921, a separate peace was signed with Germany, and the Treaty of Versailles became for the United States a dead letter. In Article II of the treaty with Germany it was expressly stipulated, "That the United States shall not be bound by the provisions of Part I of that Treaty, nor by any provisions of that Treaty including those mentioned in paragraph (1) of this Article, which relate to the Covenant of the League of Nations." This was a distinct and formal denunciation of any provisions of the Treaty of Versailles to which the United States might be held to be bound by the unratified signature of that treaty. From that date the United States had no proper place in the Annex to the Covenant.

The United States had thus formally repudiated any relation to the Cove-

nant of the League of Nations which it might have been held to hold through the signature of the Treaty of Versailles. The attitude of the United States toward the League had become that of a complete stranger. President Harding expressed this by referring to the League as "a political and military alliance" with which it was well that the United States was not associated, and President Coolidge phrased his conception of the League as "a foreign agency."

It is unnecessary here to reopen in any form whatever the political questions connected with the nature and purposes of the League of Nations, further than to say that the main objection to assuming the obligations of its Covenant was that these obligations were of a political and military character believed not to be in harmony with the constitutional limitations of the Government of the United States and the traditional attitude of the Republic concerning foreign policy as regards both Europe and America.

With respect to Article 14 of the Covenant of the League, however, this objection appeared to many to have no application. It reads:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

Granting that the Covenant, taken as a whole, is a political and military alliance, it can not be held that this article, taken by itself, contemplates either a political or a military purpose. On the contrary, it looks toward the creation of a judicial body to serve as a peaceful, and at least a quasi-legal, medium for the settlement of international disputes without resort to war.

This aspect of the League's development commended it to the general interest of the American people, who have in the past with virtual unanimity supported the efforts of their government in the direction of the peaceful settlement of international disputes.

The idea of a Permanent Court of International Justice has, in fact, been claimed as an American idea; and the realization by the League of the plans referred to in Article 14 of the Covenant is regarded by many as the successful embodiment of this idea. There can be no doubt that this pretension has been the most effective consideration in the popular mind in promoting the propaganda for signing the Protocol of Signature of the Court's Statute.

What then has been the objection to signing this Protocol?

The broadest and most comprehensive answer is, that this Court is the League's Court, and not the fulfillment of the American idea.

That it is the League's Court, and thus far only the League's Court, is undeniable. Its primary authorization is found in Article 14 of the League's Covenant. Every step of its initiation and development by the Council, the

action of the Commission of Jurists invited to frame a project, the modification of the project by the Council and the Assembly, the formal adoption of the Statute of the Court by the Assembly, the drafting of the Protocol the very form and terms of the Protocol designed expressly for "Members of the League of Nations" only, the limitation of signature to "Original members" as well as new members of the League, the form and substance of the Statute itself, in which the League is referred to more than sixty times the nomination and election of judges by the members of the League alone (Articles 4 and 5 of the Statute), the actual signature of the Protocol by none but members of the League—all these evidences show beyond dispute that this Court is the League's Court, and so far the League's Court only.

It is not only the League's Court, but it is an organization produced step by step in execution of an article of the Treaty of Versailles which has determined and restricted the form and competency of the Court in conformity with the terms of the treaty.

It is a strange example of inconsistency that the friends of the League should resent reference to the Permanent Court of International Justice as "the League's Court." Such as it is, it is beyond dispute an achievement of the League, perhaps its most important achievement. Why then should the League be denied the distinction that belongs to it for this accomplishment? Why should one substitute the expression "the World Court" which this Court is not and does not itself profess to be, for the natural and appropriate term by which to designate it?

The answer to this question is not far to seek. It is well understood in the United States that this Court gains no prestige here from its connection with the League. Pains have been taken to make it out quite independent of the League. The "Protocol of Signature" is represented to be an "independent treaty signed by various nations," as if the exclusive creation and maintenance of this Court by the League could be thus obscured!

"What difference does it make who created the Court, since it exists?" it may be asked. Then why endeavor to conceal the truth about it under a false name? The "Protocol of Signature" is not an "independent treaty signed by various nations" in the sense these words naturally convey. It is precisely what it calls itself, a "protocol of signature" accepting the results worked out by the League as a league, not a treaty but a private agreement worked out as an act of execution of Article 14 of Part I of the Treaty of Versailles, and not signed by "various nations" but by members of the League exclusively.

It is of course no objection to this Court that it has been formed by the united action of 48 nations. There could be no World Court that did not include these nations. The first objection to adhering to the Permanent Court of International Justice is not its membership but its relation to a "political and military alliance," a "foreign agency," which has created it for its own ends, and not as a World Court in which every diplomatically

recognized sovereign state bound by treaties may have an equal place without belonging to the League or being "mentioned in the Annex."

The second objection to adhering to the Statute of this Court is that, so far from being a realization or fulfillment of the American idea of an international court of justice, as conceived and expressed by the distinguished former President of the American Society of International Law, in his official instructions, in his numerous addresses, and as an unofficial member of the Commission of Jurists which prepared a project for the Statute of this Court, the Statute as modified and adopted by the Council and Assembly of the League rejects virtually all that was vital in the conceptions of Mr. Root on this subject.

These conceptions were: (1) that sovereign states should accept the jurisdiction of an international court of justice in all strictly justiciable cases; (2) that the decisions of such a court should be in accordance with definite rules of law; and (3) that there should be, to render that possible, a series of international conferences fitted to propose a revision, clarification and extension of international law in the form of conventions to be ratified by law-making bodies.

It may of course be said that all this requires time, and that the realization of such a plan requires agreement. No one disputes this. But whoever has followed the history of the formation of the League's Court is aware that departure from the unanimous proposals of the Commission of Jurists invited to frame the Project of a Statute on these subjects has been enforced by the strict execution of Article 14, by the terms of which the constitution of this Court has been held to be absolutely bound. From which it results that the Permanent Court of International Justice, as it exists, is not only the League's Court and a wide variation from the American idea of such a court as far as that idea can be defined, but it is a court which is determined to be what it is by the design and constitution of the Covenant of the League. (See Article 14, which makes no provision for compulsory jurisdiction even in justiciable cases; and Article 20, which forbids any future international engagement inconsistent with the terms of the Covenant.)

It should be evident from these considerations why opposition has arisen to the United States signing the Protocol, even with the reservations originally proposed, and also why these reservations were thought necessary by those who framed them. No one who knows the history of this Protocol can doubt that signing it is the ratification of Article 14 of Part I of the Treaty of Versailles, which the Senate declined to ratify. It was, therefore, necessary that, if it be signed at all, it must be with "conditions and understandings." Those at first proposed were found insufficient. The right of the Council of the League to ask, and of the Court to render, "advisory opinions" was seen to impose upon a signatory the moral duty of respect for such opinions if not responsibility for them, and the possible scope of such questions was seen to be incalculable. In the interest of "safety," a fifth reservation was then proposed.

But the conditions and understandings thought necessary to secure "safety" in signing this Protocol were multiplied in the Senate. Some were rejected as unnecessary. Others were accepted because they were thought necessary, at least to obtaining the consent of the Senate to the resolution authorizing signature. As a result, the United States resumes without dissent its place in the Annex assigned to it in the Protocol, which it repudiated in Article II of the Treaty with Germany, but with qualifications as to its relations to the Court which relieve it not only of all obligations to the League of Nations but of all really juridical obligations to the Court!

It is not surprising that the Senate has made provision for its exit from the Court before it has obtained a recognition of its right of entrance on the conditions and with the understandings upon which the Senate insists. It will have no advisory opinions; it will not go to court without the specific advice and consent of the Senate; it will have no responsibility for anything, except to pay what Congress will appropriate to support an institution of justice to which it is afraid to commit the United States without reserve! Does this advance the prestige of the League's Court?

Whose victory is this?

DAVID JAYNE HILL.

THE UNITED STATES SENATE AND THE PERMANENT COURT OF INTERNATIONAL JUSTICE

On January 27, 1926, by a vote of 76 to 17, the Senate of the United States agreed to a modified resolution¹ of Senator Swanson (Virginia), giving its advice and consent to adhesion by the United States to the Protocol of Signature of the Permanent Court of International Justice, of December 16, 1920. This action was taken in response to the request made by President Harding on February 24, 1923,² and repeatedly renewed by President Coolidge since that date. The final text of the resolution—or more properly speaking, the three resolutions of January 27, 1926—represents a reconciliation of various views. It includes five "reservations and understandings," and two declarations. The reservations must be accepted by the forty-eight members of the League of Nations which have signed the Protocol of Signature, such acceptance to be indicated by an exchange of notes. From an announcement made by the Department of State on March 1st, it seems that forty-eight separate exchanges are envisaged.

The first reservation follows Secretary Hughes' proposal of February 17, 1923, but amplifies his statement as to the non-assumption of obligations under the Treaty of Versailles. The first part of the reservation may be thought to be necessary because the Protocol of Signature of December 16,

¹ Senate Document 45, 69th Congress, 1st Session. See Supplement to this JOURNAL, p. 73.

² Senate Document 309, 67th Congress, 4th Session. Reprinted in this JOURNAL, Vol. 17, p. 332.

1920, opens with the words "The Members of the League of Nations, through the undersigned, duly authorized, declare their acceptance. . . ." The reservation makes it clear that the United States, in becoming a party to the Protocol, does not classify itself as a member of the League of Nations. It is doubtful whether the reservation will have any further effect. It certainly was not designed to prevent the United States from participating in the election of judges by the Assembly and Council of the League of Nations, and to this extent the United States must have "a legal relation to the League of Nations." The second part of the reservations seems quite superfluous, for it is difficult to see how the United States would have assumed any obligations under the Treaty of Versailles even if this had been omitted.

Fortunately the second reservation does not raise the question of the British Dominions' participation in the Assembly of the League of Nations. Various proposals were made in the Senate which would either have deprived the British Dominions of their separate representation, or have provided a number of votes for the United States equal to the entire number of votes of the British Commonwealth of Nations, or have required for the United States a number of votes equal to the number of the states of the Union. As the reservation is worded, however, it clearly provides for one vote for the United States in the Council and one vote in the Assembly, when those bodies are electing the judges.

The third reservation will leave it within the power of the Congress of the United States to determine what will be for the United States a "fair share" of the expenses of the Court. However, it would seem to involve some collaboration by the United States in shaping the budget of the Court and in allocating the expenses among the contributing states. It is not clear how this collaboration is to be effected, but it will probably necessitate action by the Government of the United States each year before the final approval of the Court's budget by the Assembly of the League of Nations.

The fourth reservation as to withdrawal and amendment, may be thought to declare only what would have been true if nothing had been stated. Secretary Hughes had made no proposal concerning withdrawal.³ It would seem that a treaty which provides for the establishment and maintenance of a permanent international institution might be denounced by any party at any time, in the absence of a contrary provision in the treaty itself. And such an instrument certainly cannot be amended at any time without the consent of all signatories, in the absence of special provision for such amendment in the instrument itself. The Protocol of Signature of December 16, 1920, and the adjoined Statute, are silent on both of these points.

The fifth reservation is the only one which purports in any way to affect the action of the Court itself. Its origin is to be traced to the hostility which

³ See, however, the writer's suggestion in the *American Bar Association Journal*, February, 1922, p. 85.

developed in the Senate against advisory opinions. It is a wide departure from President Coolidge's proposal of December 3, 1924. In the course of the debate in the Senate, frequent allusion was made to the sixth and twelfth advisory opinions of the Court, relating to Eastern Carelia and Article 3 of the Treaty of Lausanne, respectively. The first part of the reservation merely crystallizes the practise already established by the Court in Articles 71-74 of the Rules of Court. These Rules might have been amended at any time by the Court itself, although no express reservation of the power to amend is to be found in the Statute or in the Rules adopted under it. It was the fear of the possibility of secret opinions which caused the Senate to desire this formal statement of the present practise.

The second part of the fifth reservation was designed to place the United States in a position of equality with members of the League of Nations, with respect to requests for advisory opinions. Under Article 4 of the Covenant, "any member of the League not represented on the Council shall be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League." When the Council is considering the requesting of an advisory opinion from the Court, any member of the League of Nations specially interested in the question involved would seem to be entitled to representation on the Council. If the vote in the Council must be unanimous for the purpose of making such a request, then any member of the League of Nations has the power to prevent the request from being made. But the United States, not being a member of the League of Nations, would not be entitled to such representation on the Council, and would have no power to prevent the Council from requesting an advisory opinion relating to a dispute or question in which the United States is interested. It is argued, therefore, that the fifth reservation would place the United States in a position of equality with members of the League of Nations in this respect.

If this argument is not altogether sound, it is because unanimity may not be required when the Council votes to request an advisory opinion. That point has not been decided, nor can a practise be said to have been established. Article 5 of the Covenant provides for unanimity in the Council, except where otherwise expressly provided in the Covenant or in one of the treaties of peace; but it is also provided that "all matters of procedure at meetings may be decided by a majority." Is a decision to request an advisory opinion "a matter of procedure at a meeting," within the meaning of that term as it is used in the Covenant? The Court has adverted to the question, without indicating any answer, in its fifth advisory opinion.⁴ Two cases which arose before the Council in 1923 may be thought to have raised the question. In June, 1923, the Roumanian representative opposed a proposal that the Council should seek an advisory opinion relating to the expropriation of Hungarian optants, and on that occasion the Council found another way of

⁴ Publications of the Court, Series B, No. 5, p. 27.

dealing with the question.⁶ In July, 1923, when the Council requested the Court to give its seventh advisory opinion, the Polish representative had opposed such action, but the opposition does not seem to have been maintained at the time the Council acted.⁶ In both of these cases the Council was acting under special provisions of the Minority Treaties in which its power is specifically described. Another case arose in 1925, when the Council requested an advisory opinion relating to Article 3 of the Treaty of Lausanne (Mosul). While its action had been opposed by the Turkish representative, it is not clear from the record that he voted against it at the time.⁷ Moreover, the Council acted in this case under special power given to it by the Treaty of Lausanne. The whole question is, therefore, still open to doubt, though the Senate's reservation may tend to make more probable an ultimate decision in favor of a requirement of unanimity.

It is to be hoped that other countries will not find insuperable objections to this reservation. The method by which the United States will assert its interest is not clear. It might become embarrassing to the Court to find its action arrested after a request has been made by the Council, because of objection by the United States. It would seem desirable that some method be worked out by which the United States would assert its interest before the Council finally votes to make a request, and this doubtless can be worked out in practise. Indeed it seems most improbable that the reservation on paper will ever cause difficulty in practise.

The second resolution of the Senate adopted on January 27, 1926, provides that recourse to the Court for the settlement of a difference between the United States and another state can be had only by agreement thereto through a general or special treaty concluded between the parties. This may be interpreted as an attempt by the Senate to restrict the President's control of our foreign relations. Apart from such a limitation, it is at least questionable whether the advice and consent of the Senate is necessary for the President's submission of certain cases to arbitration or adjudication. With respect to pecuniary claims made by the United States against other governments, it is for the President alone to say what diplomatic action shall be taken to assert the claim, and it would therefore seem to fall within his competence to say whether such a claim should be arbitrated or adjudicated. And in numerous instances, such action has been taken without the advice and consent of the Senate. In 1902, Secretary John Hay signed the agreement with Mexico providing for the Pious Fund Arbitration before a tribunal of the Permanent Court of Arbitration, and no action was taken by the Senate. Again in 1909, when the United States and Venezuela sub-

⁶ League of Nations Official Journal, June, 1923, p. 608.

⁶ *Ibid.*, August, 1923, pp. 881-883, 935. See also, Hudson, The Advisory Opinions of the Permanent Court of International Justice, International Conciliation, No. 214, November, 1925, pp. 347-351.

⁷ League of Nations Official Journal, October, 1925, pp. 1379 ff.

mitted the Orinoco claims to arbitration before a tribunal of the Permanent Court of Arbitration, the advice and consent of the Senate was not sought by President Roosevelt.⁸ But the Senate attempted to gain control over such submissions when it gave its advice and consent to the 1907 Convention for the Pacific Settlement of International Disputes. In the resolution adopted on April 2, 1908, it was provided that "the United States approves this convention with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute;".⁹

It is interesting to speculate as to the legal effect of a Senate resolution requiring a special or general treaty for recourse to the Court. In any case it would seem to constitute merely a declaration of American constitutional policy which does not in any way bind other countries. Its embodiment in the act of ratification or adhesion will only give notice of the policy declared. The "understanding" to which the Senate resolution refers can hardly restrict the competence of the Court itself, or prevent it from taking jurisdiction; the "understanding" does not become a part of the constitutional law of the Court. How far is such a declaration binding on the President? May he not continue to exercise his constitutional powers without reference to the declaration? It is hardly possible to contend that by proceeding with American adhesion, the President becomes bound to refrain from exercising a part of his constitutional power.

The third resolution adopted by the Senate on January 27, 1926, provides that American "adherence" shall not be construed to require a departure from our traditional policy of non-interference in the internal affairs of other countries, nor to imply any relinquishment of the Monroe Doctrine. The language follows that of the declarations of the American delegations at the first and second Hague Conferences—on July 25, 1899, and October 16, 1907. And it was with a reservation of these declarations that the United States ratified the two Hague Conventions for the Pacific Settlement of International Disputes. It may be doubted whether these reservations have in any way reduced the frequency of recourse by the United States to tribunals of the Permanent Court of Arbitration; and it is likewise doubtful whether the Senate's third resolution will reduce recourse by the United States to the Permanent Court of International Justice.

The Senate's action on January 27, 1926, clears the way for progress in several directions, when the American adhesion is finally consummated. First, resort to the Court may then become politically possible, as it was previously legally possible. It seems conceivable that the difference with

⁸ For other such instances, see John Bassett Moore, "Treaties and Executive Agreements," 20 *Political Science Quarterly*, 385, 408-417; James F. Barnett, "International Agreements without the Advice and Consent of the Senate," 15 *Yale Law Journal*, 77-78.

⁹ 36 *Stat. at Large*, p. 2240.

the Netherlands relating to the Island of Las Palmas, now being arbitrated before a tribunal of the Permanent Court of Arbitration,¹⁰ might have been sent to the Court, if this action had been taken earlier. Yet in view of the contest concerning American support, it seems improbable that the United States will make frequent use of the Court in the early future. Second, the United States may then consider the substitution of the Permanent Court of International Justice for the Permanent Court of Arbitration in various arbitration treaties renewed in recent years, in accordance with the intimation in various exchanges of notes.¹¹ Third, the whole question of organized coöperation with other nations will doubtless receive more fruitful consideration than was possible until the issue about the Court was out of the way.

MANLEY O. HUDSON.

PAUL FAUCHILLE

February 11, ~~1858~~—February 9, 1926

The life of Paul Fauchille was that of the scholar. He was in the world, but not of it. He has written a book now and then making an appeal to a limited circle of readers, increasing, however, with the years, and he has appealed to the members of the younger generation coming into contact with him, being at once a source of instruction and of encouragement. At the first meeting of the Royal Academy of Belgium after the World War in the spring of 1919, held under the presidency of King Albert himself, Mr. Fauchille was elected an associate for the class of letters and moral and political sciences, at the same time with men of distinction such as Mr. Clemenceau, then Prime Minister of France, Mr. Balfour, then His Majesty's Principal Secretary of State for Foreign Affairs, and Mr. Lusatti, formerly Prime Minister of Italy. The government of his country had also discovered his existence, notwithstanding his modest reserve, and accorded him the Cross of the Legion of Honor for his services to France and its scholarship. Such is the scholar's reward, and none other would he have had.

Paul Auguste Joseph Fauchille, to give him his full name, although he only used the first of his prænomens, was born at Loos-les-Lille, on February 11, 1858, and studied law in the Faculty of Douai. Later, he received his doctor's degree in the Law School of the University of Paris. He was admitted as an advocate to the Court of Appeal of Paris in 1878, but preferred the life of a scholar and scholarly investigation to the exactions and worries of the bar. He never aspired to a professorship in the universities of France, many of which would have been open to him had he cared to enter their service.

¹⁰ U. S. Treaty Series, No. 711.

¹¹ U. S. Treaty Series, Nos. 674 (Great Britain), 679 (France), 680 (Norway), 682 (Netherlands), 683 (Japan), 708 (Sweden).

Mr. Fauchille's interests were many and varied, but international law held the first place in his affections and activity. In this broad domain he devoted himself primarily to the law of nations as distinct from what is called on the Continent, private international law, and in the English-speaking world, the conflict of laws.

Among his numerous works dealing with phases of the law of nations there should be expressly mentioned: *Du blocus maritime: Etude de droit international de droit comparé*, published in 1882 and crowned by the Law Faculty of the University of Paris; *La diplomatie française et la ligue des neutres de 1780 (1776-1783)*, published in 1893 and crowned by the Institute of France; and the various editions of Bonfils' *Manuel de droit international public*, culminating in his own elaborate *Traité de droit international public*: Vol. I, *La Paix*, first part (1922), pp. 1-1058, second part (1924), pp. 1-1185; Vol. II, *Guerre et neutralité* (1921), pp. 1-1095, and the third part of Vol. I, *La Paix*, which he was enabled to finish before his untimely death on February 11, 1926.

Mr. Fauchille has thus left for the benefit of professors and practitioners of international law the most comprehensive treatise on the law of nations published within this generation; and with the modesty characteristic of the man, and which we would like to consider as an essential element of true greatness, he retained on the title page of his Treatise, "Eighth Edition, entirely revised, completed and brought up to date, of the Manual of Public International Law of Mr. Henry Bonfils."

Two publications of which Mr. Fauchille was editor should be mentioned, if only in passing, for they are of timely interest and of permanent value: *La Guerre de 1914—recueil de documents intéressant le droit international*, published 1916 *et seq.*; and *La Guerre de 1914*, consisting of prize decisions rendered by countries parties to the World War, edited by Mr. Fauchille in collaboration with other distinguished publicists (1916 *et seq.*, and still in progress). And a third publication should be recalled, *Louis Renault (1843-1918) sa vie—son oeuvre*, published in 1918—a book of the heart and a tribute to his teacher, to whom international lawyers in all parts of the world look up and venerate as master.

Mr. Fauchille's services to international law are not merely historical, literary and systematic. With Mr. Antoine Pillet, Professor of International Law in the Faculty of the University of Paris, he founded, in 1894, the *Revue générale de droit international public*, which endowed, and continues to endow the world with an admirable periodic journal of international law, whose services, month by month and year by year, have been appreciated not only by theorists and practitioners, but by the Institute of France, which awarded it the Drouyn de Lhuys Prize for 1904. And within the last few years of his life he was able to launch the Benjamin of his children, the *Institut des Hautes Etudes Internationales*.

The earlier editions of the Treatise state the law in existence at the out-

break of the World War in 1914, and in its final form it opens the way to the future development of international law. Mr. Fauchille thus stands between the old and the new—a kindly, gentle and modest figure, a model of simplicity, of dignity, and of moral grandeur.

If Ernest Renan's dictum be true—that his life is happy who, in his declining days sees the visions of his youth realized, Paul Fauchille should have died contented in this large and generous sense.

JAMES BROWN SCOTT.

SETTLEMENT OF THE GRAECO-BULGARIAN DISPUTE

The settlement by the Council of the League of Nations of the recent controversy between Greece and Bulgaria may be set down as one of the most successful and dramatic of the League's achievements for the preservation of peace. The dispute arose out of a mere frontier "incident," but as Mr. Chamberlain remarked, it was one of a kind that has sometimes led to very serious consequences in the past. It began by an exchange of shots on October 19th last, between Greek and Bulgarian sentries, in the course of which a sentry on each side was killed. Prolonged firing followed and each party charged that troops of the other had penetrated its territory. The Bulgarian Government on the 23rd of October addressed an appeal to the League, invoking Articles X and XI of the Covenant. The Secretary-General on the same day summoned the Council to meet in extraordinary session at Paris three days later (the 26th). The Council met on the day fixed, one of the members arriving by aëroplane from Sweden. Representatives from Greece and Bulgaria, both of which are members of the League, attended and presented their views regarding the events which took place on the 19th of October. Their statements, it may be remarked, were contradictory.

The Council was called upon to deal with two questions: first, the fixing of the responsibility and the amount of reparation, if any, which was due to the injured party; and, second, the bringing about of an immediate cessation of hostilities and the withdrawal of the troops of both parties, to their respective territories. The request of the Council that the representatives of both states inform it within twenty-four hours that orders had been given for the withdrawal of the troops of each from the territory of the other and that within sixty hours they had been so withdrawn, was promptly complied with, and before the expiration of the time-limit fixed the evacuations had taken place.

Both parties having united in asking for the appointment of a mixed commission to clear up the facts, fix the responsibility and determine whether indemnities or reparations were due, and if so, to whom, the Council appointed for these purposes a commission of five persons of "neutral" nationality, under the chairmanship of Sir Horace Rumbold, British Am-

bassador to Spain. In addition to determining the above mentioned facts, the commission was requested to report to the Council "any suggestions as to measures which, in its opinion, would eliminate or minimize the general causes of such incidents and prevent their recurrence."

The commission proceeded promptly to the spot where the incident had occurred and there conducted its investigations. Before the end of November it submitted a report to the Council placing the responsibility on Greece and pronouncing her invasion of Bulgaria as unjustifiable. The Council thereupon "officially imposed a fine and damages" of 30,000,000 levas (about \$219,000) on Greece and ordered it to be paid to the Bulgarian Government within two months. The Greek Government is reported to have accepted the decision in good spirit and even to have expressed its thanks to the Council for having absolved it of the charge of premeditated aggression.

The Council in its decision affirmed two principles which will serve as guiding precedents in such cases in the future: first, that reparation must be made for the unjustifiable violation of territory, even when the aggressor believes that its conduct was justified by the circumstances; second, that a desirable method of preventing the recurrence of incidents of this kind in the future would be the appointment of neutral representatives to exercise a mediatory function along particularly dangerous frontiers. In accordance with this latter view, the Council adopted the suggestion of the commission of inquiry and recommended that the Swedish Government be requested to supply such neutral representatives to exercise this function along the Graeco-Bulgarian frontier. Both the Greek and Bulgarian Governments appear to have accepted the recommendation, and thus the whole affair was satisfactorily liquidated.

The settlement demonstrated the potentiality of the League as an institution for the peaceful adjustment of petty disputes which may lead to dangerous consequences. The remarkable celerity with which the machinery of the League functioned in this case showed also that its alleged cumbersomeness is not necessarily one of its greatest defects. Finally, the whole attitude of both disputants from first to last was such that if it were generally adopted by all members of the League in cases of future disputes, and especially more serious ones, the cause of peace would be greatly advanced. Not only was there an entire absence of any disposition to defy the authority of the council or to deny its right of intervention, but both parties at the outset willingly submitted their cases to its decision, they gave an undertaking in advance to accept whatever decision might be reached, and in fact both the decision and the recommendations appear to have been fully complied with. In this respect Greece and Bulgaria have set an example which, it is to be hoped, will be followed in the future by other members of the League, and especially the more powerful ones, not only for the settlement of frontier disputes, but for others of a more dangerous character. The Council also both by the promptness and rapidity with which it acted and by the tactful and conciliatory

manner in which it dealt with the dispute set an example which it too may well follow in future cases.

J. W. GARNER.

AMERICAN MARITIME INTERESTS AND THE YORK-ANTWERP RULES

The regulation of private rights in ships and cargoes upon the high seas is not completely governed either by national legislation nor by international treaties. This is perhaps additional evidence of the incomplete development of international law in respect to commerce upon the high seas. At all events, there is wide latitude permitted to the agreement of the parties. This is especially true in determining the rights of the parties where the ship and its variously owned cargo are involved in a common peril and sacrifices have to be made to avert a common disaster.

The increasing complexity of modern overseas commerce has made it essential that uniform regulations of so-called General Average should be framed, applicable uniformly, whatever may be the flag of the ship, or the jurisdiction adjusting the loss. Ever since 1890, a series of clauses known as the York-Antwerp Rules of General Average have been inserted generally in charter-parties, bills of lading, policies of insurance and other maritime documents used in international trade. As Mr. Justice Washington expressed it, so early as 1814, "the object is to incur a partial loss and to risk a minor or contingent danger, to avoid the more certain loss of all."¹

These rules, as the United States Supreme Court has decided,² do not declare the general principles which are to be applied to General Average, but rather only the losses or expenses which are to be included in adjusting a common sacrifice and the manner of distributing such losses. For years, therefore, maritime interests in many countries have been endeavoring to arrive at an understanding looking toward a revision of the York-Antwerp Rules and an extension of these rules for the purpose of accomplishing international uniformity even upon certain of the underlying principles. Accordingly, as a result of a number of national committees working together, a special Maritime Section of the Stockholm Conference of the International Law Association, Sir Norman Hill acting as chairman, drafted and finally adopted a revision and extension of the rules, now known as the York-Antwerp Rules of 1924.

The revised rules have been already widely adopted in practice in Great Britain, France and Scandinavian countries, by incorporation in maritime documents, but as yet American interests have refused acceptance and have retained the text of 1890. It is claimed that the proposals were not circulated in sufficient time for American interests to be represented at Stockholm

¹ *Case v. Reilly* (1814), 5 Fed. Cas. 2538, at p. 334.

² *Ralli v. Troop* (1894), 157 U. S. 386, 412.

and that the revision was open to certain fundamental objections. Accordingly, at the request of the American Steamship Owners Association, a conference of American maritime interests was convened in Washington under the auspices of the United States Chamber of Commerce in March, 1925, at which the writer was elected chairman. The conference was attended by representatives of American steamship owners (including the Government Shipping Board), marine underwriters, cargo owners, maritime associations, marine underwriters, average adjusters and admiralty lawyers. A technical committee was appointed, with Judge Harrington Putnam of New York as chairman, to formulate specific objections from the point of view of American interests. One of the chief objections proved to be the provision that rights to contribution "shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; *but this shall not prejudice any remedies which may be open against that party for such fault.*" This is in conflict with the Federal Statute of February 13, 1893, known as the Harter Act, exempting the shipowner from liability for negligence, provided the ship was seaworthy and properly manned, equipped and supplied at the time of departure. Such legislation does not exist in Great Britain and many other countries. Where a clause of the kind printed in italics is employed, American shipowners customarily add the so-called "Jason" clause, designed to completely preserve the benefits of the Harter Act. Such a clause was held valid in the well-known decision of the Supreme Court in the case of *The Jason*.³

In the final report rendered in February, 1926, by the technical committee of the General Average Conference, it is recommended that American maritime interests incorporate in maritime documents the Jason clause, together with certain specifically mentioned clauses of the Revision of 1924, and that they omit certain others found to be objectionable. This leaves the problem still unsolved. Perhaps the present may be safely regarded as a transitional period toward ultimate uniformity, when experience under the new rules may have made opportune the calling of a new international conference of maritime interests. Necessity will surely lead to the invention of a satisfactory solution, for the adjustment of marine losses through General Average has its origin, as Story has said, "in the plain dictates of natural law."⁴

ARTHUR K. KUHN.

TREATIES FOR THE PREVENTION OF SMUGGLING

Since the first of the liquor treaties was ratified between the United States and Great Britain, nearly two years ago, considerable progress has been made in the development of a body of treaty law intended to afford foreign vessels a limited immunity from the operation of federal prohibition statutes and to

³(1912), 32 Supreme Court Rep. 560.

⁴Equity Jurisprudence, 14th ed., sec. 661.

facilitate the suppression of the smuggling of intoxicating liquors from foreign ships into the United States. Conventions of two types have been negotiated, the first with maritime countries anxious to obtain limited immunities for their merchant craft and willing to concede in return a somewhat novel jurisdiction for the suppression of smuggling, and the second with countries contiguous to the United States, Canada and Mexico, whose territories have furnished convenient bases for all sorts of smuggling operations. At the date of writing,¹ eight conventions of the first type have come into effect through exchange of ratifications and are available in the official texts,² three others have been signed and ratification has been advised by the United States Senate,³ and the negotiation of still another has been reported as pending.⁴ Two conventions of the second type have been negotiated with Canada and Mexico respectively, both have been approved by the United States Senate, and one, the convention with Canada, has come into effect through exchange of ratifications and is available in the official text.⁵ Negotiations are also in progress with Cuba, though press reports have not indicated clearly whether there is in prospect a convention of the first type, a convention of the second type, or possibly a novel agreement embodying features of both.⁶

Treaties of the first type have followed closely the text of the convention with Great Britain;⁷ but there have been two interesting variations, the first in the text of Article I dealing with the extent of territorial waters, and the

¹ March 5, 1926.

² Ratified in the following order: Convention with Great Britain, May 22, 1924 (43 Stat. L. 1761); Convention with Norway, July 2, 1924 (43 Stat. L. 1772); Convention with Denmark, July 25, 1924 (43 Stat. L. 1809); Convention with Germany, August 11, 1924 (43 Stat. L. 1815); Convention with Sweden, August 18, 1924 (43 Stat. L. 1830); Convention with Italy, October 22, 1924 (43 Stat. L. 1844); Convention with Panama, January 19, 1925 (43 Stat. L. 1875); Convention with The Netherlands, April 8, 1925 (U. S. Treaty Series, No. 712).

³ Convention with France, signed June 30, 1924; ratification advised by the United States Senate, December 12, 1924. Congressional Record, Vol. 66, p. 531. See N. Y. Times, Dec. 16, 1924, p. 16, col. 3; Feb. 6, 1925, p. 19, col. 5; July 9, 1925, p. 7, col. 2.

Convention with Belgium, signed December 9, 1925; ratification advised by the United States Senate, March 3, 1926. Congressional Record, Vol. 67, p. 4633.

Convention with Spain, signed February 10, 1926; ratification advised by the United States Senate, March 3, 1926. Congressional Record, Vol. 67, p. 4636.

⁴ With Japan, N. Y. Times, May 14, 1925, p. 3, col. 5.

⁵ Convention with Canada, July 17, 1925 (U. S. Treaty Series, No. 718); Convention with Mexico, signed Dec. 23, 1925, ratification advised by the United States Senate, March 3, 1926 (Congressional Record, Vol. 67, p. 4635).

⁶ Current History, Feb., 1926, p. 735. A supplementary extradition treaty, adding to the list of extraditable offenses "Crimes against the laws for the suppression of the traffic in narcotic products" and "Infractions of the customs laws or ordinances which may constitute crimes," was signed between the United States and Cuba on January 14, 1926. Ratification was advised by the United States Senate on March 3, 1926. Congressional Record, Vol. 67, p. 4634.

⁷ 43 Stat. L. 1761; also this JOURNAL, Supplement, Vol. 18, p. 127. See this JOURNAL, Vol. 18, p. 301, and Vol. 20, p. 111.

second in the text of Article IV dealing with the method of settling claims to compensation.

It will be recalled that the convention with Great Britain begins in Article I with a re-affirmation of three marine miles as the limit of territorial waters. "The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters." This article is identical in the conventions with Great Britain, Germany, Panama, and The Netherlands. Many countries, on the other hand, have contended for a wider area of territorial sea. Thus Norway has contended for a four-mile limit, Italy and Spain for a six-mile limit, and Russia for a twelve-mile limit. Governments thus committed have been unwilling to accept the text of Article I as it appears in the convention with Great Britain; and so, in other treaties, Article I simply stipulates that "the High Contracting Parties respectively retain their rights and claims, without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction." This is the text as it appears in the conventions in force with Norway, Denmark, Sweden, and Italy, and also in the unratified⁸ conventions with France, Belgium, and Spain. In brief, while the liquor treaties have perhaps helped to clarify the situation with respect to the extent of territorial seas, they have contributed nothing to the solution of a long standing controversy.

On the other hand, the liquor treaties have made a substantial contribution to the development of the law with respect to the right to police the marginal seas to prevent smuggling and with respect to the immunities of foreign merchant ships in ports and territorial waters. Articles II and III in particular, of the treaties of the first type, are a novel development of international treaty law intended to facilitate the suppression of smuggling operations conducted from foreign ships and at the same time to relieve legitimate commerce of unnecessary burdens imposed by the local law.

In Article II, the other contracting state agrees to "raise no objection" to the boarding of private vessels under its flag by authorities of the United States outside the limits of United States territorial waters "in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States . . . in violation of the laws there in force." "When such enquiries and examination show a reasonable ground for suspicion," continues the article, "a search of the vessel may be instituted."⁹ "If there is reasonable cause for belief that the vessel has committed or is

⁸ Unratified at the date of writing, March 5, 1926.

⁹ "Initiated" in the conventions with Norway, Denmark, Germany, Sweden, Italy, Panama, The Netherlands, and Spain. "Effectuated" in the conventions with France and Belgium.

committing or attempting to commit an offense against the laws of the United States . . . prohibiting the importation of alcoholic beverages," it may be arrested and taken into a port of the United States for adjudication. It is stipulated, however, that "the rights conferred by this article shall not be exercised at a greater distance from the coast of the United States . . . than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense." Where the liquor is intended to be smuggled into the United States by a vessel other than the one boarded and searched, "it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised." Article II is identical, *mutatis mutandis*, in all the conventions of the first type which have been negotiated to date.¹⁰

Article II in conventions of the first type is the concession which the treaties make to the United States to aid in suppressing the smuggling of intoxicating liquor. Article III is the *quid pro quo*. Article III provides in each convention that vessels of the other contracting state may bring intoxicating liquors "listed as sea stores or cargo destined for a port foreign to the United States" into the ports and territorial waters of the United States without penalty or forfeiture, "provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States." Article III is also identical, *mutatis mutandis*, in all the conventions of the first type which have been negotiated to date.¹¹

Article IV in the same conventions deals with the method of settling claims to compensation. In the convention with Great Britain this article provides that "any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II . . . or on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties." In case no joint report can be agreed upon by the two persons thus designated, the claim shall be referred to the Claims Commission established by the Convention of August 18, 1910.¹² In the convention with Norway, the second treaty of this type to come into effect through exchange of ratifications, Article IV provides that in case no joint report can be agreed upon by the two persons thus designated the claim shall be referred to the Permanent Court of Arbitration at The Hague to be settled by summary procedure. The text of this provision as it appears in the convention with

¹⁰ See *supra*, note 9. In the Convention with Spain each of the three paragraphs of Article II of the text as it appears in the treaty with Great Britain is made a separate article, thus adding two articles to the Convention.

¹¹ This is Article V in the Convention with Spain. See *supra*, note 10.

¹² Treaties, Conventions, etc., Vol. III, p. 2619.

Norway is incorporated, *mutatis mutandis*, in all other conventions of this type except the one with Great Britain. The unratified treaties with France and Belgium contain an additional provision for reference to an umpire selected by the two governments in case no joint report can be agreed upon. Failing agreement in the choice of an umpire, the claim is to go to the Permanent Court of Arbitration as stipulated in the identical text of the other conventions. When the convention with The Netherlands was signed, there was an exchange of notes anticipating the substitution in Article IV of the Permanent Court of International Justice for the Permanent Court of Arbitration as soon as the United States should adhere to the protocol creating the Court.¹³

Conventions of the first type are now (March 5, 1926) in force with Great Britain, Norway, Denmark, Germany, Sweden, Italy, Panama, and The Netherlands. Others may have become effective by the time this number of the JOURNAL issues from the press. As already indicated, two treaties of the second type have been signed with Canada and Mexico respectively and at the date of writing the convention with Canada has become effective through exchange of ratifications.¹⁴

The convention with Canada provides for the reciprocal furnishing upon request of information "concerning clearances of vessels or the transportation of cargoes, shipments or loads of articles across the international boundary when the importation of the cargo carried or of articles transported by land is subject to the payment of duties" and also "respecting clearances of vessels to any ports when there is ground to suspect that the owners or persons in possession of the cargo intend to smuggle it into the territory of the United States or of Canada." It is agreed in Article II that "clearance from the United States or from Canada shall be denied to any vessel carrying cargo consisting of articles the importation of which into the territory of the United States or of Canada, as the case may be, is prohibited, when it is evident from the tonnage, size and general character of the vessel, or the length of the voyage and the perils or conditions of navigation attendant upon it, that the vessel will be unable to carry its cargo to the destination proposed in the application for clearance."

Article III stipulates for the reciprocal return of stolen goods which have been seized by the customs authorities of either country, Article IV for the reciprocal exchange of information "concerning the names and activities of all persons known or suspected to be engaged in violations of the narcotic laws of the United States or of Canada respectively," and Article V for the reciprocal attendance as witnesses and the production of documents in civil or criminal trials in either country by the customs and other administrative officials of the other country. Article VI adds "offenses against the narcotic laws of the respective Governments" to the list of offenses included in the

¹³ See this JOURNAL, Supplement, Vol. 19, p. 116.

¹⁴ U. S. Treaty Series, No. 718.

Treaty of May 18, 1908,¹⁵ with respect to the reciprocal conveyance of prisoners by the authorities of either country through the territory of the other. In Article VII the United States agrees that alcoholic liquors may be transported to Canada without penalty or forfeiture, under seal and guarded by Canadian authorities, by way of Skagway, Alaska, and the White Pass and Yukon Railway.

The convention with Mexico is similar in some respects to the convention with Canada, though it differs in detailed provisions and on the whole seems to promise a more effective handling of the entire smuggling problem. The convention is in four sections, including not only articles with respect to the smuggling of goods but also articles with respect to the smuggling of persons, articles with respect to fisheries, and general provisions.¹⁶ It is an interesting document, worthy of more extended comment.

The reciprocal exchange of information is stipulated with respect to shipments across the international boundary (Article I), the names and activities of known or suspected smugglers (Article III), and persons proceeding from one country to the other as well as persons suspected of unlawful migration activities or of conspiracies against the other government or its institutions (Article IX). In order to suppress the smuggling of excluded aliens, the two countries agree to give reciprocal notice of suspension or waiver by either of regulations relating to the contracting of laborers in the territory of the other (Article VIII) and of deportations by either of the nationals of the other (Article VII). More important, "each of the high contracting parties agrees to employ all reasonable measures to prevent the departure of persons destined to territory of the other, except at or through regular ports or places of entry or departure established by the high contracting parties" (Article VI).

The smuggling of merchandise, narcotics, and intoxicating liquors is dealt with rather effectively, it is anticipated, in the articles of the first section. It is agreed that the transport of property across the international boundary without special permits from both governments shall be only through authorized ports or places (Article IV) and that all shipments across the line must be covered by shippers' export declarations which have been verified by officials in the country of origin and communicated by such officials to the appropriate officers of the country of destination (Article I). Article II provides as follows:

The high contracting parties agree that clearance of shipments of merchandise by water, air, or land from any of the ports of either country to a port of entrance of the other country shall be denied if such shipment comprises articles the introduction of which is prohibited or restricted for whatever cause in the country to which such shipment is destined, provided, however, that such clearance shall not be denied on

¹⁵ *Treaties, Conventions, etc.*, Vol. I, p. 830.

¹⁶ The text consulted is in the *Congressional Record* for March 3, 1926, Vol. 67, p. 4635.

shipments of restricted merchandise when there has been complete compliance with the conditions of the laws of both countries.

It shall also be deemed to be the obligation of both of the high contracting parties to prevent by every possible means, in accordance with the laws of each particular country, the clearance of any vessel or other vehicle laden with merchandise destined to any port or place when there shall be reasonable cause to believe that such merchandise or any part thereof, whatever may be its ostensible destination, is intended to be illegally introduced into the territory of the other party.

When the signing of the convention with Mexico was announced it was also announced that there had been signed a supplementary extradition convention adding to the list of extraditable crimes offenses against laws for suppressing the traffic in narcotics, offenses against laws relating to the illicit manufacture of or traffic in substances injurious to health, and violations of customs laws. The text of this latter convention is not available at the time of writing.

It is not to be anticipated that the treaties reviewed above, even when supplemented by more of the same kind, will make immediately possible the suppression of smuggling on land or sea. But they should improve greatly what has become recently an intolerable situation. And if the principle incorporated in Article II of conventions of the first type could be generally approved, and as generally supplemented by the principle which finds expression in Article II of the convention signed recently with Mexico, it seems clear that a very substantial advance would have been made toward the solution of some problems of extraordinary difficulty. While at present it cannot be said that a solution has been found, it may be said with confidence that nothing so promising has ever before reached the stage of actual experimentation. The treaties of the first type, particularly, are a significant experiment in codification as that term has come to be freely used. The treaties of both types imply a recognition that smuggling operations on sea no less than on land raise important questions of international responsibility as well as international right. They imply a recognition, notable chiefly because it has been so long delayed, that the seas are free, not to be made a law-breakers' paradise, but to serve as an open and unobstructed highway for the commerce of the world.

EDWIN D. DICKINSON.

THE UNILATERAL TERMINATION OF TREATIES

The principles of international law governing the unilateral termination of treaties are illustrated by the history of the treaty between the United States and Turkey signed at Lausanne on August 6, 1923, and now pending in the United States Senate, and also by the address of February 21, 1926, delivered before the Brooklyn Institute of Arts and Sciences by Dr. Sao-Ke Alfred Sze, the Chinese Minister at Washington. It may be appropriate,

therefore, to examine briefly the position of Turkey and China in respect of the termination of their ancient treaties limiting their judicial and tariff autonomy.

The limitations on the judicial and fiscal freedom of Turkey arose out of usages and charters (capitulations) granted to Italian traders by the Byzantine Emperors before the Conquest by the Turks, about the middle of the fifteenth century. Mohammed, the Conqueror, extended and fostered the system of capitulations for foreign non-Moslem communities. Suleiman, the Magnificent (1520-1566), further expanded the system by granting capitulations to the French in 1535. England obtained similar capitulations in 1583.¹ Some of the grants have been made or confirmed by treaty, the United States obtaining the same rights by the treaty of 1830. Under the capitulations, Turkish customs duties were limited to a uniform eleven per cent *ad valorem*.²

At the Lausanne Conference the Turkish delegation maintained that the capitulatory rights in Turkey were historically and essentially in the nature of a unilateral grant of a privilege or license which was of a temporary nature and without any consideration and which could be withdrawn or terminated at the pleasure of the sovereign.³ The Turkish delegation further contended that even supposing these capitulatory rights to be based upon bilateral conventions, nevertheless all treaties whose duration is not fixed, imply the clause *rebus sic stantibus* (things so standing) that is, that a change in the circumstances or conditions which brought about the treaty may justify its cancellation by one of the parties. The Turkish delegation maintained this position throughout the conference and supported it by arguments and authorities. For example, Ismet Pasha, the chief Turkish delegate, said:

It is an undoubted fact that in taking such a decision Turkey merely exercised a legitimate right. As a matter of fact, the Capitulations are essentially unilateral acts. In order that an act may be regarded as reciprocal, it must above all contain reciprocal engagements. From an examination of the texts, the evidence shows that in granting the privileges in question to foreigners in Turkey, the Ottoman emperors had no thought of obtaining similar privileges in favour of their subjects travelling or trading in Europe. It is for this reason that Féraud Giraud says: "These acts are not so much international treaties as grants of privileges."

¹ Pierre Crabitès, *Amer. Bar Assoc. Journal*, Vol. XI, p. 485.

² Edgar Turlington, *this JOURNAL*, Vol. 18, p. 699.

³ The Turkish delegation was supported also by the fact that the so-called Turkish National Pact, which had been approved by the Parliament at Constantinople, January 28, 1920, and was in the nature of a constitutional law, contained a declaration that the restrictions imposed upon Turkey by the capitulations could no longer be tolerated. The Turkish delegation stated that their government had declared before the convening of the Lausanne Conference that this pact embodied the conditions upon which alone a durable peace could be made.

Professor Louis Renault also observes that "they are voluntary and spontaneous concessions, always revocable and liable to lapse on the death of the sovereign who had granted them." They lack, he says, that which above everything constitutes a treaty, that which is the distinctive and eventual character of any convention, namely, the reciprocal character to which the reciprocity of the engagements and the double signature bear witness.

Even supposing that the Capitulations were bilateral conventions, it would be unjust to infer from that that they are unchangeable and must remain everlastingly irrevocable.

Treaties whose duration is not fixed imply the clause *rebus sic stantibus*, in virtue of which a change in the circumstances which have given rise to the conclusion of a treaty may bring about its cancellation by one of the contracting parties, if it is not possible to cancel it by mutual agreement.

"Cases must necessarily be admitted in which the State must be able to declare itself freed from any engagement, even when it has not expressly reserved this right by a clause of the treaty. Respect for engagements contracted should not, for example, be pushed to a suicidal extent. Though a State may be required to execute burdensome engagements contracted by it, it cannot be asked to sacrifice its development and its existence to the execution of a treaty."⁴

Similarly, Professor Despagnet, the celebrated French jurist, expresses himself as follows:

"The cases in which the denunciation of treaties is legitimate may be classed in three categories:

"(a) When the observance of the treaty has become dangerous for the political or economic existence of a country.

"(b) When the circumstances which have given rise to the treaty have changed and deprived the old agreement of its reason for existence.

"(c) Finally, a treaty may be denounced when it has become incompatible with the common international law of civilised States to which the contracting countries subscribe; a modern example would be an old treaty, not formally abrogated, sanctioning the slave trade, which is condemned by modern international law."

In view of the reasons set forth above, the abrogation of the capitulatory system is a necessity more than justified. In fact, the continued application of these extremely detrimental rules was a grave injury to the political existence of the State.

Moreover, the circumstances and the conditions which had brought this régime into being have completely changed. It is unanimously asserted that the Capitulations are absolutely incompatible with the principles of modern public law.

On the other hand, as explained above, the Capitulations have their origin in the principle of "personal law," whereas according to modern legal conceptions each State, in order to be considered as an independent State, must enjoy, within the limits of its frontiers, a complete and full independence. Its laws and institutions must have a completely territorial character. Therefore the Capitulations in our day form, as Pélissier du Rosas rightfully observes, an anomaly and an anachronism.⁵

⁴ Pradier-Fodéré, Vol. II, p. 264, 1911.

⁵ Turkey No. 1, 1923, Lausanne Conference on Near Eastern Affairs, pp. 478-479.

Writers on international law have made much of the so-called precedent of the Protocol or Declaration of London of January 17, 1871, to the effect that a treaty cannot be annulled or modified by one of the parties alone. This declaration, signed by representatives of Great Britain, Austria, France, Germany, Italy, Russia and Turkey, reads as follows:

Les Plénipotentiaires de l'Allemagne du Nord, de l'Autriche-Hongrie, de la Grande Bretagne, de l'Italie, de la Russie, et de la Turquie, réunis aujourd'hui en Conférence, reconnaissent que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale.

The effect of this declaration, however, loses some of its force when it is understood that it was preceded by, and originated in, Russia's notice to the Powers of her intention to repudiate the provisions of the treaty of 1856 neutralizing the Black Sea on the grounds that the conditions of naval warfare contemplated by that treaty had since undergone such material changes that the treaty could no longer be deemed to be binding, and that the treaty having been in fact violated by the other parties, Russia became released from her obligations thereunder. This declaration, therefore, must be read in the light of the peculiar circumstances which led to its pronouncement. It would seem to amount to no more than a declaration that a treaty cannot be annulled by one of the parties without the consent of the other in circumstances which involve no change in the fundamental conditions on which the treaty is based and which show no violation of the treaty by the other party.

Without reviewing the numerous authorities and precedents, it may be said from a study of them that the termination of indefinite or perpetual treaties is justifiable if and when the fundamental circumstances or relations of the parties obtaining at the time and forming the basis of the treaty or the tacit conditions thereof, are materially or essentially changed or altered. Only vital changes would have this effect on account of the possibility of abuse by contracting parties. The changes which make a treaty merely disagreeable, burdensome or onerous are not necessarily on that account fundamental changes warranting the termination of the treaty. For example, a change of government of one of the parties, or a change in the form of government, as from a monarchy to a republic, would not ordinarily be regarded as a vital change in the fundamental circumstances or relations referred to. Changes which are regarded by authorities as fundamental or vital are those which—

Take away the very foundation of the engagement, that is, its *raison d'être*;

Threaten or cause the sacrifice of a state's development or its vital requirements for political or economic existence to the execution of

- the treaty; that is, make performance impracticable except at an unreasonable sacrifice;
- Are inconsistent with the right of self-preservation, or incompatible with the independence of the state;
- Modify essentially the political relations which produced political treaties; as for example treaties of alliance.
- Make a treaty really inapplicable, or actually impossible of fulfillment.

If on such grounds a state feels under the necessity of being relieved from the restrictions of a treaty, it would seem that it should first approach the other party with a view to obtaining a release before abrogating the treaty.

Basing themselves upon the doctrine of *rebus sic stantibus*, the Turks at the Lausanne Conference contended in substance that the juridical and economic capitulations were incompatible with the principle of national sovereignty as well as prejudicial to the progress and development of Turkey. The Turks also contended that they had been improving their judicial system for half a century and that it was not so bad as the Allies made out. They declared that the Commercial Code, the Penal Code, the Code of Civil and Penal Procedure, the Administrative Laws and Regulations, and other laws had been elaborated on European models and had no Moslem or religious character at all. Further, while these laws were being elaborated and promulgated, a faculty of law had been instituted at Constantinople, whose program and curriculum were more or less identical with that of corresponding schools in Europe. Besides there were only about ten or a dozen countries which claimed capitulatory rights in Turkey, whereas all of the other nations of the world had citizens or subjects who traveled, resided and traded in Turkey and appeared to be on the whole satisfied with the Turkish system of justice. The regions detached from Turkey during the Nineteenth century and still more recently, such as Mesopotamia, Epirus, etc., contained large foreign colonies and yet the capitulations were not maintained there. Moreover, Austria, Germany, and recently Russia, had terminated the capitulations.⁶

Space does not permit the summarization of the counter-arguments of the Allied Powers and of the ensuing debate. The resulting treaty of July 24, 1923, was a complete acceptance by the Allied Powers of the abolition of the capitulations. In Turkey the nationals of the other contracting Powers are to be treated in respect of their persons and property in accordance with the principles of international law and upon condition of complete reciprocity. Turkey undertook for a period of seven years to permit all questions involving the civil status of Allied nationals to be determined by courts sitting within the territory of the countries to which such nationals belong. Turkey also agreed to employ neutral European legal advisers to collaborate in respect of the administration of justice where foreigners were

⁶ Lausanne Conference, H. M. Stationery Office, Cmd. 1814, p. 465 *et seq.*

concerned and in respect of reforms which might be deemed necessary to modernize the administration of justice. Turkey granted for a period of seven years practically national treatment in the matter of taxes or imposts and for a period of five years agreed to apply with certain limitations the Turkish Tariff of September, 1916, on imports.

The American treaty of August 6, 1923, included practically the same arrangement by virtue of most-favored-nation treatment and of specific provisions of the treaty.

The situation as to the Chinese extraterritorial treaties is similar in many respects to that of the Turkish capitulatory régime. The extraterritorial rights in China, however, had no origin in custom or by virtue of capitulations as in Turkey, but arose from direct grants of these rights in treaties with the important commercial Powers. Since 1842, China has made direct treaty grants of jurisdiction to the United States, Great Britain, Japan, Italy, France, Holland, Belgium, Sweden, Norway, Denmark, Spain, Portugal, Peru and Brazil. The extraterritorial rights of Germany, Austria, and Hungary were terminated during the late war. Those of Russia were suspended by a Chinese mandate in September, 1920, and confirmed in the Chinese-Soviet treaty of May, 1924, and those of Korea were merged in those of Japan through annexation. Other countries having extraterritorial rights in China base them upon the "most-favored-nation" clause. It appears that about thirteen of these treaties are of more or less indefinite duration.

The early treaties limited China's customs duties to 5% *ad valorem*, but prices began to drop and a revision was asked for by the treaty Powers and was effected in 1858. From that time until 1902, the prices rose, but the treaty Powers did not request a revision. In 1902, as a result of the obligations arising out of the Boxer trouble, a revision was made on the basis of the average prices of 1897-1899. In 1912, another attempt was made to revise the tariff in order to bring it into accord with actual prices, but as the unanimous consent of some sixteen or seventeen Powers had to be obtained, it was only after six years of protracted negotiations, and then as an inducement to enter the war on the Allied side, that a revision was effected in 1918. The purpose of this revision was to increase the rate to an effective 5%, but on account of the further change in prices of commodities, the tariff yielded only 3½% in 1921.

Dr. Sze, in his address referred to, indicates that his government will follow the practice of nations and endeavor to seek relief from China's unequal treaties by negotiation, if possible, but he intimates that if this fails

it should not cause surprise, or warrant just criticism, if there should arise in China a demand that the treaties which purport to impose non-reciprocal limitations upon herself, in derogation of her sovereignty and highly detrimental to her essential national interests, should be denounced by China, that is, terminated by a unilateral act upon her part . . . both international law and international practice recognize that treaties may, under certain circumstances, be denounced by one or

the other of the parties to them, even though the treaties do not themselves provide for such denunciation. Especially is this true of international agreements which do not run for specified terms of years, and which do not themselves, by their very terms, state the manner in which they may be terminated.

In support of this statement, Dr. Sze advances the proposition that if treaties which endanger the very existence or are highly prejudicial to the essential and vital interests of a state, are entered into as a result of force, fraud or mistake, they are subject to denouncement. He also advances the doctrine of *rebus sic stantibus*. Thus with reference to the customs restrictions on China, it might be argued that these restrictions are seriously prejudicial to China's existence or prosperity or that these restrictions under changed conditions have become a matter of vital concern to her national needs and development. It might be argued also, says Dr. Sze, that the rule of *rebus sic stantibus* properly applies to extraterritorial rights in China on account of the growth of the number of aliens living in that country.

It will be recalled that this is not the first time that China has endeavored to obtain relief from customs and extraterritorial restrictions on the free exercise of her sovereign rights. At the Disarmament Conference, 1921-1922, China forcefully presented the difficulties of the customs régime. It deprived China of her power to make reciprocity arrangements with the Powers, so that while foreign goods imported into China had to pay only 5% import tax, Chinese goods had to pay the maximum customs duties when imported into other countries. The result was that the income of the Chinese Government proved inadequate to meet the manifold needs of the Chinese Government, such as those for education, road building, sanitation and public welfare. It is axiomatic that no government can function effectively without sufficient revenue. Furthermore the present treaty tariff régime is an impediment to China's economic development. Not only does China enjoy no reciprocity, but the necessity of levying uniform duties on all articles imported into China makes these duties too high on certain articles and too low on others. For example, the duties on machinery and raw materials for Chinese industries are too high and constitute a handicap to Chinese industrial development. China has more than 1,000 Chinese factories employing foreign machinery and engaged in over thirty different kinds of important industries. Moreover, the requirement of unanimity in changing the tariff makes revision almost impossible, as the dissent of one Power is sufficient to defeat the negotiations.⁷

It would seem, therefore, that the old tariff régime instituted over eighty years ago and only ineffectively revised since that date has, owing to fundamental changes, become a danger to the political and economic existence of the Chinese state. The treaty Powers appear to entertain the same view as they are now in conference in Peking on this subject.

⁷ Willoughby, China at the Conference, pp. 55-79.

As to the question of extraterritoriality, Dr. Wang, one time Minister of Justice and Chief Justice of China, showed at the Conference that considerable progress has been made in modernizing the judicial system of China during the last twenty years. He said:

A law codification mission for the compilation and revision of laws has been sitting since 1904. Five codes have been prepared, some of which have already been put into force: (a) The Civil Code, still in course of revision; (b) the Criminal Code, in force since 1912; (c) the Code of Civil Procedure, and (d) the Code of Criminal Procedure, both of which have just been promulgated; and (e) the Commercial Code, part of which has been put into force.

These codes have been prepared with the assistance of foreign experts, and are based on the principles of modern jurisprudence. Among the numerous supplementary laws especial mention might be made of a law of 1918, called "Rules for the Application of Foreign Laws," which deals with matters relating to private international law. Under these rules, foreign law is given ample application. Then there is a new system of law courts established in 1910. The judges are all modern, trained lawyers, and no one can be appointed a judge unless he has attained the requisite legal training. These are some of the reforms which have been carried out in China.⁸

Dr. Wang added that China granted extraterritorial rights at a time when there were only five ports open to foreign trade. Now there are fifty treaty ports and an equal number of other places open to foreign trade in China. This has meant an ever increasing number of persons within Chinese territory over which she has no judicial power. Furthermore their extraterritorial rights have led to a multiplicity of courts in one and the same locality which has given rise to uncertainties of jurisdiction and law, perplexing not only to the layman but to the trained lawyer as well. In many cases the rights and liabilities of the parties vary according to whether the one or the other sues first. A further disadvantage is that foreigners in China, under cover of extraterritoriality, claim immunity from local taxes and excises which the Chinese themselves are required to pay. Obviously China is not disposed to open up additional sections of her territory to foreign trade under these conditions. Already observers report that the system of extraterritoriality is felt by Chinese not only to be offensive and humiliating but to be disintegrating in effect on their respect for their own government and officials whom they are led to despise while envying foreigners who are withdrawn from native control.⁹

Will the Powers who have established their commercial interests in China under these preferential privileges be willing to treat with China on the basis of the equality of states before the law, or will China have to assume the position of Turkey at Lausanne and seek to regain her former status under the rule of *rebus sic stantibus*? Dr. Sze frankly raises this question.

L. H. WOOLSEY.

⁸ *Id.*, 116.

⁹ *Id.*, pp. 113-115.

CURRENT NOTES

FOREIGN POLICY OF THE UNITED STATES

Extract from address of the Honorable Frank B. Kellogg, Secretary of State, at the University of Pennsylvania, on Washington's Birthday, February 22, 1926.

I cannot close this address without mentioning one principle which, while not embodied in the Constitution or in any written law, has nevertheless become a settled national policy, that is, the policy of steering clear of permanent alliances with foreign Powers. The acceptance of this as a principle of our action in our relations with foreign governments was undoubtedly due to the influence of Washington. This principle announced by Washington in his Farewell Address has been the basis of our foreign policy for 130 years and has had a profound influence upon our national life. It is as important today when the United States is a great and powerful nation as when it was a small and a weak nation of thirteen states struggling to maintain its existence. This pronouncement of Washington was not the enunciation of a subject new to him but the expression of a deep conviction conceived during a trying ordeal while he was President. I need but call to mind the circumstances surrounding the formation of this policy, the promulgation of the first neutrality proclamation and the deep political significance of Washington's conduct during this period. After the Battle of Saratoga, France came to the assistance of the Colonies and the Treaty of Defensive Alliance was entered into on February 6, 1778. It does not matter that one of the impelling reasons of France's entrance into the alliance and her assistance to the Colonies in this struggle for liberty was traditional animosity to Great Britain, for, nevertheless, the assistance was sorely needed and in the closing scenes of this great national struggle, that assistance was of surpassing importance and aroused among the people of that day and succeeding generations sentiments of the deepest gratitude. After the peace between Great Britain and the United States, the adoption of our Constitution and the organization of the Federal Government, France overthrew the monarchy and undertook to establish a republic. This action undoubtedly was influenced to a very great extent by the example of the United States and there was in this country the deepest interest in and sympathy with the French people in this struggle. It is true that the subsequent disorders and excesses of the Revolution into which France plunged were a powerful factor in alienating the sentiments of good will and sympathy of the American people. When, therefore, France declared war on Great Britain, Austria, Prussia, Sardinia and the United Netherlands, the administration of President Washington was confronted with the problem of whether in spite of the

Treaty of Defensive Alliance entered into with France in 1778, the United States would remain neutral in the conflict. The result was that Washington published a neutrality proclamation on the 22nd of April, 1793. This conclusion was not reached without serious division in Washington's Cabinet. It was followed by wide agitation, bitter denunciations by the friends of France and by many patriotic Americans who remembered with gratitude French assistance to the Colonies. It became a political issue of first importance. Here again Hamilton performed a great patriotic service in a series of articles published under the pseudonym of "Pacificus" in 1793. He not only defended the attitude of Washington but contributed in a masterly manner the arguments which laid the foundation of this distinctive American policy. Thus when Washington delivered that immortal Farewell Address, which was to be a guide to all the future generations of his countrymen, he expressed sentiments upon our foreign relations derived not only from a wide knowledge but a long and bitter experience. He lived to realize that his action was thoroughly supported by the public opinion of his countrymen and to see the wisdom of his action. That principle has become the cornerstone of our foreign policy. This does not mean isolation or refusal to co-operate as we have always done with other nations in all those non-political activities for the advancement of science, education, commerce and all other activities so important to modern civilization. It simply means that the United States, through long experience, has come to the conclusion that offensive or defensive alliances, political or military, are not in harmony with the principles of our government or in the interests of our people.

TRIPARTITE CLAIMS COMMISSION

On January 25, 1926, there was held at Washington the first session of the commission constituted in pursuance of the agreement between the United States and Austria and Hungary for the determination of the amounts to be paid by Austria and by Hungary in satisfaction of their obligations under the treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921.¹ The claims agreement signed at Washington on November 26, 1924, is printed in the Supplement to this JOURNAL, page 51. The Honorable Edwin B. Parker, Umpire of the Mixed Claims Commission, United States and Germany, has been invited to act as sole arbitrator of the present commission. Judge Parker, an American citizen, had the unique distinction of being suggested by Germany as the umpire in the American claims against her. His record for fairness and impartiality and his judicial attitude have so impressed two other enemy countries that they are willing to entrust to him the sole determination of American claims against them.

¹ These treaties were printed in the Supplement to the JOURNAL, Vol. 16 (1922), pp. 1 and 13.

over by the Reich, will be exchanged into new "Loan Liquidation Debt" bonds, generally speaking at the rate of 25 Reichmarks for 1,000 marks face value of the old loan.

Bonds purchased prior to July 1, 1920, and since held uninterruptedly, will be redeemed in annual instalments to be drawn by lot over a period of thirty years, at five times the face value of the new bond with interest at $4\frac{1}{2}$ per cent from January 1, 1926. May 15, 1926, has been fixed as the last date for the filing of applications for revaluation. Holders of bonds who are not "old holders" within the foregoing definition cannot file their claims at this time. Later notice will be given regarding "new holdings."

The special commissioner, Mr. Hans Kruger, whose office is at 42 Broadway, New York City, will supply further information and application forms.

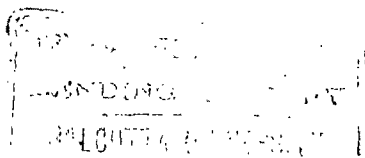
EXAMINATION OF ALIENS ABROAD

After a further study of the results of the operation of the experiment being carried on in Great Britain, where emigrants are intensively examined abroad to determine their admissibility to the United States,¹ the State Department announces that the plan is believed to be a complete success and it is prepared to extend it to other countries whose governments request similar facilities, as rapidly as funds and personnel are available. Definite requests for the installation of a similar system in their ports have been received from the Governments of the Netherlands and Belgium, and it is proposed in the near future, to send Public Health Service Surgeons and immigration officers to act as technical advisers to the American Consuls in Antwerp and Rotterdam. No further European Governments have as yet made definite requests for the extension of the facilities in question to their territories, although inquiries indicating keen interest in the plan have been received from several quarters.

The present policy has developed from conference held last April between high officials of the Departments of State, the Treasury and Labor, wherein plans were worked out to remedy a long-standing condition where many immigrants sold their possessions abroad and made the long and expensive journey to the United States only to learn that for one legal reason or another they were not admissible to the United States and must return to their former homes. Transportation companies, including American steamship lines, had paid thousands of dollars in fines for bringing to the United States persons found upon arrival to be inadmissible.

The conference found that the Immigration Act of 1924 afforded an opportunity which had not heretofore existed to examine intending immigrants effectively before their departure from their home countries, and in co-operation with the Governments of Great Britain and the Irish Free State,

seven American Consulates in England and Ireland in each of which were stationed United States Public Health Service Surgeons and Inspectors of the Bureau of Immigration who acted as technical advisers to the American Consul and assisted in the thorough examination of each applicant for an immigration visa. As a result, the number of rejections on arrival in ports of the United States has been reduced to a minimum and the number of refusals on legal grounds to issue consular immigration visas abroad has greatly increased.



CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1925—FEBRUARY 15, 1926
(With reference to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *G. B. Treaty Series*, Great Britain, Treaty series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *Nation* (N. Y.); *N. Y. Times*, New York Times; *P. A. U.*, Pan American Union Bulletin; *Press notice*, U. S. State Dept. press notice; *Rev. int. de la Croix-Rouge*, Revue internationale de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

May, 1925

- 21 ITALY—UNITED STATES. Agreement signed at Rome to regulate professional practice of medical practitioners. *G. B. Treaty Series*, no. 50 (1925), *Cmd.* 2551.

September, 1925

- 3 BOLIVIA—BRAZIL. Four protocols signed for execution of the Bolivian-Brazilian boundary treaty of Nov. 17, 1903, known as the treaty of Petropolis. Two of the protocols were signed in Rio de Janeiro and two in La Paz. *P. A. U.*, Jan., 1926, p. 82.
- 14 POLAND—UNITED STATES. Agreement of Feb. 10, 1925, to which Danzig is a contracting party, according mutual most-favored-nation treatment in customs matters, ratified by Poland. Ratification by the United States not necessary. *U. S. Treaty Series*, no. 727.
- 21 DAWES ANNUITY. Allies signed agreement at Paris regulating amounts to be allocated out of second Dawes annuity, for armies of occupation in the Rhineland, the Inter-Allied Rhineland High Commission and the Inter-Allied Military Commission of Control in Germany. Text: *G. B. Misc. Series*, no. 16 (1925), *Cmd.* 2558.

October, 1925

- 8 to November 6 INTERNATIONAL CONFERENCE FOR PROTECTION OF INDUSTRIAL PROPERTY. Held at The Hague, to revise treaty signed at Paris, March 20, 1883, and revised at Washington in 1911. Treaty signed on Nov. 6 by 30 nations. *Amer. Bar Assoc. J.*, March, 1926, p. 178.
- 12 GERMANY—SOVIET UNION. Signed three conventions in Moscow. (1) Commercial treaty. (2) Consular treaty. (3) Judicial aid in civil matters. Texts: *Europe*, Jan. 30, 1926, pp. 147 and 157.
- 17 GREAT BRITAIN—HUNGARY. Agreement signed at Budapest modifying the agreement of Dec. 11, 1923, relating to periodical instalments payable to Hungarian Government thereunder. Text: *G. B. Treaty Series*, no. 2 (1926), *Cmd.* 2593.

- 19 AUSTRIA—CHINA. Commercial treaty signed in Vienna, providing for renunciation of extraterritorial rights for Austrian citizens in China, and omitting the most-favored-nation clause. *Commerce Reports*, Feb. 15, 1926, p. 420.
- 22 BULGARIA—FRANCE. Commercial arrangement concluded by exchange of notes. Texts: *J. O.*, Dec. 11, 1925, p. 11803.
- 28 CANADA—NETHERLANDS. Exchanged ratifications at Ottawa of commercial convention signed at Ottawa on July 11, 1924. *G. B. Treaty Series*, no. 52 (1925), *Cmd.* 2555.
- 31 CUBA—UNITED STATES. Parcel post convention signed, effective Jan. 1, 1926. *P. A. U.*, Jan., 1926, p. 83.

November, 1925

- 1 IRAQ—NEDJED. Frontier agreement signed at Behra by British representatives in behalf of Iraq, and by Sultan of Nedjed. Text: *Europe*, Jan. 9, 1926, p. 47.
- 3 GREAT BRITAIN—PORTUGAL. Exchanged notes confirming the protocol signed at Cape Town, March 5, 1915, defining a section of the frontier line. *G. B. Treaty Series*, no. 55 (1925), *Cmd.* 2568.
- 10 CZECHOSLOVAKIA—GREECE. Exchanged ratifications of temporary most-favored-nation agreement signed at Athens, April 8, 1925. *Commerce Reports*, Mar. 1, 1926, p. 547.
- 12 BULGARIA—GREAT BRITAIN. Notes exchanged providing for provisional regulation of commercial relations between the two countries. *G. B. Treaty Series*, no. 53 (1925), *Cmd.* 2556.
- 16 SUCCESSION STATES DEBT AGREEMENT. Signed at Prague by representatives of all succession states (except Rumania) with regard to pre-war debts of Austria Hungary. *C. S. Monitor*, Nov. 17, 1925, p. 2.
- 17 FINLAND—SPAIN. Exchanged ratifications of treaty of commerce and navigation signed at Madrid, July 16, 1925. *Commerce Reports*, Nov. 30, 1925, p. 540.
- 18 FINLAND—GREAT BRITAIN. Agreement signed at London for reciprocal exemption from income tax in certain cases of profits accruing from the business of shipping. *G. B. Treaty Series*, no. 51 (1925), *Cmd.* 2552.
- 19 to February 18, 1926 CHINESE TARIFF CONFERENCE. Powers at Conference on Nov. 19, acceded to Chinese demand for treaty giving China unrestricted tariff rights beginning Jan. 1, 1929. China agrees to abolish the likin, or special tax on goods in inland transit. *N. Y. Times*, Nov. 20, 1925, p. 23. Conference still in session. (Customs Conference Summary, no. 6-10.) *Press Notice*, Nov. 19, 1925-Mar. 9, 1926.
- 20-27 TONNAGE MEASUREMENT IN INLAND NAVIGATION. International conference held in Paris, concluded a convention for uniform system of tonnage measurement for vessels used in inland navigation in Europe and reciprocal recognition of tonnage certificates. Signatures. *L. N. M. S.*, Nov., 1925, p. 284.
- 21 PERMANENT COURT OF INTERNATIONAL JUSTICE. Ninth (extraordinary) session closed, after rendering advisory opinion concerning Mosul, favoring League of Nations Council in Turco-Iraq dispute. Tenth (extraordinary) session to be held Feb. 2, 1926, to consider thirteen cases concerning "certain German interests in Polish Upper Silesia." *L. N. M. S.*, Nov., 1925, pp. 278 and 281.
- 23 HUNGARY—UNITED STATES. Announcement made that most-favored-nation treatment would be extended by Hungary to United States on imports from United States. *Commerce Reports*, Dec. 14, 1925, p. 660.
- 23 to December 16 MOSUL QUESTION. General F. Laidoner made report on Nov. 23 to League of Nations Council on situation in the locality of the provisional line of

- notice, Jan. 30, 1926. On Feb. 1, League notified State Department of postponement of conference to a date not later than May 15. *Press notice*, Feb. 1, 1926. *N. Y. Times*, Feb. 4, 1926, p. 4.
- 13 DAWES PLAN. S. P. Gilbert, agent-general for reparation payments, issued report covering first year of operations, ending Sept. 1, 1925. *Cur. Hist.*, Feb., 1926, 23: 723. Summary: *Fed. Reserve B.*, Feb., 1926, p. 99.
- 14 ECONOMIC CONFERENCE. Constitution of a technical committee to prepare for an International Economic Conference was decided by the League Council on Dec. 14. *L. N. M. S.*, Dec., 1925, p. 316. On Dec. 29, Secretariat announced that 14 of the 35 persons invited to comprise the Committee had accepted. *Cur. Hist.*, Feb., 1926, 23: 724. Preparatory commission to meet April 26, 1926. *C. S. Monitor*, Feb. 10, 1926, p. 2.
- 14 JAPAN-SOVIET UNION. Signed agreement for exploitation by Japanese of former Sinclair oil fields on Sakhalin Island. *Wash. Post*, Dec. 15, 1925, p. 3. *N. Y. Times*, Dec. 15, 1925, p. 2.
- 14 LOCARNO TREATIES. Agreements initialed at Locarno on Oct. 16 and signed in London on Dec. 1 were deposited in the archives of the League of Nations. *L. N. M. S.*, Dec., 1925, suppl.
- 15 GERMANY-SWITZERLAND. Exchanged ratifications of provisional commercial agreement signed at Berne on Dec. 15, 1925. *Commerce Reports*, Mar. 8, 1926, p. 612.
- 15 NORWAY-SOVIET UNION. Trade and navigation agreement signed at Moscow on basis of most-favored-nation treatment. Summary: *Russian R.*, Jan. 15, 1926, p. 29. *Commerce Reports*, Jan. 25, 1926, p. 228.
- 15-17 PAN AMERICAN COMMERCIAL CONGRESS. At tenth Congress held in New York, Canada was represented for the first time in a Pan American congress. *N. Y. Times*, Dec. 16-18, 1925, pp. 27, 1, 22.
- 17 SOVIET UNION-TURKEY. Treaty of amity and neutrality signed at Paris. *Europe*, Feb. 13, 1926, p. 221. Text: *Times*, Dec. 29, 1925, p. 9. *Russian R.*, Jan. 15, 1926, p. 28.
- 18 to February 10, 1926 MEXICO-UNITED STATES. On Dec. 18, Mexico passed a petroleum law, and on Dec. 23, an alien land law. Texts: *U. S. Daily*, March 4, 1926, p. 15. On Jan. 9, Secretary Kellogg's note was delivered to Mexican Foreign Office charging that both laws contained retroactive and confiscatory provisions, and were in violation of agreements reached in 1923 by the American and Mexican Commission as basis for recognition of Obregon government. *Press notice*, Jan. 20, 1926. On Jan. 19, Mexican Embassy in Washington published statement by Mexican Foreign Office, denying charges and stating that the law provided legal means for protection of foreign interests in Mexico. Text: *N. Y. Times*, Jan. 20, 1926, p. 1, 8. On Jan. 20, Secretary Kellogg issued statement to press repeating charges. On Jan. 21, Mexican government delivered to Ambassador Sheffield formal reply to State Department note of Jan. 9. On Feb. 4, second note of protest was delivered to Mexico. On Feb. 5, President Calles gave to *New York Times* "authorized executive statement." *N. Y. Times*, Feb. 6, 1926, p. 1. Announced at Washington on Feb. 10 that formal protest against alien land and petroleum laws had been lodged with Mexican Foreign Office by British Minister to Mexico, including objections similar to those of the United States. *Cur. Hist.*, March, 1926, 23: 890.

- 19 SIAM—SWEDEN. Treaty of friendship, commerce and navigation and a jurisdiction protocol signed at Stockholm. *Commerce Reports*, March 22, 1926, p. 736.
- 21 FINLAND—UNITED STATES. Agreement effected by exchange of notes respecting tonnage dues and other charges. *U. S. Treaty Series*, no. 731.
- 22 FINLAND—UNITED STATES. Agreement by exchange of notes entered into for reciprocal national treatment in ports to vessels flying the flag of each country. Text: *Press notice*, Dec. 22, 1925.
- 23 ESTHONIA—UNITED STATES. Treaty of friendship, commerce and consular rights signed in Washington. *Press notice*, Dec. 23, 1925. *Commerce Reports*, Jan. 11, 1926, p. 101.
- 23 LITHUANIA—UNITED STATES. Commercial agreement in form of an exchange of notes was entered into providing reciprocal most-favored-nation treatment in the levy of import and export duties, etc. To become operative after approval by Lithuanian Parliament. Text: *Press notice*, Dec. 23, 1925. *Commerce Reports*, Jan. 11, 1926, p. 101.
- 23 MEXICO—UNITED STATES. Convention for prevention of smuggling operations along the Mexican boundary signed in Washington, containing a section providing for an International Fisheries Commission. *Press notice*, Dec. 23, 1925. *P. A. U.*, March, 1926, p. 301.
- 24 AMERICAN-BRITISH ARBITRAL TRIBUNAL. Created by treaty in 1910, concluded its work by disposing of all the claims scheduled for arbitration in the treaties. *N. Y. Times*, Dec. 25, 1925, p. 8.
- 24 CZECHOSLOVAKIA—SWEDEN. Exchanged ratifications of most-favored-nation commercial treaty signed April 18, 1925. *Commerce Reports*, Mar. 1, 1926, p. 547.
- 24 SHANGHAI STRIKE. Result of Judicial Inquiry into Shanghai shootings on May 30, 1925, in shape of full summaries of the findings of the three judges, and statement of Diplomatic Commission sent to Shanghai to investigate cause of riot, made public in London. *Times*, Dec. 24, 1925, p. 10. General statement of Diplomatic Corps and summary of report of Justice E. Finley Johnson, American member of Judicial Commission: *China weekly review*, Jan. 9, 1926, p. 152.
- 26 PORTUGAL—SPAIN. Announced that they would submit for decision to Hague Permanent Court of International Justice differences of opinion between them regarding question of the Guadiana River. *For. Pol. Assoc. News B.*, Jan. 1 and 22, 1926.
- 28 BELGIUM—CZECHOSLOVAKIA. Commercial treaty signed effective Jan. 1, 1926, pending ratification. *Commerce Reports*, Jan. 11, 1926, p. 100.
- 31 BRAZIL—SPAIN. Commercial agreement signed, effective Jan. 1, 1926, to replace *modus vivendi* which expired on that date. *Commerce Reports*, Jan. 11, 1926, p. 100.

January, 1926

- 6 AUSTRIA—SWITZERLAND. Most-favored-nation commercial treaty supplemented by exchange of tariff concessions, signed in Berne. *Commerce Reports*, March 1, 1926, p. 547.
- 7 BOXER INDEMNITY. Official announcement issued by British Foreign Office in regard to Statutory Committee, set up to advise the Secretary of State as to best use of funds. Text: *Times*, Jan. 8, 1926, p. 12.

- 12 FRANCE—SIAM. Exchanged ratifications of treaty of friendship, trade and navigation signed at Paris Feb. 14, 1925. *Europe*, Feb. 6, 1926, p. 183.
- 12-29 LEAGUE OF NATIONS. CODIFICATION COMMITTEE. International jurists held second meeting in Geneva. Reached agreement on seven of the ten subjects on agenda and decided to send reports on those subjects to all governments of the world with request for opinions thereon before Oct. 15, 1926. *Cur. Hist.*, March, 1926, 23: 880. *N. Y. Times*, Jan. 30, 1926, p. 5. *L. N. M. S.*, Jan., 1926, p. 3, 16.
- 13 CHINESE EXTRATERRITORIALITY COMMISSION. Convened at Peking. Silas H. Strawn, American commissioner, elected permanent chairman. (Extraterritoriality summary, no. 1.) *Press notice*, Jan. 14, 1926. *China weekly review*, Jan. 16, 1926, p. 20.
- 13 GREAT BRITAIN—IRAQ. New treaty defining relationship of the two countries for 25 years, or for such shorter period as may be necessary to qualify Iraq for membership in the League of Nations, signed at Bagdad. *Times*, Jan. 15, 1926, p. 12, *Cmd.* 2587.
- 14 CUBA—UNITED STATES. Additional extradition treaty signed. *Press notice*, Jan. 14, 1926. *P. A. U.*, March, 1926, p. 300.
- 14 DENMARK—SWEDEN. Arbitration convention signed in Stockholm. *C. S. Monitor*, Jan. 19, 1926, p. 3.
- 15 TREATY REGISTRATION. Announced that United States government would transmit all treaties signed by United States for insertion in League of Nations Treaty Series. *N. Y. Times*, Jan. 16, 1926, p. 4. *L. N. M. S.*, Jan., 1926, p. 5.
- 16 NORWAY—SWITZERLAND. Text of treaty of conciliation signed Aug. 21, 1925, registered at the Permanent Court of International Justice by the Swiss Minister at the Hague. *L. N. M. S.*, Jan., 1926, p. 2.
- 16 BELGIUM—SERBIA. Commercial treaty of April, 1907, denounced by Serbia. *Commerce Reports*, March 8, 1926.
- 16-24 CHINA—SOVIET UNION. Trouble over Chinese Eastern Railway, which began on Jan. 16, resulted in ultimatum to Peking government and to Chang Tso-lin by Soviet Commissar of Foreign Affairs on Jan. 22. *Times*, Jan. 25, 1926, p. 12. On Jan. 24, an agreement was signed by Soviet Consul General at Mukden and Chinese Foreign Commissar for the three Eastern Provinces (Manchuria) concerning Chinese Eastern Railway. Summary: *Times*, Jan. 26, 1926, p. 15.
- 21 AUSTRIA—UNITED STATES. Agreement concluded at Vienna, effective Feb. 15, 1926, by which Austrians and Americans of non-immigrant classes will be granted visas at \$2.00 each. *Press notice*, Jan. 21, 1926.
- 21 PASSPORT CONFERENCE. League of Nations invited United States, Russia, Germany, Turkey, Mexico, and Ecuador to Conference to be held May 12, 1926. *N. Y. Times*, Jan. 22, 1926, p. 4.
- 25-28 LEAGUE OF NATIONS. Committee on Inland Navigation. Met at Geneva to consider action on Walker D. Hines' reports on Rhine and Danube navigation. *L. N. M. S.*, Jan., 1926, p. 6.
- 27 GREAT BRITAIN—ITALY. Agreement for funding the Italian war debt to Great Britain signed in London. Text: *Times*, Jan. 28, 1926, p. 14.
- 27 PERMANENT COURT OF INTERNATIONAL JUSTICE. Resolution of adhesion, with reservations, passed United States Senate by vote of 76-17. Text: *Cong. Record*, Jan. 27, 1926, p. 2494. *69th Cong., 1st sess. Senate Doc. 45*; Supplement to this JOURNAL, p. 73.
- 28 ALBANIA—CZECHOSLOVAKIA. Temporary trade agreement signed. *Commerce Reports*, March 8, 1926, p. 612.

February, 1926

- 1 LITHUANIA—POLAND. Signed agreement relative to railways. *European Econ. and Pol. Survey*, Feb. 28, 1926, p. 8.
- 1 SERBIA—TURKEY. Exchanged ratifications of treaty of peace and amity signed Oct. 28, 1925. *European Econ. and Pol. Survey*, Feb. 28, 1926, p. 9.
- 2 FINLAND—SWEDEN. Arbitration treaty signed at Stockholm. *Wash. Post*, Feb. 3, 1926, p. 1.
- 2 LATVIA—UNITED STATES. Most-favored-nation commercial agreement concluded by exchange of notes to take effect upon ratification by Latvia. *Commerce Reports*, Feb. 15, 1926, p. 420. *Press notice*, Feb. 2, 1926.
- 3 CODIFICATION OF PRIVATE INTERNATIONAL LAW. Draft code transmitted to the Governing Board of the Pan American Union by James Brown Scott, president of the American Institute of International Law, for consideration by the International Commission of Jurists. *C. S. Monitor*, Feb. 4, 1926, p. 3.
- 3 RUMANIA—SWITZERLAND. Signed treaty of arbitration and conciliation at Berne. *European Econ. and Pol. Survey*, Feb. 28, 1926, p. 9.
- 9 FAUCHILLE, PAUL. Eminent authority on international law died in Paris. *N. Y. Times*, Feb. 11, 1926, p. 21.
- 9 CZECHOSLOVAKIA—POLAND. Exchanged ratifications of provisional commercial agreement signed in Warsaw April 7, 1925. *European Econ. and Pol. Survey*, Feb. 28, 1926, p. 8.
- 10 GERMANY AND THE LEAGUE. Application of Germany for admission to League handed to Secretary of the League on Feb. 10. Text: *Times*, Feb. 11, 1926, p. 14. On Feb. 12, League Council summoned special meeting of Assembly on March 8 to take formal action on application. *Cur. Hist.*, March, 1926, 23: 878.
- 10 SPAIN—UNITED STATES. Liquor smuggling treaty signed in Washington. *Press notice*, Feb. 10, 1926.
- 11 CHURCH PROPERTY IN MEXICO. Decision of Mexican Government to enforce religious and educational clauses of the Constitution of 1917 announced by Attorney General of Mexico. Arrest of foreign priests for purpose of deporting them began on Feb. 10. *Cur. Hist.*, April, 1926, 24: 116.
- 11 GERMANY—SOVIET UNION. Exchanged ratifications of commercial treaty signed in Moscow Oct. 12, 1925. *Times*, Feb. 12, 1926, p. 11. Text: *Europe*, Jan. 30, 1926, p. 157.
- 11 LITTLE ENTENTE CONFERENCE. Opened at Temesvar. *European Econ. and Pol. Survey*, Feb. 28, 1926, p. 5.
- 12 FRANCE—GERMANY. Temporary commercial agreement signed at Paris. *Commerce Reports*, Mar. 1, 1926, p. 547.
- 12 LEAGUE OF NATIONS. COUNCIL. Held special session at Geneva to convoke extraordinary session of Assembly on March 8 to admit Germany. *N. Y. Times*, Feb. 13, 1926, p. 4.
- 15 MIXED CLAIMS COMMISSION (UNITED STATES AND GERMANY). Announced awards rendered in meetings held Jan. 13, 20, 27 and Feb. 3, 1926. *Press notice*, Feb. 15, 1926.
- 15 NETHERLANDS—TURKEY. Provisional most-favored-nation- agreement signed. *Commerce Reports*, March 22, 1926, p. 736.

INTERNATIONAL CONVENTIONS

- AGRICULTURAL WORKERS ASSOCIATIONS. Geneva, Nov. 17, 1921.
Ratification deposited: Chile. Sept. 15, 1925. *I. L. O. B.*, Nov. 20, 1925.
- EIGHT-HOUR DAY. Washington, Nov. 28, 1919.
Ratification deposited: Chile. Sept. 15, 1925. *I. L. O. B.*, Nov. 20, 1925.
- EMPLOYMENT OF CHILDREN AT SEA. Genoa, July 9, 1920.
Ratification: Greece. Dec. 21, 1925. *I. L. O. B.*, Jan. 20, 1926.
Ratifications deposited:
 Finland. Oct. 10, 1925.
 Irish Free State. Sept. 4, 1925. *I. L. O. B.*, Nov. 20, 1925.
- EMPLOYMENT OF CHILDREN IN INDUSTRY. Washington, Nov. 28, 1919.
Ratifications deposited:
 Chile. Sept. 15, 1925.
 Irish Free State. Sept. 4, 1925. *I. L. O. B.*, Nov. 20, 1925.
- EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.
Ratification deposited: Finland, Oct. 10, 1925. *I. L. O. B.*, Nov. 20, 1925. *L. N. O. J.*, Dec., 1925, p. 1726.
- GERMAN PEACE TREATY. Versailles, June 28, 1919. Amendment to Art. 393. Geneva, Oct. 18–Nov. 3, 1922.
Ratifications: Australia, Canada, India, New Zealand, South Africa. Oct. 20, 1923.
I. L. O. B., Jan. 20, 1926.
Ratifications deposited:
 Cuba. Sept. 7, 1925.
 Haiti. Nov. 2, 1925. *I. L. O. B.*, Nov. 20, 1925.
- HAGUE CONVENTION, No. VI (Enemy Merchant Ships). Oct. 18, 1907.
Denunciation: Great Britain. Dec. 18, 1925. *G. B. Misc. Series*, no. 18 (1925), *Cmd.* 2564.
- LEAGUE OF NATIONS. Covenant. Protocol of Amendments. Geneva, Oct. 5, 1921.
Ratification: Haiti (Art. 4, 6, 12, 13, 15, 26), Nov. 2, 1925. *L. N. O. J.*, Dec., 1925, p. 1725.
- Signatures:*
 Brazil (Art. 16), Oct. 15, 1925.
 Portugal (Art. 16), Oct. 30, 1925. *L. N. O. J.*, Dec. 1925, p. 1725.
- LETTERS, ETC., OF DECLARED VALUE. Stockholm, Aug. 28, 1924.
Ratification: Chile. *P. A. U.*, Jan., 1926, p. 83.
- LOCARNO. Protocol. London, Dec. 1, 1925.
Signatures: Belgium, Czechoslovakia, France, Germany, Great Britain, Poland, Italy.
 Text: *L. N. M. S.*, Dec., 1925, suppl.
- LOCARNO TREATY OF MUTUAL GUARANTEE. London, Dec. 1, 1925.
Signatures: Belgium, France, Germany, Great Britain, Italy. Text: *L. N. M. S.*, Dec., 1925, suppl.
- MARITIME PORTS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Adhesion: Malta (Colony), Nov. 7, 1925. *L. N. O. J.*, Dec., 1925, p. 1725.
- MATERNITY CONVENTION. Washington, Nov. 28, 1919.
Ratification deposited: Chile. Sept. 15, 1925. *I. L. O. B.*, Nov. 20, 1925.
- MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.
Ratification deposited: Finland. Oct. 10, 1925. *I. L. O. B.*, Nov. 20, 1925. *L. N. O. J.*, Dec., 1925, p. 1726.
- MONEY ORDERS. Stockholm, Aug. 28, 1924.
Ratifications:
 Bolivia. *P. A. U.*, Feb., 1926, p. 194.
 Chile. *P. A. U.*, Jan., 1926, p. 83.

NIGHT WORK OF WOMEN. Washington, Nov. 28, 1919.

Ratification deposited: Irish Free State. Sept. 4, 1925. *I. L. O. B.*, Nov. 20, 1925.

NIGHT WORK OF YOUNG PERSONS. Washington, Nov. 28, 1919.

Ratifications deposited:

Chile. Sept. 15, 1925.

Irish Free State. Sept. 4, 1925. *I. L. O. B.*, Nov. 20, 1925.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.

Ratification: Latvia. Oct. 7, 1925. *L. N. O. J.*, Dec., 1925, p. 1725.

PAN AMERICAN ARBITRATION TREATY. Santiago, May 3, 1923.

Ratification: Chile. Sept. 23, 1925. *P. A. U.*, Jan., 1926, p. 83.

PARCEL POST. Stockholm, Aug. 28, 1924.

Ratifications:

Bolivia. *P. A. U.*, Feb., 1926, p. 194.

Chile. *P. A. U.*, Jan., 1926, p. 83.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.

Signature (renewed): Denmark. *L. N. M. S.*, Jan., 1926, p. 2. Switzerland. *C. S. Monitor*, Mar. 2, 1926, p. 2.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Signature. Geneva, Dec. 16, 1920.

Adhesion (with reservations): United States. Jan. 27, 1926. *Cong. Rec.*, Jan. 27, 1926, p. 2494.

Ratification deposited: Hungary. Nov. 20, 1925. *L. N. M. S.*, Nov., 1925, p. 281.

POSTAL SUBSCRIPTIONS TO NEWSPAPERS. Stockholm, Aug. 28, 1924.

Ratification: Chile. *P. A. U.*, Jan., 1926, p. 83.

UNEMPLOYMENT CONVENTION. Washington, Nov. 28, 1919.

Ratification deposited: Irish Free State. Sept. 4, 1925. *I. L. O. B.*, Nov. 20, 1925.

UNIVERSAL POSTAL CONVENTION. Stockholm, Aug. 28, 1924.

Ratifications:

Bolivia. *P. A. U.*, Feb., 1926, p. 194.

Chile. *P. A. U.*, Jan., 1926, p. 83.

WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision. Sèvres, Oct. 6, 1921.

Adhesion: Soviet Union. Aug. 12, 1925. *J. O.*, Sept. 11, 1925, p. 8894.

Ratification deposited: Rumania. Feb. 11, 1926. *J. O.*, Feb. 20, 1926, p. 2338.

WORKMEN'S COMPENSATION IN AGRICULTURE. Geneva, Nov. 12, 1921.

Ratification deposited: Chile. Sept. 15, 1925. *I. L. O. B.*, Nov. 20, 1925.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.

Ratification deposited: Chile. Sept. 15, 1925. *I. L. O. B.*, Nov. 20, 1925.

WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.

Ratifications:

France. Jan. 31, 1926. *J. O.*, Feb. 2, 1926, p. 1490.

Rumania. Dec. 9, 1925. *I. L. O. B.*, Jan. 20, 1926.

Ratification deposited: Chile. Sept. 15, 1925. *I. L. O. B.*, Nov. 20, 1925.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

ARBITRAL AWARD IN THE DISPUTE BETWEEN THE GERMAN GOVERNMENT, ON
THE ONE SIDE, AND THE TRUSTEE FOR THE GERMAN INDUSTRIAL DEBEN-
TURES, ON THE OTHER SIDE, REGARDING THE EXTENT OF THE PUBLIC
LAW MORTGAGE, CREATED BY THE INDUSTRIAL CHARGES LAW OF AUGUST
30, 1924¹

Rendered December 28, 1925, at Stockholm

By MARCUS WALLENBERG

Chosen arbitrator by virtue of §69 of the mentioned law.

A distinctive feature of the Dawes Plan for dealing with the reparation problem and of the London Agreements of August 30, 1924, which provided for the putting into operation of that plan, was the adoption of the principle of arbitration for disputes which might arise between Germany and the Allies, or their agents, in connection with the interpretation and execution of the Dawes Plan and of the various laws and agreements connected therewith. In this respect Germany, for the first time after the armistice, was placed on an equality with the Allied Powers and with their joint representative, the Reparation Commission. To give the principle of arbitration practical effect a number of arbitral tribunals were set up during 1925, and several questions were submitted to these bodies.

The document which follows relates to the first arbitration which occurred after the adoption of the Dawes Plan and to the first and only arbitral decision rendered in 1925. The question at issue was whether the public charge in the nature of a mortgage which was created by the German Industrial Charges Law of August 30, 1924, adopted in compliance with the requirements of the Dawes Plan, applied only to the pertinent immovable property of German industry in possession on September 1, 1924, the day the law became effective, or applied also to after-acquired similar property coming into possession of the charged industries subsequent to September 1, 1924, and during the currency of the operation of the law. Signor Bernardino Nogara, the Trustee for the Allies, sustained the broader claim. The German Government, through the Ministry of National Economics, took the position that the operation of the mortgage was exclusively limited to pertinent property in possession on the day the law first came into operation. Article 69 of the law contained a provision to the effect that any dispute between the Government of the Reich and the Trustee for Industrial Debentures with regard to the interpretation of the law should be referred to an arbitrator to be appointed by the German Government and the Reparation Commission by common consent; or, failing such consent, by the President of the Permanent Court of International Justice. By common consent Mr. Marcus Wallenberg, President of the Enskilda Bank of Stockholm, Sweden, was appointed arbitrator for a period of five years, and to him was submitted, in identic notes of the German Government and of the Trustee, dated June 22, 1925, the difference of opinion as to the extent of the mortgage charge. The case of the Trustee was filed on July 15, 1925. The answer of the German Government was deposited August 26, 1925, and was followed by a reply from the Trustee under date of September 30, 1925.

The arbitrator, after consultation with M. John Hellner, Member of the Permanent Court of International Justice of The Hague, and M. the Baron E. Marks von Wurtemberg, President of the Court of Appeals, Stockholm, and Member of the Permanent Court of International Justice of The Hague, on December 28, 1925, handed down a decision supporting the thesis maintained by the Allied Trustee for Industrial Debentures.

The German Government was represented in the arbitration by Dr. Wolfgang Reichard, Legal Adviser to the Minister of National Economics, and by Dr. Hans Schaaffer, Legal Adviser to the Minister of Finance. The case for the Allies was presented by Mr. Leon Fraser, of the New York Bar, Legal Adviser to the Agent General for Reparation Payments, who has supplied the documents and prepared this headnote.

¹Translated from the printed German original and French version of the arbitrator.

Through identical letters of June 22, 1925, the German Government, through the Minister of National Economics, and the Trustee for the German Industrial Debentures have chosen the undersigned, Marcus Wallenberg, as the arbitrator, according to §89 of the Industrial Charges Law of August 30, 1924, and have submitted for decision a divergence of opinion that has arisen between them regarding the correct interpretation of certain dispositions of the law in question.

The questions of dispute are as follows:

Ob die Hypothek des öffentlichen Rechtes auf den Grundstücken und gleichgestellten Rechten eines der Industriebelastung gemäss dem genannten Gesetze unterliegenden Unternehmens bloss auf den Grundstücken und gleichgestellten Rechten, welche am 1. September 1924 zum Betriebsmögen gehören, lastet, oder ob die Hypothek sich überdies erstreckt:

(a) auf die Grundstücke und gleichgestellten Rechte, welche seit dem 1. September 1924 dem Betriebsvermögen eines der Industriebelastung unterliegenden Unternehmens zugewachsen sind oder ihm künftig zugewachsen werden,

(b) auf die Grundstücke und gleichgestellten Rechte, welche zum Betriebsvermögen eines anlässlich der ersten Umelgung freigebiebenen Unternehmens oder eines neuerrichteten Unternehmensgehören, sobald diese Unternehmungen in der Folge der Industriebelastung unterworfen werden.

Whether the mortgage of public law on immovable property and equivalent rights of a concern, subjected to the industrial charges according to the mentioned law, encumbers only the immovable property and equivalent rights belonging to the business capital (*Betriebsvermögen*) on September 1, 1924, or whether the mortgage extends also:

(a) to the immovable property and equivalent rights which, since September 1, 1924, have been added to the business capital (*Betriebsvermögen*) of a concern subjected to the industrial charges, or might be added in future,

(b) to the immovable property and equivalent rights belonging to the business capital (*Betriebsvermögen*) of a concern exempted at the time of the first repartition, or to a newly created concern as soon as these enterprises become in time subjected to the industrial charges.

The Trustee for the Industrial Debentures has, in a memorandum of July 15, 1925, expressed his opinion and proposed that the submitted questions be answered in the affirmative and it be declared that the public law mortgage extends to the immovable property and equivalent rights as defined in (a) and (b).

The German Government stated its viewpoint in a written reply of August 26, 1925, and proposed that the questions under (a) and (b) be answered in the negative.

On September 30, 1925, the Trustee gave a written answer to the reply of the German Government.

Finally the two parties have made it known, the German Government in a letter of November 7, 1925, and the Trustee in a communication of November 19, 1925, that they had no intention of giving any further opinions in this matter.

The Arbitrator renders the following

AWARD

The public law mortgage extends also to the immovable property and equivalent rights which have been mentioned in sections (a) and (b) of the question submitted for decision.

EXPOSÉ

From an examination of the text of the law it is seen that § 1, paragraph 1, sentence 2, contains a clear and explicit regulation to the effect that the charge imposed upon industry must first of all be guaranteed by a mortgage of the public law. No exception is given to this rule, at least not in this sentence. Neither does the wording of the regulation give any cause for assuming that exceptions might be expected later in the law. The assertion made in this respect by the German side is not correct. The reference quoted "in conformity to this law" ("*nach Massgabe dieses Gesetzes*") does not occur in the second sentence of § 1, paragraph 1, but in its first sentence, in which is stated what persons engaged in industrial and commercial concerns are affected by the "personal" charges.

On the German side it is, however, maintained that an exception to the regulation mentioned in § 1, paragraph 1, sentence 2, is established in § 41, in the sentence which reads:

Gehören zum Betriebsvermögen eines belasteten Unternehmers inländische Grundstücke etc., so entsteht an ihnen im Zeitpunkt des Inkrafttretens dieses Gesetzes zur Sicherung für die Ansprüche auf die Jahresleistungen an Zinsen und Tilgungsbeiträgen die öffentliche Last.

If any domestic (*inländisch*) immovable property, etc., belongs to the business capital (*Betriebsvermögen*) of the encumbered entrepreneur there accrues to it, with the date of the enforcement of this law, the public charge (*öffentliche Last*) as guaranty on the claims for the annual payment of interests and amounts of amortization.

On the German side they wish to interpret this provision in the sense that, from the regulation that immovable property, etc., is encumbered by the public charge on the day of the enforcement of the law, it follows that immovable property, etc., which did not belong to the business capital (*Betriebsvermögen*) of an encumbered entrepreneur on the day in question, can not be affected later by the public charge.

Objections can be raised against this interpretation.

One might say, first of all, that the wording of the provision gives cause to assume that its primary purpose was certainly not to establish the principle that the public charge should be limited to immovable property which, on the day of the enforcement of the law, belonged to the encumbered industry. As the wording reads, it allows one to assume that the primary purpose of the provision is *partly* to define more precisely what kinds of property belonging to the business capital should become the object of public charge, *also partly* to prevent that immovable property or equivalent property, which at

the time of the enforcement of the law belonged to an encumbered entrepreneur, from being withdrawn from the public charge through later transactions. For a provision for the latter purpose there could, without doubt, be a reason, in so far as it could be foreseen that some time would elapse between the enforcement of the law and the time when the amount to be charged to every entrepreneur would be determined.

There arises, however, the question whether the quoted provision in § 41, paragraph 1, does not, after all, bring about the same effect as maintained by the German side, although its primary purpose is a different one. In support of this opinion the German side has set forth that there is no provision regarding the time at which the public charge should affect immovable property which has been acquired after the enforcement of the law, or which belongs to the business capital of an entrepreneur who has not taken part in the first repartition (*Umlage*), but has been made to take part in a later one.

It is correct that there is no express provision regarding the time at which the public charge shall affect immovable property of the category just mentioned. But, on the other hand, it cannot be maintained that the absence of a definite provision makes it impossible to draw conclusions from the law for that condition to which the existing definite provision is not applicable. If the provision in § 41, paragraph 1, had been lacking there would certainly not have been created a gap which would have made the functioning of the law impossible. Since the mortgage has been made a public charge, and since the entry in the register of landed property (*Grundbuch*) is not necessary for its occurrence, doubtless, in the absence of a provision in § 41, paragraph 1, *all* immovable property belonging to entrepreneurs who are subject to the "personal charge," would also have been affected by the public charge at the moment when the "personal charge" would have affected the encumbered entrepreneur. The fact that for special reasons a certain period of time has been fixed, as has been the case, does not prevent the application of the mentioned principle within the sphere for which the special provision in § 41, paragraph 1, does not apply. That it is possible for divergencies of opinion to arise regarding the moment at which the personal charge affects an entrepreneur, does not justify the conclusion that no rule on this subject *can* be derived from the law. There might be other reasons which would make necessary the deduction of such a rule from the law.

Since it is not impossible to draw from the remaining contents of the law conclusions regarding the moment for the beginning of the public charge on immovable property belonging to entrepreneurs who have not been affected before the new repartition, or regarding immovable property which has been acquired after the enforcement of the law by entrepreneurs who have taken part in the first repartition, one cannot with certainty, contrary to the provision in § 1, paragraph 1, sentence 2, conclude from the wording of § 41, paragraph 1, that immovable property, to which the provision given there is not applicable, is to be exempted from the public charge.

In the Opinion of the Experts it is said that the Committee is convinced that it is just and desirable to demand from German industry, as a contribution to the reparation payments, the sum of at least 5 milliards goldmark to be represented by obligations secured by first class mortgages which are to bring five per cent annual interest and one per cent amortization.

In a plan which the Committee has worked out regarding such industrial obligations it is stated that the obligations represent the liabilities of the individual enterprises which, as far as payment of capital, interest, and amortization-quota is concerned, should be secured by a first mortgage on investments and property of those enterprises issuing them (*ausstellende Unternehmungen*).

The Committee of Organization, which was charged to work out in detail the plan of the Committee of Experts, and which was also empowered to propose certain changes, emphasized in the exposé of its Law-Project that the entire wealth of the industrial enterprises must be considered as a guaranty and must give effective security, both in the form of a mortgage on property which, according to German legislation, could become the object of a mortgage, and, in case of bankruptcy, in the form of preference claims (*Vorzugsrecht*) on property objects which could not be encumbered with a mortgage.

The instructions of the Committee of Organization authorized it in case the Committee should find a concern too small to make the security (*Bestellung*) of a mortgage appear practical and desirable, to entirely exempt such an enterprise from participation in the payment of the five milliards. Pursuant to this provision, the Committee believed that it should exclude in its project commercial, financial, and insurance enterprises. The Committee based this viewpoint on the fact that hypothecary securities were the safest, and that many of the enterprises of the named categories offered only relatively unimportant securities of a hypothecary kind.

When the project of the Committee of Organization, after having been accepted by the governments, was submitted to the German Reichstag, mention was made in the official exposé attached thereto of the difficulties caused by the regulation of hypothecary security for the obligations with reference to the clear and precise request contained in the Opinion of the Experts that the obligations be secured by a first mortgage on the investments and property of the enterprises which issue them. It was further emphasized that, in consideration of the clear provisions of the mentioned Opinion, it has been impossible to choose the otherwise desirable solution, *i.e.*, to limit the real obligation to a certain part of the property, if the immovable property of an enterprise be of insignificant value in proportion to the total property of the entrepreneur.

Since these different opinions were given during the international proceedings which led to the execution of the Industrial Charges Law and were incorporated later in the exposé which the German side furnished in favor

of the acceptance of the law, they must be of great importance in any question of the interpretation of the law where it cannot be considered as sufficiently clear.

The opinions mentioned show that in the different stages of the discussion of the question of German industrial charges special importance was attached to the hypothecary security for the charge of five milliards goldmark which it was intended to impose on German industry.

If one examines what effect an acceptance of the German viewpoint would have, one cannot help but realize that, in the course of years, it would mean that an ever larger part of non-negotiable obligations would lack hypothecary security. With every new repartition, in the proportion as it transfers a part of the charge from the entrepreneurs having taken part in the first repartition to entrepreneurs who have not taken part, it would follow that the transferred part would remain without mortgage. In the exposé on the law given by the German Government it has been emphasized that new repartitions would often become necessary for many various reasons. As such reasons are given, *partly* the incompleteness inherent to the system of assessment for the property-tax for 1924, *partly* the uncertainty in the present period of reverse of German finances from the state of inflation to new currency, which period will presumably continue for some time; *partly*, at last, the fact that existing concerns will decline to a marked degree, indeed even disappear or, on the contrary, will expand considerably and new enterprises will spring up. According to the plan of amortization, the period of time required for the complete amortization of the charge is about 37 years from the date of the enforcement of the law. If we compare the situation of German industry at the time when the law was enforced with the situation of 37 years before, it will certainly be found that a large number of those concerns the entrepreneurs of which had taken part in the first repartition of the charge were not in existence 37 years ago. There is certainly no reason for assuming that during a period of 37 years to come German industry will not show a corresponding development and change. It can therefore be foreseen with certainty that, if the German viewpoint be accepted, a great part of the charge would, towards the end of the period, be wanting in hypothecary security. And if entrepreneurs who have taken part in the first repartition have later on increased their business capital (*Betriebsvermögen*) and consequently have been taxed higher, this increase [in taxes], it is true, would also increase the public charge on the properties which the entrepreneur possessed at the time when the law was enforced; but since after-acquired property would not be affected by the public charge, the result would be, also regarding these concerns, a decrease in hypothecary security.

It has been remarked by the German side that in the majority of cases the refounding of companies does not also mean a refounding of concerns, and that even less often does it signify at the same time discontinuance of existing concerns, but that, on the contrary, the refounded companies

generally (*in aller Regel*) take over existing concerns and do it in a way which will not result in the extinction of the public obligation. From this train of thought the German side seeks to draw the conclusion that there is no real cause for the fear of the Trustee that, if the German viewpoint be accepted, the non-negotiable obligations would be wanting more and more in hypothecary security. Against this one only needs to be reminded of the provision in § 49, paragraph 1, according to which, in case of transfer of the whole or part of the business capital (*Betriebsvermögen*) from one entrepreneur to another, the acquiring party is liable only for the annual payments (*Jahresleistungen*) which will be due up to the end of the calendar year in which presumably the new repartition will take place. If the acquiring party is an industrial entrepreneur who, according to the law, is to take part in the charge at a new repartition, this entrepreneur will take part, to be sure, in the next new repartition of the personal charge with an amount corresponding to his business capital (*Betriebsvermögen*). But if the acquiring party is a newly founded concern, or generally speaking, a concern which has not taken part in the first repartition, its immovable property would, in case the German viewpoint be accepted, not be affected by the public charge; and this might be the case even if this new concern had acquired immovable property which formerly had been affected by the personal charge. This is at least the view which has been advanced by a German commentator (Geiler, *Industriebelastungsgesetz*, p. 250), and it might not be easy to refute this opinion, if the German viewpoint is accepted at all. Hence the fact cannot be disputed that, according to the German viewpoint, an ever increasing part of the charge would lose its hypothecary security during the course of years, and if the opinion of the German commentator just mentioned is correct, there would even be means by which to hasten, through some intentional measures, the exemption of the older enterprises from the public charge.

Since then an acceptance of the German viewpoint would lead to results which are in obvious contradiction to the purpose which has been the fundamental starting point of the Committee of Experts and of the Committee of Organization, and since no provision in the law necessarily demands the interpretation advanced by the German side, I must reject it.

(Signed) MARC WALLENBERG.

AMERICAN AND BRITISH CLAIMS ARBITRATION TRIBUNAL *

SARAH B. PUTNAM

(Fishing Claim—Group 2)

[Claim No. 74]

Award rendered at Washington, November 6, 1925

Great Britain held liable in damages for the enforced giving up of the voyage of an American fishing vessel due to the refusal of Newfoundland authorities to recognize a fishing license issued by the Canadian authorities under the terms of a *modus vivendi* agreed to between the Governments of Great Britain and the United States.

This is a claim for damages due to refusal of Newfoundland authorities to recognize a fishing license issued by the Canadian authorities under the terms of a *modus vivendi* agreed to between the Governments of Great Britain and the United States. The *modus vivendi* provided for "annual licenses" to be issued either by the Canadian authorities or the Newfoundland authorities, to be recognized by each when issued by either. A difference of opinion developed between the latter governments as to whether licenses should be issued to be valid for one year from their dates or should be made to expire on the 31st of December. Ultimately the Newfoundland Government, as we interpret the minutes of the Council, agreed to recognize past Canadian licenses issued to be good for one year from their date, and the Canadian Government agreed for the future to issue licenses expiring on December 31. It appears, however, that the Newfoundland customs officials received no orders to recognize Canadian licenses, accordingly when the vessel in question, which held a regularly issued Canadian license expiring on July 25, 1889, presented itself at the Port of Ferryland in Newfoundland in June 1889, the local customs authorities refused to recognize the license. After trying at two other ports, at each of which the authorities refused to recognize the license, and after information that the vessel would be seized if attempt was made to act under it, the master gave up fishing and sailed for his home port with a partial cargo.

In the answer it is set up (a) that the master should have paid for a Newfoundland license under protest and reclaimed the money, (b) that it is not shown that the master, even if denied his right to procure bait in Newfoundland, could not have procured it elsewhere, (c) that the abandonment of the fishery was not a natural or probable result of the refusal of the Newfoundland authorities to recognize the license, (d) that the license was not

* Established in pursuance of the special agreement signed at Washington, August 18, 1910 (Supplement to this JOURNAL, Vol. 5, pp. 257-267).

Arbitrators: Alfred Nerinx, Sir Charles Fitzpatrick, Roscoe Pound.

Agents and Senior Counsel: United States—Fred K. Nielsen; Great Britain—Sir Cecil J. B. Hurst.

Previous decisions of the Tribunal will be found printed in this JOURNAL, Vol. 7, pp. 875-890; Vol. 8, pp. 650-655; Vol. 15, pp. 292-304; Vol. 16, pp. 106-116, 301-333; Vol. 18, pp. 814-844; Vol. 19, pp. 193-219, 790-803.

Headnotes supplied by the Managing Editor.

valid in Newfoundland, and (e) that the damages claimed are "remote, speculative, contingent, and incapable of assessment."

As to the first contention, we find that the master communicated at once by telegraph with the State Department at Washington. Obviously that government could not acquiesce in the proposition that the terms of the *modus vivendi* should be set aside by requiring two licenses where but one annual license was provided for. We think the master was not bound to proceed in any other way than by asserting his rights under the license and the *modus vivendi* and referring the matter to his own government.

Upon the second and third contentions, there seems to us sufficient evidence that denial of the right to procure bait in Newfoundland compelled abandonment of the fishing voyage.

With respect to the fourth contention, quite apart from any question of the binding force of the *modus vivendi* and its provision for "annual licenses" to be recognized both in Canada and in Newfoundland, the action of the Council of Newfoundland on October 15, 1888, above referred to, seems to us to be decisive.

As to damages, the questions raised are the same as those considered in the cases of the *Horace B. Parker* (Claim No. 76)¹ and the *Thomas F. Bayard* (Claim No. 77)² and call for no further comment.

We award the sum of \$8,625, claimed by the United States for enforced giving up of the voyage. The claim, originally put forward for a possible second and third voyage, which were not attempted, were very properly abandoned by the United States.

Done at Washington, D. C., November 6, 1925.

The President of the Tribunal,
A. NERINCKX.

THE HORACE B. PARKER

(Fishing Claim—Group 2)

[Claim No. 76]

Award rendered at Washington, November 6, 1925

Great Britain held liable in damages for failure of an American fishing vessel to obtain a cargo, and for loss of bait, by reason of the refusal of the Newfoundland authorities to permit the exercise of the right of making repairs as secured to American fishermen by the treaty of 1818 between Great Britain and the United States.

This is a claim for damages by reason of the refusal of the Newfoundland authorities to permit exercise of the right of making repairs as secured to American fishermen by the proviso to Article 1 of the Treaty of 1818. The evidence is somewhat in conflict. For the purpose of decision we accept the version of the British case as to what the claimant sought to do. The riding sail of the vessel having been blown away in boisterous weather, the master

¹ *Infra*.

² *Infra*, p. 380.

put into Bay of Bulls on the east coast of Newfoundland to obtain water and make necessary repairs. The Newfoundland authorities refused to allow the procuring of a new riding sail, asserting that "a riding sail is part of a fishery outfit and is not necessary for the sailing of a vessel." The master protested to the Collector of Customs and also sought to obtain a different ruling through the American Consular Agent, but the authorities at St. Johns sustained the local authorities and persisted in the refusal. In consequence of inability to procure the sail at Bay of Bulls, the vessel was compelled to go to St. Pierre therefor. Five days were lost in getting to St. Pierre and further time in getting back to the fishing grounds. During that time the bait decayed. Also there was a "spurt of fish," and other vessels on the spot took large cargoes.

At the time of the occurrence it was contended by the authorities of Newfoundland that the words "repairing damages" in the treaty must be construed to limit the permissible repairs to repairs essential to navigation and could not be held to cover repairs necessary to fishing. At the hearing, a further contention was made to the effect that "repairing damages" must be limited to such repairs as the crew itself could make with the materials carried by the ship. But we observe that the treaty secures the right to "American fishermen." This indicates that it was given in order that they might fish in the waters adjacent to Newfoundland, not part of British territorial waters, where they had been accustomed to fish, and negatives an interpretation which would restrict the right to repairs essential to navigation and distinct from fishing. For the rest, it is enough to say that replacing a sail needed for fishing purposes, where such a sail has been blown away, seems to us clearly within the phrase "repairing damages," and we so hold.

It is contended in the answer that the damages claimed are "remote, speculative, contingent, and incapable of ascertainment." As to this, it is enough to say that a long line of decisions of international tribunals has established as the measure of damages for such cases loss of use of the vessel, to be measured by the loss of probable catch. For this purpose the catch of other vessels or the average catch under the conditions at hand has often been taken as the measure. Indeed this tribunal has so held in three prior cases. *The Wanderer*, Claim No. 13, American-British Claims Arbitration;¹ *The Favorite*, Claim No. 12, *Id.*;² *The Kate*, Claim No. 28, *Id.*³ See also, *The Hope On*, Moore, International Arbitrations, IV, 3261; Bering Sea Damage Claims, *Id.*, II, 2123, 2131; Case of Costa Rica Packet, *Id.*, V, 4948; Foreign Relations of the United States, 1902, Appendix I, pp. 451, 454, 459.

* Objection was made at the hearing that the affidavits in the memorial of the United States do not expressly preclude the possibility of the ship's having afterwards obtained a full cargo. But we find the evidence in this case is of

¹ This JOURNAL, Vol. 16 (1922), p. 305.

² *Ibid.*, p. 301.

³ *Ibid.*, p. 328.

the sort which has usually been presented in such cases, and, as the answer raised only the question of the legal rule as to the measure of damages, and did not challenge the evidence in the memorial as not sufficiently specific and circumstantial, we think there is a sufficient basis upon which we may make an award.

We therefore award the sum claimed by the United States, namely, \$1,500, on account of failure to obtain cargo and \$100 for loss of bait, in all \$1,600.

Done at Washington, D. C., November 6, 1925.

The President of the Tribunal,
A. NERINCKX.

THE THOMAS F. BAYARD,
(Fishing Claim—Group 2)
[Claim No. 77]

Award rendered at Washington, November 6, 1925

Great Britain held liable in damages for the refusal of Newfoundland authorities to permit an American vessel to exercise the right of fishing in Bonne Bay on the treaty coast of Newfoundland.

This is a claim for damages by reason of refusal of Newfoundland authorities to permit an American vessel, enrolled and licensed for the fisheries, to exercise the right of fishing in Bonne Bay on the treaty coast of Newfoundland. The American case is that while the vessel was fishing for halibut off the coast of Newfoundland bait became exhausted and it put into Bonne Bay to obtain a fresh supply. Upon arrival the customs officer gave the master a printed notice as follows:

I am instructed to give you notice that the presence of your vessel in this port is in violation of the articles of the International Convention of 1818 between Great Britain and the United States, in relation to fishery rights on the coast of Newfoundland, and of the laws in force in this country for the enforcement of the articles of the convention, and that the purchase of bait or ice, or other transaction in connection with fishery operations, within three miles of the coast of this colony, will be in further violation of the terms of said convention and laws.

The master testifies that he showed the collector a copy of the provision of the Treaty of 1818 and argued that he had a right to take bait under the treaty, but was told by the collector that the latter had an official duty to perform. Fearing that the vessel would be seized if he remained in the bay, and that the halibut already taken would spoil if he went elsewhere in search of bait, the master returned to Gloucester, losing thirty-eight days of fishing before he could get back to the fishing grounds.

It is argued that the notice in question meant only that the master would not be allowed to buy bait, and that he was not precluded from catching it, as he had a right to do under the treaty. We think the answer to this contention is to be found in the attitude of Newfoundland prior to the decision of

the Permanent Court of Arbitration at The Hague in the North Atlantic Coast Fisheries Arbitration. The sixth question put to that Tribunal was:

Have the inhabitants of the United States the liberty under the said articles or otherwise to take fish in the bays, harbours and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands or on the Magdalen Islands?

That question grew out of the claim of Newfoundland that the fishing privilege, conceded by the treaty of 1818, did not include the taking of fish in bays, harbors, and creeks on the treaty coast. Great Britain on behalf of Newfoundland so contended before the Hague Tribunal. The notice in question was drawn up in view of this contention, and we have no doubt that any attempt of the vessel to catch bait fishes in Bonne Bay would have been followed by serious consequences. The very language of the notice declaring that the mere presence of the American fishing vessel in Bonne Bay was unlawful and forbidding any "transaction in connection with fishery operations within three miles of the coast" shows that the Newfoundland authorities were asserting and were prepared to maintain the claim as to the limits of the fishing privilege of the United States which the Permanent Court of Arbitration at The Hague, by its answer to the sixth question in the North Atlantic Coast Fisheries Arbitration, has held to have been unwarranted.

As to the damages, the claim is set forth with unusual precision of detail and is substantiated by affidavits, receipts, and documents as to each item. We are entirely satisfied with this proof and award the sum of \$3,212.98, as claimed.

Done at Washington, D. C., November 6, 1925.

The President of the Tribunal,
A. NERINCX.

HAWAIIAN CLAIMS

Frederick Henry Redward, Heir of Edward Bedford Thomas, Thomas William Rawlins, Frederick Harrison, Representatives of Lewis J. Levey, G. Carson Kenyon, Michael Cole Bailey.

[Claim No. 84]

Award rendered at Washington, November 10, 1925

The doctrine of state succession held not applicable to claims for alleged delicts committed against British subjects by authorities of the Hawaiian Republic prior to annexation by the United States. The legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.

These are claims for wrongful imprisonment, detention in prison, enforced leaving of the country, and other indignities, claimed to have been inflicted upon British subjects by the authorities of the Hawaiian Republic prior to annexation by the United States.

We think the cases are governed by the decision of this tribunal in the Case of Robert E. Brown, American and British Claims Arbitration, Claim No. 30.¹

It is contended on behalf of Great Britain that the Brown Case is to be distinguished because in that case the South African Republic had come to an end through conquest, while in these cases there was a voluntary cession by the Hawaiian Republic as shown (so it is said) by the recitals of the joint resolution of annexation. We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession to liability for delict, to which the case of succession of one state to another through conquest would be an exception. We think there is no such principle. It was denied in the Brown Case and has never been contended for to any such extent. The general statements of writers, with respect to succession to obligations, have reference to changes of form of government, where the identity of the legal unit remains, to liability to observe treaties of the extinct state, to contractual liabilities, or at most to quasicontractual liabilities. Even here, there is much controversy. The analogy of universal succession in private law, which is much relied on by those who argue for a large measure of succession to liability for obligations of the extinct state, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts. Nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up by, some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.

We decide that these claims must be rejected.

Done at Washington, D. C., November 10, 1925.

The President of the Tribunal,
A. NERINCKX.

ILOILO CASE

(Philippine War Claims)

Ker & Co., Hoskyn & Co., Stevenson & Co., Warner, Barnes & Co., Smith, Bell & Co., Hong Kong & Shanghai Banking Corporation (Limited), W. S. Macleod, J. Thomson, W. S. Fyfe, H. T. Fox, E. D. and J. D. Hawkins, F. von Kauffmann, Strachan & McMurray, "Pohoomull," "Pohang," J. M. Underwood, C. M. Chiene, J. W. Higgin.

[Claim No. 40]

Award rendered at Washington, November 19, 1925

The United States held not liable for destruction of British property when Iloilo was burned by Filipino insurgents who were forcibly driven out by American forces on February 11, 1899.

¹ This JOURNAL, Vol. 19 (1925), p. 193.

There was no duty upon the United States under the terms of the protocol of agreement with Spain concluded August 12, 1898, or of the unratified treaty of peace, or otherwise, to assume control of Iloilo upon its evacuation by Spanish forces under pressure of Filipino insurgents. *De jure* there was no sovereignty over the islands until the treaty of peace was ratified on April 11, 1899, nor was any *de facto* control over Iloilo assumed until the taking up of hostilities against the United States on the part of the so-called Filipino Republic required it on February 11, 1899.

No culpable disregard of the interests of the claimants was shown in the conduct of military operations, which were in charge of experienced officers.

These are claims for destruction of property of British subjects on the occasion of the occupation of Iloilo by the forces of the United States during the Philippine insurrection. On August 12, 1898, a "Protocol of Agreement" had been entered into between the United States and Spain whereby it was provided that the United States should "occupy and hold the city, bay, and harbor of Manila, pending the conclusion of a treaty which shall determine the control, disposition, and government of the Philippines. On December 10, 1898, a treaty was signed whereby, in Article III, Spain ceded the Philippines to the United States. Article V of the treaty provided that on exchange of ratifications Spain should evacuate the islands. Exchange of ratifications did not take place till April 11 following. In the meantime, the Spanish commander at Iloilo, on the Island of Panay, the second place of importance in the archipelago, being pressed by Filipino insurgents, desired to evacuate, and seems to have communicated this desire to General Otis, the American commander at Manila. The latter stated that he was without authority to act on the suggestion. On December 14, however, the business men of Iloilo having requested General Otis to occupy the place in order to preserve peace and property, the General cabled to Washington asking permission to do so. No answer was sent till December 21. In consequence an expeditionary force could not be dispatched until December 26; and it did not reach Iloilo until December 28. Although General Otis had endeavored to get word of the expedition to the Spanish commander, he had not succeeded. The place had been evacuated on December 24, and was promptly occupied by a force of Filipino insurgents. General Miller, who commanded the expeditionary force, acting on a petition from the business men of Iloilo, which he communicated to General Otis, and on instructions from Manila, and ultimately from Washington, remained in the harbor without landing his force or attempting to take possession until February 11. On that date, pursuant to orders dated February 8, which reached him on February 10, he landed, drove out the insurgents, and occupied the town. From the beginning the insurgents had threatened to burn the town if forcibly driven out, and on February 11 they succeeded in carrying out this threat. The property of the claimants was destroyed by, or lost in consequence of, this fire.

It is contended by Great Britain that there was culpable neglect on the part of the authorities of the United States in three respects: (1) In the delay of a week in answering General Otis's request, so that the Spanish

commander had evacuated Iloilo and the insurgents had taken control before the expedition under General Miller arrived; (2) in delaying the occupation of Iloilo after General Miller's arrival, so that the insurgents were able to make and carry out preparations for burning the town; (3) in the manner of landing and occupation when finally made.

As to the first contention, we are of opinion that there was no duty upon the United States under the terms of the protocol, or of the then unratified treaty, or otherwise, to assume control at Iloilo. *De jure* there was no sovereignty over the islands until the treaty was ratified. Nor was any *de facto* control over Iloilo assumed until the taking up of hostilities against the United States on the part of the so-called Filipino Republic required it on February 11, 1899. The sending of General Miller's force, at the request of the business men of the place, was an intervention to preserve peace and property. As between the United States and the claimants or their government, it was a matter of discretion whether or not to do this, and no fault can be imputed because of delay in undertaking such an intervention.

As to the second contention, it appears that the delay was, at least, largely due to request of the business men who had originally sought intervention (among them six of the present claimants) who feared the town would be burned and their property destroyed if General Miller attempted to land and to take forcible possession. Even if it is assumed that there was any duty toward the claimants to act promptly, under all the circumstances we can not say that the delay was culpable.

As to the third contention, it appears that the Filipino insurgents, who burned Iloilo, were acting under orders from and professed allegiance to the so-called Filipino Republic, which, on February 4 preceding, had declared war against the United States and had attacked the American forces at Manila, thus bringing on a conflict which lasted over three years. There was no wanton or intentional destruction of property by the vessels or troops of the United States. Indeed there is evidence that the troops exerted themselves vigorously to put out the fires and to stop looting. The most that is claimed is that, if the operations of landing and taking the town had been carried out in a different way, the burning by the insurgents might have been prevented. But the circumstances were difficult and the general situation was trying. The operations were in charge of experienced officers and we do not feel competent to criticize their judgment as to the conduct of military operations. Considering all the circumstances, we do not think that any culpable disregard of the interests of the claimants has been shown.

We decide that these claims must be rejected.

Done at Washington, D. C., November 19, 1925.

The President of the Tribunal,
A. NERINCKX.

J. PARSONS

(Philippine War Claim)

[Claim No. 38]

Award rendered at Washington, November 30, 1925

Destruction of stock of liquors by American military authorities at Manila during Philippine insurrection justified as a police measure.

This is a claim for a stock of liquors destroyed by order of the Provost Marshal General, under authority of the Military Governor General, at Manila, during the Philippine insurrection. We are satisfied that the destruction was a matter of police entirely within the powers of the military government and quite justified by the circumstances. Hence, we hold that this claim must be rejected, and it is so decided.

Done at Washington, D. C., November 30, 1925.

The President of the Tribunal,
A. NERINCKX.

"ZAFIRO" CASE

(Philippine War Claim)

D. Earnshaw, A. Young, G. Gilchrist.

[Claim No. 39]

Award rendered at Washington, November 30, 1925

The United States held liable for looting by Chinese merchant crew of supply ship to Admiral Dewey's fleet in Manila Bay.

The liability of the state for the actions of a public ship must depend upon the nature of the service in which she is engaged and the purpose for which she is employed.

The *Zafiro* was a supply ship, acting in Manila Bay as a part of Admiral Dewey's forces, and under his command through the naval officer on board for that purpose and the merchant officers in charge of the crew.

The nature of the crew, the absence of a régime of civil or military control ashore, and the situation of the neutral property, were circumstances calling for diligence on the part of those in charge of the Chinese crew to see to it that they were under control when they went ashore in a body.

These are claims for property looted or destroyed by the crew of the *Zafiro*, on May 4, 1898, while the ship was moored alongside the wharf of the Manila Slipway Company at Cavite, engaged in coaling. The claimants were employees of the company and lived on the premises in houses belonging to the company. During the naval battle of May 1, 1898, in Manila Bay, as the wharf and premises were in the line of fire and shells were exploding about the houses, the claimants and their families went away for safety, leaving the premises in charge of Filipino watchmen and Chinese employees of the company. On May 4 the *Zafiro* was ordered to go to the Spanish coal pile at Cavite to coal, and in order to do so moored alongside the company's wharf. The evidence as to what followed is in conflict and there is much dispute as to the facts. We do not doubt that the affidavits of the watchmen and of the Chinese employees are at least somewhat exaggerated.

But it is clear enough that the Chinese crew of the *Zafiro* took a substantial part in the looting of the houses of the claimants and destruction of their property, which was undoubtedly complete and thorough. Hence it becomes necessary to consider whether and how far the United States is liable for the actions of the crew.

It appears that the *Nanshan* and *Zafiro*, two British merchant vessels, were bought by Admiral Dewey at Hong Kong, under authority of the Secretary of the Navy, in April, 1898. They were not commissioned, but were registered as American vessels, and the original crews (British officers and Chinese sailors) were shipped in the American merchant service. The reason for so doing is set forth in Admiral Dewey's *Autobiography* as follows: "We registered them as American merchant steamers, and by clearing them for Guam, then almost a mythical country, we had a free hand in sending them to English, Japanese, or Chinese ports to get any supplies we might need." In other words, it was not intended that they should trade and they did not trade. They were used as supply ships and colliers; and the purpose of registering them as merchant steamers was to enable them to resort to neutral ports to obtain supplies and coal; not for general purposes of the United States, but for the specific purposes of Admiral Dewey's naval operations. An ensign and four men were placed on each and Admiral Dewey and Admiral Crowninshield each speak of the naval officers as being "in command." Admiral Crowninshield says: "The naval officer exercised control over all the movements of the ship and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew and with the ship." Ensign Pearson, now Commander Pearson, who was on the *Zafiro*, says: "My instructions were not to interfere particularly with the details of the ship's routine, but to receive the Admiral's orders for the ship and see them carried out, and to assist as much as possible and consistent with the general duty of the ship." He adds: "At the time of her purchase she was manned by British merchant officers and a crew of Chinese. With the exception of the captain and chief engineer, these officers and crew were retained on the vessel. . . . A. M. Whitton, who had been first mate, was made captain, and W. D. Prideaux, formerly second mate, was made first mate. . . . The handling and management of the Chinese crew was left to the ship's officers, who had been with the crew in the merchant service and better understood their ways and peculiarities."

On behalf of the United States, it is contended that the *Zafiro*, registered as a merchant ship, must be so regarded and cannot be held to be a public ship for whose conduct the United States may be held liable. In support of that contention reference is made to a long line of cases as to the immunities of public ships, *e. g.*, *The Exchange*, 7 Cranch, 116; *The Charkich*, L. R. 4 Adm. & Eccl. 59; *The Parlement Belge*, 5 P. Div. 197; *The Guj Djemal*, 264 U. S. 90; *The Pesaro*, 277 Fed. Rep. 473; *The Attualita*, 238 Fed. Rep. 909. In addition counsel for the United States rely upon the seventh convention

of the Second Hague Conference of 1907, and on the decisions of the United States Court of Claims in *Stovell v. United States*, 36 Ct. Cl. 392, and *The Manila Prize Cases*, 188 U. S. 254, in which, it is argued, the status of the *Nanshan* and the *Zafiro* was established.

We have no difficulty in distinguishing those cases from the one before us. *The Exchange* case had to do with the immunity of war ships in foreign ports. So also the other cases first cited have to do with claims to immunity from process while in foreign ports. That is quite a different question from the one before us, which is not one of what immunity the *Zafiro* might have claimed in Hong Kong, but of what responsibility attaches to the United States for her action, in Manila Bay, where and while she was acting as a supply ship for Admiral Dewey's squadron, in the naval operations he was then and there conducting, and was under his orders through a naval officer put on board to carry them out. No such situation is presented in the cases cited. In *The Guj Djemal*, 264 U. S. 90, and *Ex Parte Hussein Lufti Bey*, 256 U. S. 616, the Turkish Government owned, possessed, and operated the vessel, but it was engaged in "ordinary commerce under charter to a private trader." It was held that the vessel could be libeled for services and supplies. In *The Pesaro*, 277 Fed. Rep. 473, the ship was owned by the Kingdom of Italy, was in possession of the Italian Government, and was manned by a master, officers, and crew employed by a department of the government. But it "was engaged in commercial trade, carrying passenger and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the department of the Italian Government having to do with military or naval affairs." (473-4.) Even if the case before us were necessarily governed by the question whether immunity could have been claimed for the *Zafiro* in a foreign port, these decisions would not be in point. Even more is this true of *The Attualita*, 238 Fed. Rep. 909, where the crucial point, as the court decided, was to be found in the circumstance that the Italian Government was not in possession of the ship which it owned.

In the admirable opinion of Judge Mack in *The Pesaro*, 277 Fed. Rep. 473, 481, it is said. "If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily, not upon her ownership, but upon the nature of the service in which she is engaged and the purpose for which she is employed." We agree. But if we carry this out and say that the liability of the state for her actions must depend upon the nature of the service in which she is engaged and the purpose for which she is employed, it is obvious that the case before us differs radically from all those which have been cited and on which the United States relies.

It may be conceded that the *Zafiro* does not meet all the requirements of "a converted merchantman" under Convention VII of the Second Hague

Conference of 1907. But the purpose of that convention was to distinguish converted merchantmen from privateers and to give them a proper status as ships of war; not to cover such a case as that presented here.

As to the Manila Prize Cases, 188 U. S. 254, and *Stovell v. United States*, 36 Ct. Cl. 392, we think, when looked at critically, they go to sustain liability of the United States. One of the findings of the Court of Claims, affirmed by the Supreme Court of the United States, was: "The naval officer exercised control over the vessel and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew." (188 U. S. 280.) Another finding was: "The duty of the naval captain on said ship was to take general charge of the vessel, execute all orders from the flagship, controlling the movements of the *Nanshan*, . . . but not to interfere with the internal management and discipline of the ship, and such things as loading and unloading cargo." (*Id.*, 281.) The question involved in those cases was whether the merchant officers of the *Nanshan* and *Zafiro* were entitled to prize money for ships taken in the battle of Manila. The District Court held that "the *Nanshan* and *Zafiro* not participating in any of said captures and not being armed vessels of the United States within signal distance of the vessel or vessels making the capture, under such circumstances and in such conditions as to be able to render effective aid if required, are not entitled to share in any of the prize money." (*Id.*, 282-3.) The Court of Claims "held on the facts that the *Nanshan* was not at the battle of Manila in such a condition as to enable her to render effective aid if required; that she was performing the functions of a collier, to be protected instead of to act aggressively." (*Id.*, 282.) These findings were approved and adopted. They are far from showing that the *Zafiro* at the time in question was a mere merchant ship for whose actions the United States would not be responsible.

From all the evidence we are of opinion that the *Zafiro* was a supply ship, acting in Manila Bay as a part of Admiral Dewey's force, and under his command through the naval officer on board for that purpose and the merchant officers in charge of the crew.

We have next to inquire whether at the time of the looting in question the Chinese crew were under discipline and officered, so as to make the United States responsible, and to consider how far the United States would be chargeable for want of supervision by those who had or should have had the crew in charge under the circumstances.

It is well settled that we must distinguish between soldiers or sailors under the command of officers, on the one hand, and on the other hand bodies of straggling and marauding soldiers not under the command of an officer, or marauding sailors not under command or control of officers. *Hayden's Case*, 3 Moore, International Arbitrations, 2985; *Case of Terry and Angus*, *Id.*, 2993; *Mexican Claims*, *Id.*, 2996-7. These cases draw a very clear line between what is done by order or in the presence of an officer and what is

done without the order or presence of an officer. But it is not necessary that an officer be on the very spot. In *Donougho's Case*, 3 Moore, International Arbitrations, 3012, a Mexican magistrate called out a posse to enforce an order; but no responsible person was put in charge and the "posse" became a mob so that damage to foreigners resulted. The Mexican Government was held liable. In *Rosario & Carmen Mining Company's Claim, Id.*, 3015, growing out of the same occurrences, Sir Edward Thornton relied in part on the culpable want of discretion shown by the magistrate, who called out the posse. In not putting it in charge of a proper person or being present himself "to restrain the violence of such an excited body of men." In *Jeanneaud's Case*, 3 Moore, International Arbitrations, 3001, a cotton gin belonging to neutrals was burned by volunteer soldiers who were in a state of excitement after a battle. The officers did not use the ordinary means of military discipline to prevent it, and their government was held liable. In the *Mexican Claims*, 3 Moore, International Arbitrations, 2996-7, a government was held liable where the officers failed to restrain such actions after having had notice thereof. (See also *Porter's Case, Id.*, 2998.) And in the *Case of Dunbar & Belknap, Id.*, 2998, there was held to be liability where officers left the property of foreigners without protection when it was in obvious danger from their soldiers.

In the case before us, we think the officers were not actually present at the houses when the looting was done. After members of the crew brought some of the property upon the vessel, and one of the officers found where it came from, he went to the houses and took away some articles in order to preserve them for the owners. This is evidently what the Chinese witnesses have in mind when they charge the officers with looting; for one of the officers tells us that when he found the Chinese so interpreted his good offices, he desisted for the sake of good order. After the matter was drawn to the attention of the naval officers, the vessel was searched and the articles found on board were returned to the claimants. But the damage had been done. Moreover, Captain Whitton's statement that he "stopped anything he saw coming on board" gives the impression that he did not stop with sufficient promptitude the taking of things on land before they could come on board, after he found that plundering was going on. Without regard to this point, however, we feel that there was no effective control of the Chinese crew at the time when the real damage took place. When the *Zafiro* was tied up alongside the company's wharf, where the houses were, the naval officer and the merchant captain went off to look at the Spanish batteries, leaving the crew in charge of the first mate. The latter gave half of the crew leave to go ashore. Captain Whitton says significantly: "You know what Chinese are, especially these times." To let this crew go ashore where these houses were, with no one in charge of them, at a time when plunder and pillage were certain, and plunder and pillage by the Filipinos had been observed by all the officers, seems to us to have been highly culpable.

It was said in argument that a government is not responsible for what its sailors do when on shore leave. But we can not agree that letting this Chinese crew go ashore uncontrolled at the time and place in question was like allowing shore leave to sailors in a policed port where social order is maintained by the ordinary agencies of government. Here the Spaniards had evacuated Cavite, and no one was in control except as the Navy controlled its own men. The nature of the crew, the absence of a régime of civil or military control ashore, and the situation of the neutral property, were circumstances calling for diligence on the part of those in charge of the Chinese crew to see to it that they were under control when they went ashore in a body. In *Jeanneaud's Case*, 3 Moore, International Arbitrations, 3001, the unusual circumstances were dwelt upon. Here also what might have been proper enough under other circumstances became culpable under those which actually obtained. Had the officers been ashore with the crew, liability would be clear enough. But to let the crew go ashore uncontrolled, and thus to let them get out of the control that obtained when they were on the ship, seems to us in substance the same thing.

We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.

In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.

We award as follows:

To D. Earnshaw \$4,392 (Mexican).

To A. Young \$1,306.50 (Mexican).

To G. Gilchrist \$458 (Mexican).

Done at Washington, D. C., November 30, 1925.

The President of the Tribunal,
A. NERINCKX.

THE LUZON SUGAR REFINING COMPANY, LIMITED

(Philippine War Claim)

[Claim No. 41]

Award rendered at Washington, November 30, 1925

Foreign residents whose property was in the field of military operations of American forces in driving out Filipino insurgents, have no ground of complaint against the United States, where no complaint is made that the troops did anything beyond what the operations necessarily involved.

This is a claim for injury to the plant of the claimant during the Philippine insurrection. It appears that the insurgents intrenched about 50 yards on each side of the pumping station of the claimant and that during the operation of driving them out the plant was damaged by shells. It is clear from the report of General Otis that the damage was an incident of the military operations whereby the insurgents were driven from their capital. The foreign residents, whose property unhappily chanced to stand in the field of those operations, have no ground of complaint against the United States which had no choice but to conduct them where the enemy was to be found. No complaint is made that the troops were out of hand or did anything beyond what the operations necessarily involved.

Hence this claim must be rejected and we so decide.

Done at Washington, D. C., November 30, 1925.

The President of the Tribunal,
A. NERINCKX.

WILLIAM WEBSTER

[Claim No. 31]

Award rendered at Washington, December 12, 1925

Claim for damages resulting from denial of title to certain lands in New Zealand after its annexation by Great Britain.

Claimant acquired no more than a native customary title, the content and scope of which was very uncertain and can not be said to have extended to a full property or *dominium* as known to matured law.

These native customary titles were not destroyed by the local legislation. Claimant agreed to exchange his customary title to the surplus lands for a title derived from the Crown to such lands as should be awarded him. He was awarded more than sixteen times the maximum allowed by statute and has no good claim for further grants.

Losses due to delay or uncertainty in conferring or establishing the titles, or to deductions in exchange for full and marketable titles under British law, were a risk of claimant's speculation.

As described in the memorial, "this claim is for damages resulting from the denial of title to and loss of possession of certain lands in . . . New Zealand" as a consequence of what are claimed to have been "unwarranted and unjustifiable acts of the British authorities after the annexation by the British Crown."

It appears that Webster, a citizen of the United States, who was engaged in trading with the native population of New Zealand, purchased from native chiefs and native tribes, between 1836 and 1839, large tracts of land, the ex-

tent of which is not clearly established. As shown by the claims lodged before the New Zealand Land Commission, they amounted to some 184,000 acres. As claimed in his applications to the American Government, they amounted to about 500,000 acres, of which he asserted he had "proved title to about 240,000 acres." The purchases were paid for chiefly in goods and merchandise, and he claims to have invested in this way about \$78,000. The New Zealand Land Commission found an outlay of a little less than \$40,000.

Webster was not the only person engaged in buying land from the natives at this time. Indeed it appears that different land speculators, other than Webster, claimed to have bought in this way some 654,000 acres more than the whole area of the two principal islands. Hence, to avoid conflict and to prevent spoliation of the natives, it became necessary for some government to step in. This was done by the British Government when, in 1839, it commissioned Captain William Hobson, R. N., as Lieutenant Governor of New Zealand, and directed him to proclaim that Great Britain would "not acknowledge as valid any title to land, which either has been or shall hereafter be acquired in that country," unless derived from and confirmed by the Crown. In pursuance thereof, on January 29, 1840, Captain Hobson made a proclamation in which, reciting that it was not intended to "dispossess the owners of any lands acquired on equitable conditions, and not in extent or otherwise prejudicial to the present or prospective interests of the community," he announced that the crown did not deem it "expedient to recognize any titles to land in New Zealand which are not derived from or confirmed by Her Majesty." A like proclamation had been made on January 14, 1840, by Sir George Gipps, Governor of New South Wales, to whose jurisdiction New Zealand had been added.

On February 6, 1840, Great Britain entered into a treaty with the native chiefs and tribes of New Zealand, called the Treaty of Waitangi, whereby sovereignty was ceded to the British Crown. The land laws of New South Wales were then extended to New Zealand, by an Act of August 4, 1840, and commissioners were appointed to examine and report on claims to land titles. On June 9, 1841, this Act was repealed, and an Act was passed by the Colony of New Zealand providing for a second commission to examine titles derived from the aborigines and recommend grants in lieu thereof. This Act established a maximum of 2,560 acres for any one claimant, unless more was authorized expressly by the Governor and Council. After some correspondence with the American Consul at Sydney, New South Wales, and with the New Zealand authorities, Webster, on October 3, 1841, wrote to the Colonial Secretary: "I wish my claims to be laid before the Commissioners and am willing to take my chance with all others." Accordingly he submitted his claims to the Lands Commission and ultimately he and his assignees were allowed about 42,000 acres, the difference being due partly to surveys and definite fixing of boundaries, partly to interpretation of native

grants, partly to determination of the amount of the consideration paid by Webster in different conveyances, and partly to the insistence of the Home Government that the Colonial Government should not go too far in approving and allowing grants in excess of the maximum. The contention is that the several native grants should have been given effect as conveying to Webster a full and complete title by British law to their entire extent, and that his successors are entitled to compensation for the difference between the amount of land called for in the native grants and the amount granted to him by the Crown.

A preliminary question was raised to the effect that this claim is barred by Article V of the convention between Great Britain and the United States, executed on February 8, 1853, and ratified on July 26, 1853. This question was argued to us in connection with the argument of a like question in the Cayuga Indians claim. We found upon that argument that some of the points involved were also involved in the Cayuga Indians Claim, and felt unable to pass upon them with assurance until a more complete understanding of the latter could be had from a full hearing thereon. Hence we were constrained to overrule the preliminary objection, reserving power to decide the present case upon the point involved in the objection, should it ultimately appear proper to do so. At the hearing on the merits, counsel for Great Britain has once more urged this point upon us.

Rule 39 of the Rules of Procedure governing our proceedings reads: "The award of the Tribunal in respect to each claim shall be delivered at a public session of the Tribunal as soon after the hearing of such claim has been concluded as may be possible." We do not feel justified in passing on the question as to the effect of Article V of the convention of 1853 until after full argument of the Cayuga Indians Claim. Nor, in view of Rule 39, do we feel justified in delaying a decision of the present case until after that argument is concluded, since we are satisfied that, in any event, the claim now before us must be rejected on its merits.

Native land tenure in New Zealand prior to the annexation was the subject of an elaborate report to the Colonial Government in 1843. It is a subject upon which much has been written by local historians, in public documents, and by anthropologists and ethnologists. The native law was customary and in a low stage of development. The land was possessed and occupied by the tribe, and separate cultivation seems to have given no more than what might be called a usufructuary interest. Alienation, in the sense in which it was understood by the white purchasers, was something quite new to the natives. There is some evidence that many of the tribes and chiefs supposed that they were giving purchasers no more than a sort of usufruct. As the sales to speculators were made mostly within five years before annexation and the bulk of Webster's purchases were within the year before Captain Hobson's proclamation, it is obvious that no specific customary law as to the manner or effect of these wholesale alienations of

communal property could have grown up. In order to purchase land so held, so as even to obtain such title as was known to native law, was far from easy. It involved the collective interests of a large group, not always easy to ascertain, and called for representation of interests by persons whose authority was not always clear. Hence before annexation purchases of land from the natives were the chief source of quarrels and disturbances. The first care of the government after annexation was to put an end to this cause of conflict by establishing a definite régime of private property under British law instead of the indefinite régime of customary, collective tribal rights of occupation or possession and of uncertain titles by purchase from chiefs and tribes.

Conveyances from the native chiefs could give Webster no higher or different title than that which existed by native customary law. As has been said, it is, at least, very doubtful how far the customary communal or collective title to land involved more than a claim to occupation by the tribe. Nor is it clearly shown that the natives understood any such thing as *dominium* over land, as it is understood in developed law, or understood the sort of title, with its implications, which Webster asserts was conveyed to him.

It is argued that the title of the British Crown is derived from the same source as Webster's title. We can not agree. All those who had any claim to represent the aboriginal natives, as politically organized, entered into a treaty ceding sovereignty to Great Britain. The treaty ceded sovereignty in Article I. In Article II, possession was guaranteed to the chiefs and tribes in all which they possessed individually or collectively. This is a clear declaration of the nature of native property as it existed at the time of the cession. It is far from recognizing the sort of proprietary system which Webster's claim presupposes. In addition an exclusive right of preëmption of lands was given to the Crown. This was a matter of sovereignty. It was a legal regulation of alienation, not a conveyance of property.

It is said that in this respect the present case is governed by the decision of this Tribunal in one of the Fiji Land Claims, namely, the Claim of Rodney Burt, American-British Claims Arbitration, No. 44.¹ But we think that case differs from the present case in three important respects. In the first place, in the Burt case there was a long period of transition from native customary law to the white-men's law, as a result of which conflicting theories as to power to convey and the effect of conveyance grew up. The British Government deliberately committed itself to one of these theories, and that theory was the basis of Burt's claim. Secondly, Burt, who had what, under the decision of the Land Commissioners in his case, was a full and complete native title, was deprived of all rights although he had been in actual (not constructive) possession prior to the cession. He was not allowed even what the native grant, at the very least, must have given him, nor was he

¹ This JOURNAL, Vol. 18 (1924), p. 814.

allowed any equivalent therefor. Thirdly, the provisions of the cession as to titles were very different from those in the present case. In the Burt case, in addition to the cession of sovereignty, there was a declaration that "the absolute proprietorship of all lands, not shown to be now alienated, so as to have become *bona fide* the property of Europeans, or other foreigners," subject to certain exceptions, should be the property of the Crown. In other words, the cession assumes a preëxisting régime of "absolute proprietorship" in land and of alienations whereby European purchasers had acquired such property rights. In the present case the cession recognizes nothing more than a régime of possession by chiefs and tribes.

It is argued further that Webster's title has the same basis as the title of the British Crown because the native grants to him were taken as extinguishing the native title and the surplus over the grants made to Webster by the Colonial Government was held to revert to the Crown. But we interpret differently the proceedings by which these grants were made and can not accept this contention.

Our conclusion is that Webster acquired no more than a native customary title, the content and scope of which was very uncertain and can not be said to have extended to a full property or *dominium* as known to matured law.

We do not think that these customary titles were "destroyed" by the local legislation, as contended by the United States. The Act of August 4, 1840, setting up the first commission, provides that native titles not "allowed" by the Crown, after investigation, shall be void. It then provides for grants and prescribes a maximum grant to any claimant. The Act of June 9, 1841, setting up the second commission, provides that all lands validly sold by the aboriginal natives shall be vested in the Crown. But this is evidently for the purpose of adopting the common-law view that all lands are held of the Crown, and thus laying the foundation for a modern property régime in place of the native customary tenure. For the Act then provides how any person who had acquired title prior to annexation may obtain a grant in lieu of his purchase fixing a scale for judging what he had paid and a maximum grant for any grantee. True, it was not till 1865 that an allowance of customary titles as such was provided for. But we think Webster was given an option of claiming his customary title and insisting it be allowed, for what it was worth, on the basis of international law, or of exchanging it for a crown grant in fee simple under the terms of the statute of 1841. Obviously there was great advantage in the latter in that the title under the latter was marketable, while, after annexation, the customary title was not. Webster agreed to submit his claims to the land commission and "take his chances along with the rest." We think this means that he agreed to exchange his customary title for a title derived from the Crown to such lands as should be awarded him. In fact the maximum was not applied in his case. He was awarded more than sixteen times that maximum. This feature of the case distinguishes it at once from the Burt case. After this

exchange and these grants, which seem to have been the result of very careful investigation and of a disposition on the part of the commissioners and of the Governor to do Webster justice and to be governed by equity rather than by the strict terms of the statute, we do not think Webster had any just claim for further grants in fee simple. He had exchanged his customary title to the surplus for a better title to what was granted him. It does not seem to us equitable that for his customary title he should receive a full title by British law to the whole of the large areas which he claims. Even less would it have been equitable to award him full title by British law to the fullest possible extent of the indefinite boundaries which his conveyances from the native chiefs called for. He could not have been in actual possession of all of these tracts, nor were the limits of such possessions as he had by any means clear. In these respects also the Burt case is very different.

As to one claim which Webster submitted to the Land Commission, it appeared that all the chiefs who should have joined were not parties to his conveyance. On this ground the commission rejected his title. It is contended that he should have been allowed an undivided interest corresponding to that of those who joined. But, as we understand it, these customary titles were collective. The chiefs were in no sense tenants in common. Such title as there was, was in the collectivity. If the collectivity, or its representatives acted, there was an alienation. If not, less than the collectivity had nothing to convey. Such seems to have been the view of the commission, and we see no reason to think that their view of native tenures was erroneous.

It is said that the "threat" in the instructions of the British Government to Captain Hobson in 1839, and in the proclamation of Sir George Gipps, prior to annexation, that the Crown would not acknowledge as valid titles not derived from or confirmed by a grant from the Crown, destroyed the value of Webster's property. But the statutes after annexation did not go as far as these proclamations. The proclamations deprived him of nothing. If it is claimed that they injured the marketability of his property (which he had acquired as a speculation, not in order to settle thereon), the answer is that he must have known that, in order to be marketable, the title would ultimately need some kind of confirmation or establishment of some kind of transformation into the sort of title known to developed law. The titles obtained from native chiefs under customary law were not like those under consideration in *United States v. Percheman*, 7 Peters 51, 86-87. Those were titles to land in Florida under Spanish law. They were full and complete, giving a *dominium*, as well understood from Roman times in Continental Europe and in lands settled therefrom. In the present case, losses due to delay or uncertainty in confirming or establishing the titles, or to deductions in exchange for a full and marketable title under British law, were a risk of Webster's speculation.

We are, therefore, of opinion that this claim should be rejected, and we so decide.

Done at Washington, D. C., December 12, 1925.

The President of the Tribunal,

A. NERINCX.

FISHING CLAIMS—GROUP I

Cunningham & Thompson Company; Representatives of Fred L. Davis, deceased; Representative of William Parsons, deceased; Gorton-Pew Fisheries Company; Representative of William H. Jordan, deceased; Orlando Merchant; Representative of Jerome McDonald, deceased; John Pew & Son; Gorton-Pew Fisheries Company, successor to D. B. Smith & Company; Sylvanus Smith & Company, Inc.; Representative of John Chisholm, deceased; Carl C. Young, Hugh Parkhurst & Company; Almon D. Malloch; Thomas M. Nicholson; Lemuel E. Spinney; William H. Thomas; Frank H. Hall; M. Walen & Son, Inc.; Atlantic Maritime Co.; Waldo I. Wonson; Henry Atwood; Fred Thompson.

Award rendered at Washington, December 22, 1925

Claims for refund of light dues, customs duties, and other charges, levied upon American vessels engaged in herring fishing upon the treaty coast of Newfoundland.

The disposing of fishing outfit and gear to Newfoundland fishermen and in Newfoundland waters as a part of their compensation, such outfit and gear remaining their property after use in the employment and entering into the general stock of the country, was not a reasonably necessary mode or incident of exercising the fishing privilege and must be held to have been trading.

Agreed amount to be paid to the United States in each case awarded by the Tribunal.

These are claims for refund of light dues, customs duties, and other charges, levied upon vessels engaged, as claimed by the United States, in herring fishing at Bay of Islands and other places upon what, for convenience, may be called the Treaty Coast of Newfoundland. The answer of Great Britain sets up that the vessels in question were exercising commercial privileges by (a) purchasing herring, (b) hiring men in Newfoundland waters, and (c) "selling goods in Newfoundland to employees."

As to the first contention, there is a mass of conflicting evidence on the one hand as to the course pursued by particular American vessels which are claimants, and on the other hand as to the practice of American vessels generally in the herring fishery on the Treaty Coast. Partly the contention involves questions of fact and of the legal interpretation of the facts when found. In part it involves the questions of law raised by the second contention. There can be no doubt that purchase of herring from independent fishermen in Newfoundland waters could not be regarded as an exercise of the fishing privilege belonging to the United States under the Treaty of 1818. But, for reasons which will appear presently, we do not deem it necessary, with respect to each vessel in question, to determine as a fact whether it was fishing or was buying herring on each occasion for which claim is made.

We think the questions raised by the second contention are disposed of in the answers to the first and second questions in the Award of the Permanent Court of Arbitration at The Hague in the North Atlantic Coast Fisheries Arbitration.

It remains to consider the third contention.

Under the answer of the Permanent Court of Arbitration at The Hague to the seventh question in the North Atlantic Coast Fisheries Arbitration, an American vessel could not exercise fishing privileges and commercial privileges on the same voyage. As to any voyage there must be wholly and purely fishing activities or the vessel must be regarded as trading. Concession of the fishing privilege in the Treaty of 1818 carried with it tacitly (or by implication) the privilege of doing such things as are reasonably necessary to its exercise in view of the nature of the fishery to be carried on. It is contended, on behalf of the United States, that the privilege extends to all customary means and methods of carrying on the fishery. But in our opinion this is true only provided and to the extent that the customary means and methods are reasonably necessary to the exercise of the fishing privilege. We consider that the disposing of fishing outfit and gear to Newfoundland fishermen in Newfoundland waters as a part of their compensation, such outfit and gear remaining their property after use in the employment and entering into the general stock of the country, was not a reasonably necessary mode of or incident of exercising the fishing privilege and must be held to have been trading.

So far as appears, it was quite enough to have given out outfit and gear for the purpose of fishing while in the employ of the vessel, charging it might be for outfit and gear lost or destroyed. A payment or part payment in outfit and gear, so as to come into competition with the trade of Newfoundland in such articles, was not necessary nor was it reasonable. There is nothing to show that an arrangement, whereby the outfit and gear, so far as unconsumed, should remain the property of the vessel, was not perfectly feasible and reasonable. There is evidence that Newfoundland fishermen, who employed servants and fished independently, provided nets in this way.

As all the American vessels pursuing the herring fishery on the Treaty Coast regularly disposed of gear and outfit to Newfoundland fishermen so as to leave such articles (if unconsumed) in Newfoundland, as the property of those fishermen, we must hold that all of the claimant vessels, at all the times in question, were to that extent engaged in trading and hence were not exclusively exercising fishing privileges.

It is assumed that the Agents of the respective parties will be able to agree upon the amounts recoverable in view of the foregoing findings. If not, the Tribunal will proceed to determine them.

Done at Washington, D. C., November 6, 1925.

The President of the Tribunal,
A. NERINCKX.

Memorandum as to barrels and salt:

With respect to barrels and salt, which went back upon the ships on which they came, were not landed, and were used solely to transport the fish obtained, we are of opinion that they were part of the ships' equipment and were not subject to duty.

Washington, D. C., November 9, 1925.

The President of the Tribunal,

A. NERINCX.

The Agent for the United States and the Associate Agent for Great Britain having reached an agreement concerning the amounts to be paid to the United States in the fishing claims in Group One, conformably to the decision of the Tribunal with respect to these claims rendered on November 6, 1925, and the order made with respect to them on November 9, 1925, the Tribunal awards the following sums in these claims pursuant to this agreement:

Number of claim	Name of Claimant	Amount
45	Cunningham & Thompson Company	\$1,093.70
46	Representatives of Fred L. Davis, deceased	452.38
47	Representative of William Parsons, deceased	390.95
48	Gorton-Pew Fisheries Company	1,089.50
49	Representatives of William H. Jordan, deceased	37.50
50	Orlando Merchant	831.00
51	Representative of Jerome McDonald, deceased	304.24
52	John Pew & Son	106.62
53	Gorton-Pew Fisheries Company, Successor to D. B. Smith & Company	882.85
54	Sylvanus Smith & Company, Inc.	228.23
55	Representative of John Chisholm, deceased	249.08
56	Carl C. Young	406.70
57	Hugh Parkhurst & Company	121.41
58	Almon D. Malloch	139.47
59	Thomas M. Nicholson	364.44
63	Lemuel E. Spinney	151.10
64	William H. Thomas	130.56
65	Frank H. Hall	56.38
66	M. Whalen & Son, Inc.	313.85
67	Atlantic Maritime Co.	287.90
68	Waldo I. Wonson	341.22
70	Henry Atwood	21.00
71	Fred Thompson	19.92
	Total	8,000.00

Done at Washington, D. C., December 22, 1925.

The President of the Tribunal,

A. NERINCX.

BOOK REVIEWS AND NOTES*

The Recent Foreign Policy of the United States. By George H. Blakeslee. New York: The Abingdon Press, 1925. pp. 368. Index. \$2.00.

The six chapters of this handy little book contain the lectures, revised and expanded to include the whole of Mr. Hughes' administration of the State Department, delivered by Professor Blakeslee on the Bennett Foundation at Wesleyan University in March, 1924. The subtitle limits the general topic to "Problems in American Coöperation with other Powers," and the various chapters follow the problems into our relations with Europe, Latin America and the Far East, concluding with a prognosis of coöperation in the future. The writing is crisp and lucid; the narrative and argument are replete with illustrative matter from recent events, comment and official utterances.

Dealing with the relations between the United States and the Latin American Republics, the author finds several related factors in control,—the Monroe Doctrine, Pan Americanism, Latin Americanism, the special interest of the United States in the Caribbean, and the opposition of this country to European participation in our relations with Latin America. He recognizes the persistence of Latin American opposition to a Monroe Doctrine that is the exclusive possession of the United States, and without taking direct issue with the statement made by Secretary Hughes that such it must remain, he supports the Secretary's suggestion that each Latin American state make its own declaration of the Monroe Doctrine. If Professor Blakeslee regards such declarations as a first step toward an effective Pan American Monroe Doctrine, one may agree with him; otherwise he would appear to be urging our southern neighbors to beat upon sounding brass and tinkling cymbals, to put sentiment before interest.

The treatment of our Far Eastern policy is, properly, an analysis not of one policy, the Open Door, but of the related policies of the Open Door and the integrity of China, though the relationship between the two is not stressed. Curiously enough, in view of the author's special interest in coöperation, he omits any consideration of Mr. Roosevelt's strenuous application of that principle in his "agreed memorandum" of 1905, and also of the Root-Takahira agreement, though he characterizes the Lansing-Ishii reaffirmation of the latter as "unfortunate." Must one not admit that it is not in coöperation that virtue lies, but in what states coöperate to accomplish? An interesting issue, the relation of the wireless controversy to the Open Door doctrine, is not touched upon. The author brings out clearly and strongly the necessity of Japanese-American coöperation and the importance of a

* The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.—ED.

diplomacy consistently directed to that end. But coöperation in the Far East must take full account of China and the other Powers, as well as Japan.

In the concluding chapter the significance of coöperation is dealt with at some length. It is stated that: "the United States will be compelled in the future to follow a course of much closer coöperation, economic and political, with the other nations of the world than it is following today." This the author believes to be true of Europe, where hitherto this country has followed a middle course of coöperation in economic programs and avoidance of it in political issues, as well as in Latin America and the Far East. Believing that "in the task of coöperation for international peace a peculiar obligation rests upon the United States," and that "if ever reasonably rapid progress is to be made toward the abolition of the war system it will require an increasingly close and effective coöperation by the nations of the world, including the United States," Professor Blakeslee concludes that if the League of Nations gains in prestige in other states, "the League idea will make an increasingly strong appeal to the judgment and the conscience of the American people."

HAROLD SCOTT QUIGLEY.

The World Court. By Antonio Sánchez de Bustamante y Sirvén. Translated by Elizabeth F. Read. New York: The American Foundation through The Macmillan Company, 1925. pp. xxv, 379. \$3.00.

There is a widespread feeling that the settlement of disputes by due process of law is as practicable, although it may be more difficult, between nations as it is between individuals, and experience already had with this form of settlement has created the belief that disputes should be settled in the same way and to the same extent between nations as the disputes which arise between and among their own peoples. Therefore, a Court of International Justice is now in existence at The Hague, having been established in the course of 1921, to which the majority of the nations are parties, including the United States of America if its adherence with reservations be accepted. In view of these things, it is desirable that an authoritative account of the establishment of the court, its methods and procedure, be at the disposal of the people generally, not merely those already interested, but those whose interest is necessary in order that the great experiment may be crowned with success, and the foreign relations of nations be conducted according to those principles of justice expressed in rules of law which have maintained peace in each and every nation applying them.

It is fortunate that a publicist of large experience, a leader of the Bar not only in his own country but in the Western Hemisphere, and himself a judge of the Permanent Court of International Justice by the free choice of the nations at large, should have taken upon himself the burden of preparing such a work; for in so doing, Antonio Sánchez de Bustamante y Sirvén, a citizen of

the Republic of Cuba has made us all, irrespective of language and irrespective of country, his debtors. Mr. Bustamante was a plenipotentiary of Cuba at the Second Hague Peace Conference, where the question of a Permanent Court of International Justice was first proposed and discussed at an official international gathering. As diplomatic representative of Cuba in the Peace Conference at Paris, his name is affixed to the Treaty of Versailles containing the Covenant of the League of Nations, pursuant to the 14th Article of which the Court has been established. He is therefore familiar with the antecedents of the Court, as well as with its composition and its procedure.

Mr. Bustamante has written for the various classes of readers who either are or can be interested in the Court. To those with an inclination toward history, the first five chapters will make a special appeal. Those interested in the actual creation of the Court will find Chapters 6, 7 and 8 absorbing; and those whose chief interest is in the practical working of the Court will ponder the balance of the book, Chapters 9-16.

The author, however, recognized that his self-imposed mission would fail of realization unless the volume were in languages which make a large, if not a universal, appeal. It was, therefore, prepared in the first instance in Spanish, the official language of no less than nineteen countries—indeed, a third of the nations and states accredited in a more or less degree with international personality. He felt, however, that great as is this public, the volume should be issued in French, not merely for the four countries of which French is an official tongue, but also for the intellectual classes in most parts of the world, who look upon French as a second language. This, however, was not enough, inasmuch as English, the language of the British Empire and the United States, is, with French, an official language of the League of Nations and of the Court, whose origin and activity Mr. Bustamante was describing. It is now to be had in English, under the title of *The World Court*.

In tracing the antecedents of the Court, Mr. Bustamante deals with those individuals who advanced the idea of a court and, therefore, of judicial settlement, beginning with the thirteenth century and continuing until the movement which they began had resulted in collective proposals. These proposals of unofficial gatherings, he describes. He then takes up the Hague Peace Conference of 1899, where the so-called Permanent Court of International Arbitration was created, and the second Conference of 1907, in which the official proposal for a Permanent Court of International Justice was made by the delegation of the United States, and a project to that effect, omitting a method of appointing the judges, was adopted, dealing with the organization, jurisdiction and procedure of the proposed institution. Naturally, and properly, he describes the Central American Court of Justice created by convention of the five Central American Powers, December 20, 1907, meeting in conference at Washington. He then passes to the Paris Peace Conference and the Treaty of Versailles, and considers those portions of it relating to the creation of the Permanent Court of International Justice.

Wisely, the Council of the League of Nations, a political body, decided to invite jurists of international reputation from the different countries to prepare the plan of the Court which, when completed, would be presented to the Council and to the Assembly, and approved by the members of both in their sovereign capacity as nations. It happened that the jurists were drawn from five of the so-called great Powers, and five of the so-called lesser Powers, so that the representatives of each group were a check upon the representatives of the other. It also happened that the representatives of the lesser Powers, in favor of the equality of nations, formed the majority of the Assembly; and that the majority of the Council was composed of the larger Powers which, favoring their special interests, were not in favor of the equality of nations. The way was open to a compromise, if some method of appointing the judges could be found which, representing each, would meet with the approval of both.

Mr. Root, one of the ten jurists taking part in the Advisory Committee, as it was called, meeting at The Hague in the summer of 1920, therefore proposed the election of the judges by the concurrent, separate action of the Council and the Assembly, and reinforced his recommendation by the experience of the Congress of the United States, whose separate but concurrent action is necessary in legislative matters—in the lower house of which the larger States have a preponderance of members, whereas, in the upper house, the smaller States have a preponderance of members. The proposal was accepted, and the Court became a reality instead of an aspiration.

For practical purposes the balance of Mr. Bustamante's book is to be studied, as no adequate analysis of it can be given within the compass of a few paragraphs. It is, however, necessary to say that the plan of the Advisory Committee as it left the hands of its members was, to all intents and purposes, a replica of the Supreme Court of the United States, with such modifications as seemed necessary to fit it for a different environment. Resort was not to be had to the tribunal until diplomatic negotiations had proved unavailing between the states, and in case of disagreement on that point, the Court itself was to decide; whereupon, state could sue state in the Permanent Court of International Justice, as State can sue State in the Supreme Court of the United States. Each of the states was to be invited, and the suit conducted to judgment in the absence of the defendant state, if it did not care to appear. Unfortunately, the large Powers would have none of this clause. Willing to hail before the Court smaller Powers which can not resist the material force of the great, the larger Powers insist upon appearing before the Court only when it suits their pleasure or their interests to do so. Therefore, recourse to the Court, according to the Statute eventually adopted by the Assembly of the League of Nations on December 13, 1920, provides for a previous agreement of the parties to submit their disputes to the Court. It should be said, however, to the credit of the so-called lesser Powers, that they insisted upon the right of a plaintiff state to bring the

defendant state before the Court; and Mr. Fernandez, of Brazil, ingeniously suggested the original plan of the Advisory Committee (of which he had been a member) as an alternative procedure in this regard, so that the nations wishing to take advantage of it might adopt it in their signatures to the Optional Clause of the Protocol.

When the so-called great Powers have confessed their faith in judicial settlement, as the so-called small Powers have repeatedly done, and expressly in the Optional Clause, the world will have an international tribunal before which the nations will be invited to appear, irrespective of their size or influence, to litigate their disputes as the individuals composing them would be obliged to do within national lines. That day may be far off, but it is the inevitable goal toward which advocates of international peace must press.

Mr. Bustamante's volume, written with Latin logic and that faultless precision which seems to be an inheritance from Rome, shows what has been done, and indicates what must be done, in order that justice may prevail, not only at home and abroad, but between nations. Many services he has to his credit, but none assuredly greater than the preparation and publication of this volume, descriptive and constructive as well as critical, and interesting and irresistible as it is authoritative.

The case of judicial settlement is in competent hands. It should, and, therefore, it will prevail.

JAMES BROWN SCOTT.

Historia de la Institución Consular en la Antigüedad y en la Edad Media.

By Alberto M. Candiotti. Buenos Aires: Editora Internacional, 1925. pp. xxv, 856. Index.

This history consists of two parts, the first dealing with the consular institution in ancient times, and the second in the Middle Ages.

The first part is divided into two books, the first of which is composed of nine chapters, in which the author discusses the uncertain beginnings of the consular institution, tracing them to India, Egypt, Palestine, Persia, Phoenicia, Carthage, Greece and Rome. The second book is divided into four chapters, in which the author discusses the Greek "Proxenia" and the Roman "Patronato" as being determined sources from which the consular institution is derived.

The second part of the work, dealing with the consular institution in the Middle Ages, is divided into four books, the first of which discusses the institution in China, the second during the era prior to the Crusades, including the commerce of the Mediterranean and consular establishments, the Consular Government of Communes, and of the cities of Pisa, Genoa and Milan. The third book treats of the development of commercial institutions from the time of the first crusade to the end of the Middle Ages. It shows the influence of the Crusades in the revival of commerce, and dis-

cusses consular tribunals in the Near East, Italy, France and Spain, the organization and attributes of the then existing consular tribunals, as well as commercial corporations in Italy, France, Germany, England and other countries. Chapters are also devoted to maritime customs and laws.

The first part of Book 4 is a generalization of the consular institution, and the second part is a generalization of the consulates in the Near East. In this second part is included a discussion of consulates in Venice, Genoa, Pisa, Florence and Barcelona. Chapters are devoted to the consulates in the eastern parts of the Adriatic, in Hungary, Genoa, Barcelona, Venice and Serbia, to those on the Black Sea, and on the Sea of Azof, a branch of the Black Sea, as well as to those of Asia Minor.

A lengthy bibliography of 38 pages is printed at the end of the treatise, being a list of the authorities which were consulted by the author. The work contains a number of interesting illustrations, particularly those of distinguished Greeks, who occupied the position of "Proxenó," and those of prominent Romans who held the office of "Patrono."

The author would appear to have given many years of reading and careful investigation to the preparation of this work. He gives a well defined idea of the remote beginnings of the consular institution, which he believes to be based on the most noble sentiments of humanity, hospitality and protection to the foreigner, and he shows its gradual development up to the end of the Middle Ages.

It is undoubtedly the most complete historical compilation written in the Spanish language on the consular institution during the period stated. The author is to be congratulated for the scholarly research that he undertook to secure the material for his work, for the clear method of presenting his subject, and for the distinct historical contribution he has made, as a representative of the consular service of the Argentine Republic, on a subject in which the members of his profession, as well as students of international affairs, are so much interested.

WALTER SCOTT PENFIELD.

International Economic Policies—A Survey of the Economics of Diplomacy.

By William Smith Culbertson. New York: D. Appleton & Co. 1925. pp. xix, 575. \$3.50.

The material Dr. Culbertson presents has almost all been worked and reworked by competent writers on commercial policy. And yet Dr. Culbertson's book gives an impression of freshness, originality, and in a sense, superior validity. Other writers have taken the point of view of nationalism, or that of liberal cosmopolitanism. Dr. Culbertson's point of view is international.

What confronts the modern world is a vast and rapidly developing network of economic relations that transcend national boundaries. More and more the nations are coming to depend on foreign markets for their products, on

foreign sources of supply of raw materials. The international movement of capital assumes larger and larger proportions; technical skill and scientific achievement are no longer easily contained within their countries of origin. Political government, here as elsewhere behind the times, comes limping along after the development of the facts and endeavors to supply the rules and regulations needed, to create order in this new realm of activity. But its endeavor is animated by nationalistic purposes and the means it employs are those it has used effectively in domestic relations where its competence is not subject to question.

The results are not encouraging. National governments urge on the creation of international interests over which they can have no adequate control. They back up their nationals in enterprises abroad which they would prohibit or curb at home. "To the fierceness of private trade competition has been added national competition, and trade rivalry, instead of being checked, has been intensified and stamped with a national stamp. It may be predicted that this nationalist competitive system, if allowed to continue the course pursued by it in recent decades, will, like Samson in the temple of the Philistines, destroy itself." (p. 20.)

Dr. Culbertson makes a rapid survey of the commercial policy of the last two hundred years, chiefly with a view to separating out the principles that would serve in an intelligent international order. The first of these is the grant of "national treatment" to the alien who is permitted to enter the national jurisdiction for business purposes. This involves equality before the law in virtually every peace-time economic relation—in taxation, in trading privileges, in the courts; in transportation charges, port dues and the like. The United States sins against this principle only by exception. The second principle is the unconditional most-favored-nation rule, by which a nation grants forthwith to all nations with which it has normal treaty relations any privileges it grants to any one nation. This principle, widely accepted in Europe during the nineteenth century, has recently won the adhesion of the United States. In the world at large it has been losing ground, nevertheless, through the development of imperial preference in the family of British nations, which insist more and more on being regarded as separate and independent nations in political relations but cling to the mother-country-colonial status in economic relations.

The third principle is the Open Door. The land grabbing of the last half century, which has subjected nearly half the surface of the earth to imperial control, menaced the peace of the industrial nations chiefly because it threatened a monopoly of markets and raw materials. No other nation would have been greatly disturbed over the extension of French, British or German influence in Africa, or over the extension of Russian and Japanese influence in the Far East, if there had been no risk that the territories controlled would be subjected to nationalistic exploitation. America, for the better part of half a century, has stood consistently for the Open Door,

in her professions and preaching. In her practice, to be sure, her record is not so good. The régime we apply to the Philippines, is, from the point of view of international economic policy, about the most illiberal in the world. The French come near matching us in their policy of "assimilation" for colonies so remote as Madagascar and Indo-China, and the Italians do their small worst in their desert possessions. England and Holland, as old and experienced colonial Powers, practice the Open Door though they do not often preach it, and Germany, when she had colonies, exhibited enlightened liberalism in the treatment of alien interests.

Another principle which may serve in building up a sound system of international economic policy is involved in the control of investments abroad. Such control can not be absolute. In the nature of the case much foreign investment is made without flotation on the public markets. When the balance of international payments runs heavily in favor of a country, its financiers are in a position quietly to invest abroad credits accumulating in foreign financial institutions. They may finance revolutions or reactions, peonage enterprises, sweated industries or what not, without ever presenting an appearance at the foreign offices of their national governments. But much international financing must necessarily be of a more open character and hence fall within the horizon of governmental approval or disapproval. Dr. Culbertson believes that our State Department stands on solid ground in insisting on the right to pass an informal judgment on foreign flotations. *Laissez faire*, he believes, will not answer to modern conditions. He does not commit himself as to whether the State Department is actually equipped to do this work competently and intelligently.

The international consortium, exemplified in the recent abortive loan to China, appears to Dr. Culbertson to present important possibilities for a sane handling of certain knotty problems of international finance. The regulation of concessions and their limitation to the actual necessities of exploitation, he points out, are also of great importance for international good will.

For regulating all these complicated international economic relations there is need of frequent conferences among the leading commercial and industrial nations. Dr. Culbertson does not contemplate an economic league of nations, nor an international administrative body controlling the distribution of raw materials or of capital. But matters that really transcend the competence of the several nations can only be handled well through conferences that will seriously consider the common welfare of the whole family of nations.

It is impossible in a review to give a fair idea of the skill with which Dr. Culbertson marshals his arguments, the adequacy and yet economy of the materials presented, the moderation and good sense with which opposing views are criticized. Dr. Culbertson's book is a very good one and deserves a distinguished place in the literature of commercial policy.

ALVIN JOHNSON.

The Dawes Plan in the Making. By Rufus C. Dawes. With foreword by Frank O. Lowden. Indianapolis: The Bobbs-Merrill Company, 1925. pp. 525. Index. \$6.00.

This is an interesting and useful book, but its title is misleading. The author was chief of the staff of experts which accompanied General Dawes, Mr. Young, and Mr. Robinson. One gathers the impression that these experts, and their chief as well, were stationed somewhere near the periphery of the conferences. At any rate, despite its markedly candid tone, the book tells very little about the origin of the different elements in the Dawes plan or about the way in which those different elements were put together.

Most of these elements can be found in the plans for the financial reconstruction of Austria and Hungary, and one or two may be found in the proposals made by the German Government in May and June, 1923. Mr. Dawes mentions the Austrian plan and the German proposals (pp. 33, 126), but not as directly related to the Dawes plan. The name of Sir Arthur Salter, the principal author of the Austrian and Hungarian plans, does not appear in the book, although his counsels must have been given much weight by the Dawes Committee. Nor is there any account of the way in which, in the actual drafting of the plan, one obstacle after another must have been encountered and surmounted, or of the way in which, at the last moment, the whole thing must have been whipped into shape. Of the actual working sessions of the Committee of Experts and of the informal conferences in which agreements were reached and policies decided upon the book has little to say.

Nevertheless, there are points at which the book adds to our knowledge. It prints several interesting memoranda that were prepared by members of the American staff of experts. Two of them, drafted by Professor J. S. Davis, are particularly able documents. We are left to surmise, however, whether they had any effect on the outcome. There is a short but informing account of the history of the reparation problem. The interpretation of the reparation provisions of the Treaty of Versailles, although not the usual interpretation or the one adopted by the Reparation Commission, is, in my opinion, defensible. The story of the estimates made by the Division of Economics and Statistics of the American Commission to Negotiate Peace is told correctly, except that the Division's first estimate of Germany's capacity to pay (\$10,000,000,000) was not submitted in the form of "a document prepared by Mr. Paul D. Cravath." Some of the figures, however, were taken from Mr. Cravath's able document.

There are other interesting details, such as the emphasis put from the beginning by Mr. Owen Young and others upon the strategic importance of the formula of "equality of tax burden" as a substitute for "total obligation" or for "ability to pay." It is made abundantly clear why the Committee, even if its powers had extended that far, could not wisely have attempted to fix the aggregate amount of Germany's indebtedness. And from various

paragraphs scattered here and there in the book the reader is able to piece together an account of the way in which Dr. Schacht, the head of the Reichsbank, was able to guard the plans which he already had under way for the improvement of the German banking and currency situation.

The book is curiously organized—a mixture of narrative, diary, and economic analysis. But it is clearly written, it is candid and modest in tone, and it reflects the openmindedness and intelligence with which the American participants in the conferences of which the book tells approached the problems they helped to solve.

ALLYN A. YOUNG.

A Concise Treatise on Private International Law based on the Decisions in the English Courts. By John Alderson Foote. 5th ed. by Hugh H. L. Bellot. London: Sweet & Maxwell, Ltd., 1925. pp. xxviii, 692. Index. £1. 15s.

Foote's well known treatise first appeared in 1878. The present edition by Dr. Bellot considerably enhances its value to the practitioner. Not only has it brought the English decisions down to date, but it has embodied in the text the Nationality Act of 1914 and has given attention to the changes effected by the Bankruptcy Act of 1914 with its comprehensive provisions assuming to control all property of the bankrupt, both real and personal, even though situated abroad. It also adds new matter in discussing the orders contained in the Judicature Rules in regard to the service of writ or process in foreign countries. Differing from general legislation in the United States, English judicial procedure makes extensive use of the British Foreign Office in serving writs and processes in foreign countries through the coöperation of the government of the particular foreign country. It may also seem strange to American practitioners that different procedural rules are applicable in the service of process upon British subjects than upon aliens, whether or not such aliens are domiciled in England (p. 564).

The tendency in England is to draw the links closer in the matter of international assistance in private legal procedure. This is evidenced by the convention of 1922 with France, and of 1924 with Belgium, facilitating service of process abroad and providing for reciprocal execution of commissions to take testimony (*commissions rogatoires*). The judicial authority to whom the commission is addressed in the foreign country executes it by the use of the same compulsory measures as would be applied in the case of a commission emanating from the authorities of the foreign country itself (p. 589).

Foote properly sensed the practical value of the discussion of procedure and evidence generally in cases involving foreign issues or foreign proof. The proof of foreign law is one of the most difficult tasks which confronts the practitioner. The English rule is in some respects narrower than the

prevailing rule in the United States where foreign written law found in an officially published statute book is generally admissible as a document, whereas the English rule seems to admit only those parts of foreign codes or statutes which have been expressly referred to by expert witnesses (p. 575).

The editor has also added as appendices to certain chapters the Carriage of Goods by Sea Act of 1924, and the so-called York-Antwerp Rules of 1924 relating to General Average. As to the latter, the reader should be cautioned that these rules do not partake of the authority of legislation but are model provisions for voluntary adoption in bills of lading, charter-parties, insurance policies and other documents. General adoption by American shipowners and other interested parties in this country is still under discussion.

ARTHUR K. KUHN.

Twenty-five Years, 1892-1916. By Viscount Grey of Falldon, K. G. Two Volumes. New York: Frederick A. Stokes Company, 1925. pp. xxx, 331; and x, 353. Index. \$10.00.

Viscount Grey's *Memoirs* must be ranked as the most important publication written from the British point of view regarding the international events during the quarter of a century which this record covers. It is important not only because for a great part of this time, Sir Edward Grey, as he was then known, was personally the centre of the diplomatic action of the British Empire, but because of the moral and intellectual qualities of the man. His elevation of mind, his sensibility to right and wrong, and his sincere interest in human welfare are clearly evident to the unprejudiced reader of these well documented recollections.

The picture he paints is, however, far removed from the character of the writer. It is remarkable that a man of such unusual serenity of spirit, a man of thought and a lover of nature, simple in his tastes and without a passion for political activity, should ever have found himself so permanently placed at the centre of the machinery of imperial diplomacy as to be the pivot about which, for nearly a decade, to a very considerable extent, the whole mechanism of British policy revolved.

The first impulse of an American reader of this book is to ascertain what Lord Grey has to say about the precipitating causes of the Great War. Upon this he has much to offer, but in the light of what is already known this is not the most important topic of this book. Although he writes with a singular openmindedness, it is not what Lord Grey says, but what is implied in what he says, which to the present writer is most impressive. Never once does he condemn British policy. No one would expect him to do that. But he does unveil it; and in his loyal determination to defend it he sometimes gives reason to believe that, in his own thought, imperialism is a dangerously rough game, even when played with much delicacy of conscience and a true sense of sportsmanship.

Honestly and punctiliously Lord Grey reviews the causes and consequences of the four great Anglo-German crises that preceded the war. Great Britain, thinking always of her trade, was truly anxious for peace and had no reason to desire war. Lord Salisbury, at an earlier period, had made considerable efforts for an understanding with Germany, and for a long time it was France and Russia that had been regarded as England's natural adversaries. With Germany's naval ambitions the tide changed. Peace was still desired—according to Lord Grey it was always desired in England—but Germany had become annoying, and began to be regarded as a source of danger as an ambitious world power, specifically as a sea power. Compared with Germany, the ambitions of France and Russia were easily satisfied. Since "splendid isolation" had become an evident weakness, a way was found to create an entente with France as regards Egypt and Morocco, and later with Russia, the ally of France, in the East. But this only irritated Germany and promoted the crises that followed over the Austrian annexation of Bosnia-Herzegovina, the agitations about Agadir and the commotions of the Balkan Wars.

An entente with France and Russia was not to be had for nothing. France wished an out-and-out defensive alliance against Germany. This Britain would not promise. But of what value was a friendship that would promise no help? France inquired. And so, help was contingently provided for through army and navy conferences, with France for both arms and with Russia for the navy; but everything was held to be without obligation of performance. Britain was to be free to help or to abandon her friends, according to her interest at the time!

With a clean alliance of three Great Powers confronting it, the Triple Alliance, of which Italy was in a sense a forced member, might have concluded that peace was necessary; and yet in this case also, war might eventually have come from either side thinking itself superior.

But as it was, the Entente was an irritant to Germany much more than it was a sure protection, even temporary, for France and Russia. Lord Grey seems deeply conscious of this. The ambiguity of England's position appears to remain unpleasantly on his mind as something to be explained if not excused. Britain, it is maintained, had not really promised anything to France or Russia, which left them both anxious and very dependent upon each other. Germany, on the other hand, without being greatly intimidated, was irritated and angered by what she knew, and even more by what she suspected. In time she came to believe that she had been deceived.

There was, according to Lord Grey, no intimidation intended, only a prudent preparation for defense. It is entirely credible that Britain did not want war, and was hoping to avoid it. If war should come from the hand of fate, it would be the aggressor, whoever it was, against which Britain would stand! And yet was it not with France and Russia alone, and not with Germany also, that Britain was making military and naval preparations for

war? And this was done behind the back of Germany. It continued, Lord Grey affirms, during eight years in a time of peace.

Sir Edward Grey was troubled at the time, and Lord Grey seems to be troubled still, by this attitude toward a nation with which friendship was professed. It is evident by the pains he takes to give assurance that it was only against an "aggressor" that the force of Britain was to be employed. This was of course in itself a position wholly beyond criticism, if it had been openly so understood. But it was so far from being thus understood that the fact of military and naval conversations with France and Russia with regard to a war with Germany was not supposed to be known by Germany. It was carefully concealed. When Sir Edward Grey was asked in Parliament if any naval agreement had recently been entered into between Russia and Great Britain, he answered, referring to a previous assurance, "It remains as true to-day as a year ago. . . . No such negotiations are in progress, and none are likely to be, as far as I can judge. But, if any agreement were to be concluded that made it necessary to withdraw or modify the Prime Minister's statement of last year, which I have quoted, it ought, in my opinion, to be, and I suppose that it would be, laid before Parliament."

"The answer," Viscount Grey comments, "is absolutely true. The criticism to which it is open is, that it does not answer the question put to me. That is undeniable." But both Parliament and Germany appear to have believed that the question had been answered negatively. And why was it not plainly answered? Lord Grey explains: "Parliament has an unqualified right to know of any agreements or arrangements that bind the country to action or restrain its freedom. But it cannot be told of military and naval measures to meet possible contingencies."

It would be difficult to deny this last proposition. It reveals the very heart of military diplomacy. Unless it is secret, it is futile; and to keep it secret there must be a resort to evasion and *suppressio veri*. It is of the very essence of imperial power that the people, even their parliaments, should not know the dangers to which they are exposed by the actions of their own governments. An empire is of necessity in the hands of its trustees.

It is impossible within the limits assigned to this brief notice to follow out all the ramifications of imperial ambition and diplomatic finesse disclosed in these volumes. To appreciate their revelations, their effort to state the truth with more than usual frankness, and their value for history, it is necessary to read them, every word, and between the lines. Their meaning is liable to be distorted in opposite directions, according to the prepossessions of the interpreter: one seeing in these statements a complete vindication of the wisdom of British policy; the other, a confession of complicity in a system of diplomacy which, more than any single act of any nation, is responsible for the fear and the consequences of war. To jurists in particular this reflection would appear to be the deepest impression received from the reading of these absorbing and illuminating volumes. There is something wrong with the

public law of Europe—or must we say of the world?—that makes the relations of powerful nations what they were, and what they still are; and Viscount Grey's frankly human, and sometimes very noble, expressions of sentiment and judgment help to disclose what it is. It is that there exists in connection with the European conception of the State a belief in a difference between the interests of the State as such and that of the people who compose the State,—a difference which requires a secrecy in the interest of the State in which the people may not share. This conception is a heritage from absolutism and belongs to a stage of human evolution from which Europe has not entirely emerged. The escape from its consequences is honest conference in the light of everybody's interest.

Of this Sir Edward Grey seems to have been more acutely conscious than any other European statesman of his time. His method of procedure was not of his choice. It was imposed upon him by forces over which he had no control. He felt the pressure of the thongs by which he was bound. The closing chapters of his first volume reveal the conflict that went on within him. He desired peace with Germany, but he had not been able to escape the conviction that Prussian militarism meant an eventual war. He shrank from the prospect that its occurrence might find Europe unprepared. To his mind Britain had a part to play in preventing it, and if need be in armed resistance. Hence the conversations with France and Russia. But why not also with Germany?

It is this question which Lord Grey's first volume is intended to answer. With Germany, conference in which the interests of Europe as a whole might be considered appeared to him impossible.

If only the conferences which in 1912-1913 had kept the general peace of Europe during the Balkan Wars could have been continued through 1914! There is something pathetic in Lord Grey's disappointment that this could not be. With a heavy heart he reflects upon what might have happened, if he could have had Cambon, Benckendorff, Mensdorff, Lichnowski and Imperiali, sitting around the same table as in 1913, in the Balkan crisis, and their governments loyally standing behind their united efforts for peace.

It is often flippantly suggested that it is the diplomats who make wars. No, it is not true. It is the hereditary hates of peoples, the asperities of the press, the ambitions and the weaknesses of rulers, but above all the reliance upon force in order to obtain the fruits of force, that make wars.

"The fact is," writes Lord Grey, "that in dealing with Chancellors and Secretaries for Foreign affairs at Berlin, we could make no progress, because we were not dealing with the men who really directed policy. The last and decisive word was with some military or naval person."

It has been said that if, in 1914, Sir Edward Grey had promptly announced a real alliance with France and Russia, and not a mere entente, the Central Powers would have been frightened, and there would then have been a peaceable conference, and no war. It is easy to throw out such hypotheses,

but this one is merely an empty assertion. There is nothing to render probable. To one who realizes the state of feeling on both sides, it is more credible that, in the case supposed, there would have been two sides feeling themselves ready for war. The side that believed itself the stronger would have considered it the moment to strike because it was ready, and the side that felt menaced would not have cared to postpone a struggle when such powerful aid was positively assured.

But it is vain to indulge in speculation when all such theories are incapable of conclusive proof. Lord Grey has rendered it unnecessary. He appeals to the facts and the documents upon which history will rest. Judgments about intentions must be controlled by actual performance. Here he takes his stand, and for history it is the only solid ground. It is probably true that the Central Powers felt that they had received provocations which justified them in appealing to arms. They had been suspected, irritated and offended and believed in their superior power. They thought that nothing but blood would give them satisfaction. Let all this be granted. It only carries us back to the realm of motives,—a realm that is supposed to be under the control of reason. But reason was not appealed to. An appeal to it was declined. It was action that began the war; and it is for action, not for motives, that men are held responsible by and to one another.

In the second volume, Lord Grey states his case regarding the conduct of Britain at the outbreak of the war and during its continuance. It is here that his statesmanship shines most brightly. It is impossible to doubt his sincere desire for the preservation of peace, nor can it be established that he failed to resort to the measures that were best fitted to preserve it. If he had previously failed to draw Germany into the Entente's partnership for peace, he at least endeavored to do it when, on July 29, 1914, he sent to the German Chancellor this message:

If the peace of Europe can be preserved, and the present crisis safely passed, my own endeavor will be to promote some arrangement to which Germany could be a party, by which she could be assured that no aggressive or hostile policy would be pursued against her or her Allies by France, Russia, and ourselves, jointly or separately. I have desired this and worked for it, as far as I could, through the last Balkan Crisis, and, Germany having a corresponding object, our relations sensibly improved. The idea has hitherto been too Utopian to form the subject of definite proposals, but if this present crisis, so much more acute than any that Europe has gone through for generations, be safely passed, I am hopeful that the relief and reaction which will follow may make possible some more definite *rapprochement* between the Powers than has been possible hitherto.

Lord Grey answers the question, Why did Great Britain decide upon war in the following words: "The real reason for going to war was that, if we did not stand by France and stand up for Belgium against this aggression, we should be isolated, discredited, and hated; and there would be before us

nothing but a miserable and ignoble future." Was England prepared for war? Lord Grey asserts, "For the first time perhaps in our history war found us with all the forces, naval and military, that we were believed or supposed to have, actually there, ready and mobile."

To readers of this JOURNAL the chapter on "America and the War" will be of special interest. It deals particularly with the question of contraband and the detention of American ships. "In all this," writes Lord Grey, "Page's advice and suggestion were of the greatest value in warning us when to be careful or encouraging us when we could safely be firm;" and he pays the memory of the American Ambassador this curious tribute:

One incident in particular remains in my memory. Page came to see me at the Foreign Office one day and produced a long despatch from Washington contesting our claim to act as we were doing in stopping contraband going to neutral ports. "I am instructed," he said, "to read this despatch to you." He read, and I listened. He then said: "I have now read the despatch, but I do not agree with it; let us consider how it should be answered!"

The chapters on "Allied Diplomacy in War" explain the origin of the "Secret Treaties" which caused President Wilson such astonishment, and illustrate how it is possible, even with a diplomatic service widely extended, for a nation to be totally ignorant for a considerable period of time of the uses made of the small Powers by the great, of the inhibitions which impart to diplomacy a fatality that appears to the outsider wholly inexplicable, and of the national jealousies and appetites for territorial advantages which initiate, deflect and frequently frustrate the real purposes of war.

DAVID JAYNE HILL.

The Constitution at the Cross Roads. By Edward A. Harriman. New York: George H. Doran Company, 1925. pp. xviii, 274. \$3.00.

As indicated in the subtitle, this book is a study of the legal aspects of the League of Nations, the Permanent Organization of Labor and the Permanent Court of International Justice. How far the Constitution of the United States may be affected by a decision in this country to participate in these organizations, the author asserts, is one of the vital questions of the day. The Constitution, he thinks, is at the cross roads. "In one direction leads the way of national tradition and absolute independence; in the other, the way of surrender of absolute independence of action in some degree to a federation of the world."

In his conclusions on this subject Mr. Harriman confines himself to the legal consequences of possible membership in these organizations, leaving it to the judgment of others whether or not it is desirable to incur these consequences. The task he here undertakes is to point out by means of an analysis of these international organizations precisely what their nature

is and how national independence might be affected by them. His aim is to show the American people that their Constitution is now at the cross roads between nationalism and internationalism.

First of all it is to be noted that the three organizations named in the subtitle of this book are creations of the Treaty of Versailles. The League of Nations is constituted by its Covenant, which is Part I of the treaty; the Permanent Organization of Labor is constituted by Part XIII of the treaty; and the Permanent Court of International Justice is constituted by the Statute of the Court, prepared and adopted in execution of Article 14 of the Covenant of the League.

Taking these documents as the basis of his analysis, the author proceeds to an exhaustive and almost meticulous examination of their contents, which with more or less closeness he compares with the contents of the Constitution of the United States, and occasionally with those of the Articles of Confederation which the Constitution was designed to supersede.

Mr. Harriman entertains no doubt that the international organizations which he describes constitute a government. To use his own language:

We are compelled, therefore, to recognize the fact that the League of Nations is a political society; that it is a legal person; that as such society, it possesses some control over its members; that as those members are independent sovereign nations, in creating a League, they have necessarily, and regardless of their intention or desire, created a super-state—that is, a new nation with certain powers of sovereignty, however limited, superior to those of the sovereign nations composing the League. Much argument has been spent to show that the League of Nations is not a super-state because its control over its members is so limited and so weak, but all such argument is not to the point. There is no escape whatever from the conclusion that the League of Nations, because it is a real society of nations, has some control over its members, for no society can exist without some such power of control. Such power of control over its members is inherent in its very nature in every society, but the extent thereof is dependent upon the objects and constitution of the particular society in question.

The nature and extent of the "control" over independent sovereign nations possessed by this confederation of states depend upon the obligations toward one another and the means of giving them effect which are accorded to the various organs of the society by its constitution.

It is of course impossible in this brief notice to follow the details of the author's analysis of the obligations assumed and the authority accorded in these international organizations. To appreciate this analysis as a whole, it is necessary to read the book itself. One inevitable impression results from this reading, namely, the inchoate character of these international constitutions as compared with a document like the American Constitution. The explanation of this difference is not far to seek. These international constitutions deal with matters which have not been clearly worked out

by experience anywhere. They have not only been prepared with relative haste, they are consecrated to relatively indefinite ends, and they are warped and deflected from those ends by the exigencies of group control.

The end aimed at by the League of Nations is "Peace;" that aimed at by the Permanent Organization of Labor, is "Social justice;" that aimed at by the Permanent Court of International Justice, is "Justice under law." Who will undertake to say that any one of these ends has been clearly defined? "Peace," in this scheme, is to be preserved by armed force; "Social justice" is to be sought in the interest of labor; "Justice under law" is to be arrived at by a court from which an improved and adequate law has been deliberately withheld.

These aims are deflected in each case by a special group control,—in the field of international peace by the League, to the exclusion of non-League members; in the field of industry by the Labor Organization, which emphasizes a single social interest; and in the field of justice by the League's Court, in which only members of the League, original or actual, participate.

As to the Permanent Court of International Justice, Mr. Harriman declares: "It is obvious that the Court is not a body independent of the League, but is the body which exercises the judicial power of the League just as the United States District Courts, created by Congress, exercise the judicial power of the United States" (p. 52); and he supports this view by the following:

A court is "A body in the government to which the administration of justice is delegated."

The term "court" is often loosely used. Tribunals of arbitration are not true courts, whether they are special tribunals or the Court of Arbitration organized by the Hague Conventions. The Permanent Court of International Justice, however, is not a tribunal of arbitration, but is a true court, because it is a body in the governments of the League of Nations and of the Permanent Organization of Labour to which the administration of justice is delegated by those governments. Being a true court, it administers the law of the two governments of which it is the judicial body.

Citing Chief Justice Marshall, "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power," Mr. Harriman declares:

The jurisdiction of the Permanent Court of International Justice, accordingly, is a branch of that which is possessed by the League of Nations and the Permanent Organization of Labour as independent sovereign powers. It has frequently been asserted that the Permanent Court is not a judicial branch of the League of Nations, but "an independent judicial body." Such a statement is merely a statement that the Permanent Court is not a court in the legal sense of the term.

And he concludes: "If a decision of the Permanent Court of International

Justice is not an act of the League of Nations, it is not a judicial decision, but the mere expression of an opinion by the members of the Court."

Is it true then that the League of Nations possesses sovereign power, and if so in what degree?

The author enters deeply into this subject, treating, in distinct chapters, of the Executive, Legislative and Judicial Powers of the League of Nations and of the Permanent Organization of Labor.

Mr. Harriman finds in these organizations traces at least of sovereign power, but he hesitates a little with regard to the application of the expression "super-state" (p. 48). His best justification for applying it to the League of Nations would perhaps be found, not in what the League can do to its own members, who have voluntarily accepted its obligations, but in what it claims the right to do, under Article 16, to states that are not members, in absolutely prohibiting their trade with a culprit member. By what authority, unless it is its own independent sovereign will, does the League override and annul the previously accepted legal rights of neutrals?

There is perfect consistency between the author's assertion that the Permanent Court of International Justice is a "true court," and his effort to find the attributes of sovereignty in the League. His conclusion is, no sovereign, no court; but, given a true court, there must be a sovereign. And if it is the League's Court, then the League is a sovereign power!

No doubt the idea of a court implies some relation to a government, or at least to governments. But why not to many governments as well as to one government, to many sovereignties as well as to one sovereignty?

Mr. Harriman goes so far as to say:

Certain opponents of the League admit their willingness to participate in a "World Court" which is not the League's court. . . . In the legal sense of the term persons who oppose a League court are opposed to any real court. . . . It seems reasonably clear that the Permanent Court of International Justice is the judicial body of the League of Nations, and is a true court and that its judges, however elected, are officers of the League of Nations. Persons who object to the Court on this ground, and demand a court independent of the League, are really objecting to any true international court, because a court without a Government is a legal impossibility (pp. 140-141).

The court in question is without doubt the League's court, because it has been created by the League in execution of an article of the League's Covenant, and is so named in the Statute of the Court; but does it follow from this that a "World Court" can not be created by several governments independently uniting to create it? Do they first have to create a sovereign league of some kind, in order to create an international court? Why may not several sovereignties combine to create a court?

Mr. Harriman appears at this point to have raised a controversial issue which it is not possible to discuss fully in this notice, but which will undoubtedly attract attention.

Can the whole relation of courts to governments be determined by so simple an expedient as Marshall's definition of "the jurisdiction of a court"? The Mixed International Courts of Egypt, with a dozen nations coöperating, have been in operation for fifty years. Would the Court aimed at by the project framed at the Second Hague Conference not have been a "true court," without any league, if a way had been agreed upon to appoint the judges? Why then must an opponent of the League's Court be opposed to any real court? The ground of objection to the League's Court is usually not that it is not a true court,—although as at present organized it is merely a tribunal for voluntary appeal,—but that the Permanent Court of International Justice is molded in the image of the League and its structure and powers are determined by the League's Covenant, the First Part of the Treaty of Versailles, which the United States has definitively refused to ratify.

Important remaining chapters of this book are those on "The Obligations of Members;" "Sanctions;" "Rights of Members;" "Rights of Individuals;" "Diplomatic Immunity;" "Mandatories;" and "Constitutional Amendments."

So far as the present writer has observed, the author of this book does not explicitly state, beyond what has been quoted from the Preface, in what definite particular the Constitution of the United States is at the cross roads.

It is, however, made perfectly clear that while the Constitution marks out for this nation a straightforward course of independent development, the international organizations here described and analyzed invite the United States to embark upon a line of future action involving unknown and incalculable deviations from the course so plainly indicated by the Constitution, which nowhere contemplates a surrender or a transfer of the powers which, under its safeguards and limitations, the people have confided to the Government of the United States.

An appendix contains the Covenant of the League of Nations, the Permanent Organization of Labor and the Statute of the Permanent Court of International Justice.

DAVID JAYNE HILL.

The Reawakening of the Orient and Other Addresses. By Sir Valentine Chirol, Yusuke Tsurumi, Sir James Arthur Salter. New Haven: Yale University Press, 1925. pp. vi, 176. Index. \$2.00.

The title of this volume is, as the title of most of the collected essays of the Institute of Politics must be, somewhat misleading. Anyone who expects to find even rumors of the stirring of the mutilated dragon of China will be disappointed. The East begins in this volume with Morocco and Egypt. Sir Valentine Chirol, in what are very close approximations to chapters from his book, *The Eastern Question*, takes the "Reawakening of the Orient" no

further than the boundaries of Egypt and the Sudan and of British India. It is very simply and very cleverly done, and there are some interesting asides on Turkey and the Near East. The problem of Egypt in its relations to England and to the British Sudan is put with some candor as to the economic background of the control of cotton and of the fertilizing waters of the White and Blue Nile. The résumé of the history of India under British rule and influence is interesting but elementary. The complications are honestly faced, even those that arise from the existence of two great and not always friendly religions in India, and from racial prejudices widely held in the empire against Indian immigration or equality of citizenship. Perhaps it was too much to expect in a necessarily popular exposition anything of the economic setting of Indian civilization, which has been recently summed up in brilliant fashion by an Indian economist.¹ Yet it is certainly more relevant to the difficulties of British rule than the caste system or even the clash of religions. Speakers before the Institute of Politics almost inevitably appear as apologists for their own nationalities. It is not strange that Sir Valentine should omit mention of the struggle of Indian nationalists to get control of fiscal policy and tariff rates, given the huge part that army expenditure and opium culture play in the former, and a struggle with Manchester in the latter.

Mr. Tsurumi is both more enlightening, and more interesting to Americans, in his descriptions of "The Liberal Movement and the Labor Movement" in Japan. He is perhaps unduly optimistic in his appraisal of the possibilities of liberalism. He himself feels that the American Immigration Act of 1924 was the most serious blow in years to Japanese liberalism, and he goes to the length of asserting that it has delivered over a promising labor movement into the hands of the Russian Bolshevik agents and their allies in Japan. The liberals naturally lost face in their policy of settlement by diplomacy, and the extremists of the labor movement could point to the exclusion clause as the natural result of capitalistic economy. To the liberal it was a slap in the face; to the radical, a welcome proof of the revolutionary socialists' interpretation of diplomatic history.

The analysis of Japan's new attitude toward China, a retrocession from her "vigorous foreign policy" to one of placation, is not less interesting. Whether or not "Japan's Cultural Work in China," which is tantamount to peaceful economic penetration behind a smoke-screen of modern propaganda, will be abandoned in the face of the most recent chaos in China, the fate of Mukden may bear witness. Apparently there has been a change of policy, if not a change of heart.

The third division of the volume has only the most indirect bearing on the Orient. Sir James Salter is interested in Europe first of all, and his whole thesis as to "The Economic Causes of War" is that Europe is an economic unit and that the last war and the present period of reconstruction have adequately demonstrated the folly of "an overnationalized system."

¹ *Economic Conditions in India*, by P. P. Pillai.

As a good European, he is anxious to ground the new system of the League on a sound understanding of the necessity of internationalizing the questions of surplus population and raw materials. Here he speaks as a good Briton, too; but it is curious that his contribution should be so totally blind to the economic threats in a reawakened Orient, titled as the volume is in which his essay appears—curious and disillusioning. May that not be the history of the next war? While the friends of the League keep their eyes on the boiling pot in Europe, the whole lid may be blown off in the East.

W. Y. ELLIOTT.

Das Völkerrecht. By Franz von Liszt, 12 ed., by Dr. Max Fleischmann. Berlin: 1925. pp. i—xx, 764.

The work of von Liszt has long been favorably received. The first edition appeared in 1898 and the 12th in 1925. Von Liszt died in 1919, and this edition is edited by Professor Max Fleischmann of the University of Halle.

Von Liszt intended in all editions to present international law as a system from the German point of view, and Dr. Fleischmann endeavors to maintain the spirit of von Liszt. In the eleventh edition, even though prepared in 1917 when war was general, von Liszt had shown a spirit of hopefulness for international law.

To the well known earlier editions, new sections have been added on such subjects as have since the death of von Liszt become newly or more significant. These sections touch on the World War, mandates, aerial matters, mixed international courts, protective measures for health and general well being, laws of war, rights of neutrals, reparations and other results of war. Naturally, plebiscites, submarines, reprisals, war zones, private property in war, and the recent doctrines of contraband and blockade receive attention.

In some points Dr. Fleischmann indicates disagreement with von Liszt, but in the main he has elaborated the work of the author, and brought it up to date. This is particularly true in the matter of bibliography.

The appendices of source material of about 170 pages cover a variety of subjects. Some of these documents will have for other than illustrative purposes only a temporary value. Here appear President Wilson's message to Congress of January 8, 1918, the Russo-German Convention of Rapallo, April 16, 1922, the German-Bulgarian Consular Convention of September 29, 1911, and like documents.

The index has been made much more full to correspond with the text.

GEORGE GRAFTON WILSON.

Superstition or Rationality in Action for Peace? By Prof. A. V. Lundstedt. London and New York: Longmans, Green & Co., 1925. pp. 239. \$4.50.

Literature critical of the foundations of what is termed the Law of Nations is growing in a manner which must soon challenge the attention of the masters of this science. Recently was published *The Lawless Law of Na-*

tions, by Professor Edmunds of St. Louis, and now we have the present little work written by a professor of Upsala, Sweden. The arguments of the two books are widely different, but the conclusions do not run far apart.

Professor Lundstedt discusses at length what he conceives to be the errors of the naturalistic school in social thought, dealing most largely in the earlier portion of his work with the application of his theories to the law of torts and of crime within the state. He denies that morality or any theory as to right and wrong can furnish a sufficient foundation for the law, and finds its basis in the welfare of the community. "Nothing," he says (p. 146), "but the public welfare can awaken and sustain an interest so general that law can be based upon it." The larger fraction of the work is devoted to this general thesis. While the writer admits that for the most part within the state nearly the same result is obtained either by what he considers the existing theory of natural right or by approaching the subject of law from his own point of view, yet he feels that the fundamental error involved in making supposed right or wrong the basis brings about evil consequences. When carried into international affairs he regards it as subversive of all order and inconsistent with a true conception of law. In reaching this conclusion he rejects the utilitarian theory by argumentation which one has difficulty in accepting. For usually while what is called natural law is based upon *a priori* conclusions as to right and wrong, the utilitarian in considering international law may limit himself to an examination of the natural reactions of nations to certain situations, and as such reactions involve possible good or evil to communities, deduce the laws which should control them and furnish sound foundations on which to build the Law of Nations.

Some of the author's conclusions may not be lightly ignored. For instance, he says (p. 173): "If it were a question of actual law as a basis for peace, then it would be of no consequence to the contents of the Peace Treaty which side won a war. Thereby it ought to be understood that the 'right' which is here dealt with is the opposite to the idea of right, namely, the power alone gained by the victor as a result of winning the war."

The author finds that today a country cannot openly refer to lust of power, chauvinism or considerations of economic gain as reasons for an act of violence against another country. It therefore disguises its motives under a claim of legal right which in some way has been infringed upon. But for this he thinks France and Germany would not have sought warlike equipment before the World War—France to recover Alsace and Germany to vindicate its God-given superiority.

The absurdity of punishing a nation as retribution for its sins—illustrated in the case by Germany—is indicated by pointing out that it is the tremendous mass of innocent individuals which is made to suffer for the offenses of a small body of rulers. This is because so-called international law sets up the nation as an artificial entity apart from its component elements, forgetting that it is nothing more than an aggregate of individuals. This

consideration, in the author's opinion, disposes of the fiction of sovereignty. "What," he asks (p. 209), "is the nature of the brain which considers that the moral blame of such a small number of people [the rulers] morally justifies the punishment of a wholly innocent nation?"

Based though it be on superstitions, the professor finds (p. 213), "There was not one belligerent Power which was not inspired by eagerness to fight with blood-stained weapons for that monstrous phantom which is called the Law of Nations?"

As may be inferred from the foregoing, the writer believes (p. 233) that, like municipal law, international law must "take its contents from what proves to be important for the maintenance and development of spiritual and material culture in a prospective world community."

We are thus prepared for his conclusion that at present, and without rejecting the superstitions surrounding and distorting the whole subject, codification (p. 236) "will do more harm than good," and a world's peace "can only flourish on the tomb of the idea of sovereignty and the other conceptions of the so-called law of nations."

The book is calculated to disturb the self-complacency of those who regard the Law of Nations as a finished science or even as a science at all. In compelling a re-examination of the foundations of current belief, whether or not itself as surely correct in detail as its author manifestly believes it, the work has a real value.

JACKSON H. RALSTON.

Les Mandats Internationaux. By Albert Millot. Paris: Émile Larose, Libraire-Éditeur, 1924. pp. iv, 255.

Le Mandat de la France sur la Syrie et le Grand-Liban. By Alphonse Joffre. Lyon: Imprimerie L. Bascou. 1924. pp. 150.

Both of these volumes, marked by the logical arrangement of material and careful attention to details characteristic of French political treatises, will serve a useful purpose in helping the student to detach the system of mandates from the diplomatic controversies which have attended its operation and to consider it in its legal and administrative rather than in its political aspects.

The volume by Dr. Millot, dealing with the more general issues involved in the question of mandates, begins with a historical survey of the establishment of the new system. Here, as is stated in the prefatory note by Professor Basdevant, the author could not draw upon the minutes of the Supreme Council, which were secret, but was able to work out his story from press reports and from the "generous indiscretions" committed by members of the American delegation. The account is most interesting and throws new light upon the motives and aims of the delegates, particularly President Wilson. The concluding sections show the effect of the subsequent inter-

vention of the United States in connection with the assignment of mandates by the Council of the League of Nations to particular states.

Part II undertakes to construct a general theory of the mandate system, and after defining the political status of the territories placed under A. B. and C mandates deals at some length with administrative problems and with the civil status of the inhabitants of the several territories under mandate. Other chapters deal with the economic equality secured to third states and with the status of religious missions. A lengthy appendix contains the texts of the various mandates and of the treaties entered into in connection with them.

Dr. Joffre's volume is written more particularly with French readers in view, to whom the author wishes to make better known the "New Syria" over which France is exercising a mandate. But in spite of its somewhat restricted outlook and its patriotic defense of the administration of the mandate it contains much useful material, presented in an unusually attractive style. The first four chapters deal with the geographic, racial, religious and economic features of Syria, with the agreements and treaties relative to the Levant, with the general nature of mandates, and with the establishment and administration of the particular mandate over Syria. More important to the American reader are perhaps the succeeding chapters on the Syrian Federation and the individual states which compose the federation. Here within brief compass the author gives us many useful details of the practical problems involved in the organization of a government adapted to so many divergent and conflicting elements; and in the face of the difficult task imposed upon the mandatory state one is almost tempted to forget recent scandals and to accept the author's conclusion that France may be proud of its rôle of benevolent guardian and Syria grateful.

C. G. FENWICK.

Das Geld in Theorie und Praxis des Deutschen und Ausländischen Rechts. By Arthur Nussbaum. Tübingen: J. C. B. Mohr (Paul Siebeck), 1925. pp. xv, 278. Index, M. 13.

The purpose of this treatise on the theory and practice of money under various legal systems, is a systematic exposition of the general economic principles of money as reflected in the legislative and judicial acts of modern commercial and industrial nations. The treatment of the subject is logically divided into two books.

The first book, entitled General Principles, discusses the traditional economic theories of money, with interesting comment by the author on points on which he differs from the views of some of the older writers in this field. The four chapters of the first book include such topics as, Concept of Money, Value, Debts, Money Equivalents, and concludes with an outline of the more recent course of currency legislation in Germany.

The second book treats of money problems in practice, and involves concrete application of the general principles enunciated in the first book. The

three chapters of the second book deal with subjects of such current international interest as Money Fluctuations and Their Influence on Floating Debts, Foreign Exchange Obligations, and Trade by means of Foreign Credit Instruments.

The second book is deserving of careful consideration by those interested in international financial questions and the varying policies adopted by the legislative, judicial, and administrative authorities of different nations in meeting problems essentially similar in origin. These policies have too frequently savored of political expediency rather than of sound economics. This has been especially true in the field of fiat money. The debtor classes, usually numerous, and always the exponents of cheap money, render ready support to the political opportunist for his specious doctrines.

In commenting upon the financial policies of different nations in periods of currency unsettlement, the author directs attention to the United States with its issues of depreciated greenbacks in the period of readjustment following the Civil War. He points out the bitter political controversy which raged over the constitutionality of the Legal Tender Acts, an issue on which the Supreme Court was divided in *Hepburn v. Griswold* (75 U. S. 603) almost simultaneously with the increase in the membership of that court from seven to nine.

The book shows evidence of careful preparation, a comprehensive knowledge of the subject matter, together with an intimate acquaintance with the many authorities in this field. Following the table of contents there is a four-page bibliographical note covering the legal literature on money in the industrialized nations. Among the Anglo-American authors in this field he mentions Laughlin, Garland and McGehee. Throughout the book there is a wealth of notes, references and citations tending to amplify the text.

The author, Dr. Arthur Nussbaum, has been for some years the Professor of Commercial Law and Civil Procedure at the University of Berlin. His legal training and academic experience have fitted him to make substantial contributions to this increasingly important field. Since 1916 he has written a number of treatises dealing with the legal aspects of various international economic questions. The present book is timely and deserving of attention by those desiring a brief but accurate orientation on international currency problems.

HOWARD S. LEROY.

Concise Bibliography of Hugo Grotius. By Jacob Ter Meulen. Leyden: A. W. Sijthoff, 1925. pp. 88. Index.

Liste Bibliographique de 76 Editions et Traductions du de Iure Belli ac Pacis de Hugo Grotius. Par Jacob Ter Meulen. Leiden: E. J. Brill, 1925. pp. 50. Table.

Dr. Ter Meulen, the learned librarian of the Peace Palace at The Hague, has put all students of Grotius under obligation for the excellent contribution to Grotian bibliography made by him as a part of the tercentenary celebra-

tion of Grotius. The *Concise Bibliography* will supersede the work of Rogge which appeared after the tercentenary of Grotius' birth. It is prefaced by a good summary of the life and genealogy of the founder of modern international law.

In his *Liste Bibliographique* of the 76 editions and translations of Grotius' *magnus opus* reprinted from the *Bibliotheca Visseriana*, Volume 5, Dr. Ter Meulen has done more than prepare a check list. Each edition is carefully described and identified. Comparing Dr. Ter Meulen's list with the check list of editions published in this JOURNAL (April, 1925, pages 259-262), it may be noted that the latter lists the same Latin editions with one omission, that of Jena, 1680, and to the translations listed Dr. Ter Meulen adds one French (Leyden-Lyons, 1760), and one German edition (Frankfort, 1721). Both of these bibliographic aids will be indispensable to the student of Grotius. In this connection it may be permitted to call attention to an article by Dr. P. C. Molhuysen published in the communications of the Netherlands Royal Academy of Sciences (Division of Literature, 60, series B, no. 1, Amsterdam, 1925), in which he shows that the first edition of the *De Jure Belli Ac Pacis* appears in two states, page 489 having been reprinted.

J. S. REEVES.

International Law in Ancient India. By S. V. Viswanatha. London, New York and Toronto: Longmans, Green & Co., 1925. pp. x, 214. Index. \$3.75.

The reviewer recalls vividly with what interest he read many years since certain passages from the *Ordinances of Manu* (as translated by Burnett and Hopkins) tending to show, on the one hand, the humane customs of warfare practiced by the ancient Indians (or at any rate recommended by the Brahman priesthood) and, on the other hand, their Machiavellian maxims or principles of diplomacy. Some of these customs and maxims were included in the historical section of the *Essentials of International Public Law* published in 1912 (No. 20, pp. 29-30 and notes).

And now appears a very learned little book by a Hindu scholar which shows conclusively that these and other relatively humane customs of warfare and Machiavellian principles of diplomacy formed part of the ancient political and legal systems of India which appear to have been widely practiced by the ancient Indian nation-states, at least since the earliest Vedic or Rig-Vedic period. It is, indeed, surprising to learn what an advanced and highly developed stage many of their ideas and customs both of international law and of diplomacy had reached. They compared very favorably (and in some respects were in advance) of modern ideas and practices.

This is particularly true of their rules of warfare. Thus, the rights of non-combatants and of those not participating in actual fighting

were very carefully guarded. Among those not to be slain in battle were: "Those who are sleeping, thirsty, fatigued, or insane; those who are flying or walking along the road; those who are engaged in eating or drinking; those who have been mortally wounded or extremely weakened by wounds; those who are in fright; those who are unfit for further action; those who are struck with grief; and those who are camp followers or doing menial services." Wholesale destruction and devastation (particularly the felling of fruit trees) were forbidden and, as a rule, non-combatants were exempt from the severities and barbarities of warfare. Only men in arms might be killed in battle; if captured, these were to be held as prisoners of war.

Levies en masse were allowed, but guerilla fighting was generally condemned. "Only such instruments were to be used as would barely bring about the disabling of the enemy. Weapons which caused unnecessary pain or which inflicted more suffering than was indispensable to overcome the foe, are condemned by all ancient authorities." (p. 149). Quarter was not to be denied. Real property was not to be confiscated, but the invader might enjoy the usufruct thereof. • Booty appears to have been freely taken and distributed, the king taking the lion's share. The enemy character of vessels was determined by their destination.

In the final chapter on "Neutrality" (Ch. X), the author shows that the conception of neutrality was more highly developed in ancient India than amongst the Greeks and Romans. Though there were no elaborate rules of neutrality, as in the case of warfare, alliances, or diplomacy, at least six kinds of intermediary relationships (between war and peace) are in evidence. Neutral goods that might be of use to the enemy were subject to capture. "The characteristics which determined contraband in ancient India were the quality of the goods and the nature of their destination." (p. 197).

The Machiavellian character of Hindu diplomacy is evident, though our author does not stress this point. He refers to the fact (p. 124) that "Kautilya has been styled the Indian Machiavelli" because his *Arthśāstra* "subordinates considerations of morality to experience and practical gain." This is certainly the essence of Machiavellianism. The Epics contain detailed regulations regarding diplomacy (p. 29). According to Kautilya, who is the main authority on this subject, "a watchful king, was to consider his immediate neighbor a natural foe. . . . The next king beyond his neighbor, . . . was his natural friend" (p. 33). Alliances were common, and the idea of the balance of power was not unknown. Permanent embassies were unknown, but the law of embassy was highly developed. In speaking of the Machiavellian character of Indian diplomacy, it should not be overlooked that war was regarded as a last resort and should be waged only if all other expedients of maintaining peace had failed.

On the whole, it may be said that this book constitutes a real contribution to the history of international law. It brings within our Western purview a considerable body of knowledge which should tend to broaden our horizon

and make us realize that there is much that is not new under the sun or exclusively European or Occidental. It is to be hoped that the author will soon be able to present us with his history of "Medieval Indian Diplomacy" which is to be a companion volume to this book.

AMOS S. HERSHEY.

Manuel de Droit International Privé. By André Weiss. 9th ed. Paris: Recueil Sirey, 1925. pp. xxxviii, 737. Fr. 30.

This book by Professor Weiss, now Vice-President of the Permanent Court of International Justice, was first published under a somewhat different title. It was accorded the Wolowski prize in 1888 by the *Académie des sciences morales et politiques*. It is designed primarily as a manual for the use of students. It may be found useful to a wider circle, however, when employed in connection with the author's voluminous treatise, in which the authorities are cited *in extenso*. Here the discussion advances systematically with less digression and with emphasis rather upon the statement of principles. The author presents the law of his own country governing nationality, as a sort of foundation for the entire topic, although he recognizes that it lies partially within the field of public rather than of private law. About one-third of the book is taken up with the various phases of the subject. The present edition adds material drawn from war legislation and also from the Treaty of Versailles so far as it is applicable to the inhabitants of the reconquered provinces.

In the main portion of the book, which deals with the conflict of laws proper, the author makes a comparison of the doctrines by countries. The principles of Anglo-American law in this field are considered by him to be much behind the times in comparison with the systems of the Continent, and this he believes to be due to the residual influence of the feudal period (p. 422). Whatever the opinion of the reader, he will doubtless absolve the author from patriotic bias, because in many respects he is most critical of French legislation. Thus he attacks the wisdom and the justice of Article 14 of the Civil Code, the effect of which is to give exclusive jurisdiction to French courts in actions between French citizens and foreigners, even though the French citizen be domiciled abroad. The author points out how easily this rule leads to international retorsion (p. 622). The lesson to be drawn would seem to be that the same rule which tends to maintain public tranquillity between states is also suitable for jurisdictional adjustments of private international justice—"suum cuique."

The author frequently makes use of the term *ordre public international* where the rule of public order or policy is not only strictly local, but where the accepted principle in many countries is quite contrary to the rule in France. Thus he employs the term to explain French law in its refusal to recognize the validity of divorces granted French citizens in foreign coun-

tries even where the parties are domiciled there, except for a cause recognized by French law (p. 527). This "embarrassing situation," as the author terms it, leads to results only too familiar to American lawyers. The remedial effect of the Hague Convention of 1902 no longer applies, as France denounced the treaty in 1913.

ARTHUR K. KUHN.

BOOK NOTES

The American Year Book, A Record of Events and Progress for the Year 1925.

The Macmillan Co. 1926. pp. i-xxxv, 1-1158.

The American Year Book was published annually from 1909 to 1919, when it was discontinued. It is now revived under the general supervision of the American Year Book Corporation constituted, as formerly, of national societies, of which the American Society of International Law is one. The scope of the book is indicated by its Divisions, which are as follows: Historical, American Government, Governmental Functions, Economics and Business, Social Conditions and Aims, Science Principles and Application, The Humanities, Chronology and Necrology. The Year Book has a division relating to international affairs as affecting the United States, touching upon the Foreign Service, debts, the Opium Conference, Arms Traffic, recent treaties, the United States and European relations, Latin-American relations, the Far East, World affairs, as well as a brief bibliography of recent books referring to such matters. Under national governmental questions, such topics as citizenship, naturalization, freedom of speech, electoral laws, governmental functionaries, administrative, judicial and executive affairs are treated.

In other parts of the book such matters as immigration, labor organization, discoveries, and the like, touch upon topics of international significance.

In bringing out a book early in the year, which will record the events and progress of the preceding year, there are always difficulties. In this book these difficulties have been excellently met, and the reappearance of the American Year Book is welcome upon the shelves of our annuals.

GEORGE GRAFTON WILSON.

Documental History of Law Cases Affecting Japanese in the United States, 1916-1924. Compiled by the Consulate General of Japan. San Francisco: 1925. 2 Vols., pp. ii, 413, vii, 1051.

This work consists of a collection of cases published without preface, and without textual comment. It is in two volumes, the first of which is entitled *Naturalization Cases and Cases Affecting Constitutional Rights*. This volume is divided into three parts, bearing as their respective headings, "Naturalization Cases," "Cases Affecting Constitutional and Treaty Rights," and the Appendix. The last contains the Constitution of the United States,

the Naturalization Laws of 1924, the Immigration Act of the same year, the treaty between the United States and Japan, signed at Washington on February 21, 1911; and an abstract of some sixteen pages "of Treaties and Conventions entered into between the United States Government and Foreign Governments in reference to Property Rights of Foreign Subjects." Volume two is entitled *Japanese Land Cases*, which include some forty cases, and an appendix containing the Alien Land Legislation of thirteen States of the Union.

The method of presentation of cases adopted in this work is unusually complete, including in general not only the decisions rendered, but such of the pleadings as are essential to a full understanding of the issues involved, as well as the briefs and arguments submitted by counsel. This compilation should be most helpful as a document of reference to all who have occasion to refer to the laws therein recited, their analysis and discussion by able counsel, and their interpretation and application by the courts.

CLEMENT L. BOUVÉ.

Le Droit Penal de la Rhénanie Occupée. By Pierre Huguet. Paris: Les Presses Universitaires de France, 1923. pp. 247.

This is an important contribution to the list, not over large, of works dealing with military but non-belligerent occupation of territory. The author writes from a practical point of view, facing as he did various problems of penal administration during his service as a member of the legal bureau of the French staff attached to the French Army in the Rhineland. The foundation of the legal system described is "the right of Germany's adversaries to take guaranties for the reparation of wrongs done for the security not only of immediate neighbors, but of the whole world, in the fear too nearly justified of a new attack" (p. 17), and thus a guaranty of military order against even future aggression by Germany. The work thus describes what may be considered as one of a past era, the organization, jurisdiction, and administration of the Inter-Allied High Commission of the Rhineland with special reference to the preservation of order, the prevention, prosecution, and punishment of crimes during the Rhineland occupation, and based largely upon official documents. It is to be commended as a careful piece of work. One should be on one's guard, however, in generalizing from it because the general situation was created by special treaty arrangements. There is still place for a general work treating of the various cases of military non-belligerent occupation not in any sense depending upon treaty arrangements, of which the American occupation of Vera Cruz is a conspicuous example.

J. S. REEVES.

International Maritime Committee. J. E. Buschmann, Antwerp, 1924-1925.

The International Maritime Committee Bulletins No. 66-71 cover par-

ticularly the matter of compulsory insurance of passengers which was brought before the committee at the session in Gothenburg in 1923, as well as propositions for an International Code of Affreightment, which was brought before the Gothenburg Conference, though earlier draft codes had been considered by the committee. Some of these matters are still under consideration, but the bulletins show the progress already made, as well as the proposed modifications and the discussions during the year 1924-1925.

The Unsolved Problem of the Pacific, A survey of international contacts, especially in frontier communities, with special emphasis upon California, and, An analytic study of the Johnson Report to the House of Representatives. By Kiyō Sue Inui. The Japan Times. 1925. pp. 1-3, 1-618.

The title of this book indicates its nature. The immigration question is considered in a temperate and reasonable spirit, saying "Japan is not objecting to immigration restriction but she is objecting to the manner in which the restriction is brought along through discrimination." More than one-half of the volume of 618 pages is given to appendices containing relevant treaty, legislative and other documents since 1854, which illustrate the points of view of the United States and Japan.

Theorie und Praxis des Völkerrechts. By Dr. Karl Strupp. Berlin: Verlag von Otto Liebmann, 1925. pp. xii, 212. Index. M. 8.50.

This book is an outline or syllabus intended for academic use and self-study. It includes carefully selected bibliographies and outlines of recent developments, such as the League of Nations, International Bureaus and Administrative Unions, and the Permanent Organization of Labor. It is a thoroughly systematic and scientific piece of work and should prove very serviceable to real students of international law. It could hardly be recommended for popular consumption.

REVIEW OF CURRENT PERIODICALS

BY CHARLES G. FENWICK

1. AMERICAN BAR ASSOCIATION JOURNAL, February, 1926

The Problems of the Law, by Roscoe Pound (pp. 81-87), while dealing more immediately with the difficulties involved in the resort to legislation to attain desired reforms in our national or local state life, contains many helpful observations which may be brought to bear upon the problem of the codification of international law. *The Advisory Function of the World Court*, by Albert R. Ellingwood (pp. 102-108), examines in detail the arguments recently advanced by Senator Borah and others against the entrance of the United States into the World Court if that body is to continue to exercise its advisory functions and reaches the conclusion that "in reality there is less reason why the World Court should not exercise the advisory function in connection with political questions than there is for the unwillingness of municipal courts to pass upon such questions." The discussion of political, as distinct from legal, questions is particularly interesting.

2. AMERICAN POLITICAL SCIENCE REVIEW, February, 1926

Latin America and the League of Nations, by Percy A. Martin (pp. 14-30), reviews the general effects of the abandonment by Latin America of the "traditional New World isolation" and makes special mention of the demand made by Bolivia upon the League of Nations for a revision of the treaty of 1904 with Chile and of the circumstances attending the withdrawal of the Argentine delegation from the meeting of the First Assembly of the League. In respect to the latter question he finds it difficult to arrive "at any satisfactory interpretation of President Irigoyen's intransigent attitude." The relation of the Monroe Doctrine to the stipulations of the League Covenant is discussed from various angles. While pointing out the theoretical possibility of conflicts between the two, the writer thinks that such an embarrassment is unlikely to arise in practice.

3. CANADIAN BAR REVIEW, November, 1925

The Dominions and Foreign Relations, by Sir Robert Borden (pp. 513-521), while primarily concerned with the relations of the Dominions to "the premier government of the Commonwealth," discusses incidentally the effect of the admission of the Dominions to membership in the League of Nations and emphasizes the conviction that "the influence of the Dominions upon foreign relations must be for the good of the Commonwealth and for the peace of the world." Since the Commonwealth "cannot go to war in sections," it will be wise for British statesmen to secure the concurrence of the Dominions in commitments which may involve the latter in war.

4. FOREIGN AFFAIRS, January, 1926

(See previous issue of this journal). A special supplement contains an address by Frank B. Kellogg on *Some Foreign Policies of the United States* (pp. i-xvii) in which the Secretary of State emphasizes the slow growth of American foreign policy and its development from a long line of international customs and treaty agreements which in part reflect the common policies of all nations and in part mark the distinctive attitude adopted by the United States. Among the special features of American foreign policy commented upon are the avoidance of participation in purely European political matters, the relations of the United States to China and the Far East, its attitude towards the payment of foreign debts and the making of foreign loans, and the admission of aliens under the immigration and visa laws.

5. GEORGETOWN LAW REVIEW, November, 1925

Codification of American International Law, by Thomas H. Healy (pp. 22-49), continues the discussion of the subject begun in the March number of the same journal and after calling attention to the recent action of the League of Nations, in respect to the general problem of codification, analyzes in detail the draft Pan American code prepared by a committee of the American Institute of International Law. The various projects are, in so far as commented upon, warmly endorsed, and the code as a whole is pronounced by the writer to be "a practical code drawn up by practical men as the basis of practical discussion between twenty-one of the most enlightened nations on the face of the globe."

6. MICHIGAN LAW REVIEW, January, 1926

Canada's Treaty Making Power, by C. D. Allin (pp. 249-276), is a careful analysis of the present legal relations between the Dominion and Great Britain in respect to the negotiation and ratification of treaties relating to Canada. The three schools of public opinion in Canada in regard to the assumption by Canada of independent treaty-making powers are described in their reactions to the recent treaties concluded with the United States and the writer observes in conclusion that "the struggle over the treaty-making power furnishes an excellent illustration of the mode in which the Imperial constitution expands to meet new situations, not through the long and difficult process of constitutional amendment or revision but through the simple adoption of new constitutional usages or conventions." In this instance there has been no formal renunciation on the part of the Imperial government of its jurisdiction; the Canadian government simply assumed jurisdiction when it had become evident that Canada could more effectively exercise it under the circumstances.

Ibid., February, 1926. *Rights of Non-Resident Aliens under United States Laws Regulating Foreign Trade*, by Boris M. Komar (pp. 370-390), calls attention to the discriminatory laws of the different countries by which

citizens and domestic corporations are given preferential treatment in regard to transportation rates and monopolistic combinations and examines in this respect the laws of the United States under the four divisions of common carriers, commercial combines, unfair methods of competition proper, and customs duties. The attitude of the United States is commended, but it is not, the writer thinks, likely to have of itself a wide influence, and "no permanent results tending to bring commercial competition in international commerce within the rule of law can be looked for without some concerted action by all the states participating in the struggle for the world markets."

7. UNIVERSITY OF PENNSYLVANIA LAW REVIEW, December, 1925

Economic Sanctions and International Security, by Amos E. Taylor (pp. 155-168), examines the provisions of Article 16 of the Covenant of the League of Nations and describes the proceedings taken by the Council and the Assembly of the League to make them effective. The powers of the Council under Article 16 are analyzed and attention is called to the fact that each member of the Council is to decide for itself whether a breach of the Covenant has been committed. In conclusion the effect of the Geneva Protocol upon the obligations incurred by Article 16 is shown and the consequent necessity which a naval power such as Great Britain is under of adjusting its naval policy to the "new conception of international law."

8. YALE LAW JOURNAL, November, 1925

Among the editorial Comments, *Further Developments as to the Effect of Soviet Decrees* (pp. 98-104) contains a brief survey of recent decisions with numerous references to cases in point.

Ibid., December, 1925. *Sovereign Immunity—The Modern Trend*, by Ernest Angell (pp. 150-168), undertakes a reexamination of the principles and reasoning of recent decisions involving suits brought in the courts of the United States by unrecognized foreign governments or by their citizens where a right is claimed under the authority of such unrecognized government, as well as suits in which government-owned merchant vessels are being libelled for tort, repairs or salvage service. In respect to the latter class of cases the writer finds that the rulings and practices of the federal courts and the Department of State do not "gear together" and that some more logical and more practical solution must be worked out.

Ibid., January, 1926. *Treaty Relations with Turkey*, by Edgar Turlington (pp. 326-343), surveys the rights of the United States under past treaties with the Ottoman Empire and in their light seeks to determine the significance of the new treaty of August 6, 1923, and its adequacy for the protection of American interests in Turkey under existing conditions. In conclusion the writer points out that if the pending treaty should not be ratified an anomalous situation will exist in which the capitulations will have been abolished by all the other capitulatory powers and it will be difficult for the

United States to assert claims under treaties which Turkey has denounced because of material change of circumstances.

Ibid., February, 1926. *The Obligations of Extinct States*, by Thomas Baty (pp. 434-437), is a brief note reiterating the writer's previously maintained thesis that the present Austrian Republic and the Russian Soviet Republic are not the successors at law of the defunct Austrian and Russian Empires on the ground that those former states simply ceased to exist as states and have been replaced by a number of new states, the present Austria being as new as any of the others. The provisions of the peace treaties in respect to the division of the Austrian public debt do not represent the application of an established rule of law but are merely a convenient treaty stipulation.

WHAT PARTS OF INTERNATIONAL LAW MAY BE CODIFIED?

BY WILLIAM LEDYARD RODGERS

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The discussions on the subject of the codification of international law at the 1926 annual meeting of the American Society of International Law made clear once more that matters as to which codification was conceivable fell into two broad classes, namely: Those affecting the international relations of states in their sovereign capacity and those affecting individuals in their international relations. It will be difficult to make law control in the first class of relations; it will be less difficult to do so in the second class.

When states in their sovereign capacity find a cause of dispute, the difference is often one which in its nature law is not apt to solve. Law is a rule of conduct enforced by the courts and by the executive. It is the proud assertion as to law that it is a rule of reason impartially applied. But it must be admitted that law is designed to operate on individuals. Its penalties are applicable to individuals. When, however, men cohere in groups to operate for a common purpose beyond the law, it becomes more and more difficult to control them by law as the size of the group increases.

As was just said, law is an affair of reason, but when men cohere in groups they are apt to be led by play upon their emotions and not by appeal to reason. The old established way of dealing with men in a state of emotion is by diplomacy, by persuasion and, finally, by force, but not by compulsion of law. If the group of men acting outside the law can not be persuaded by diplomacy to renounce their emotion and their contumacious attitude, the effective coercion to apply is not legal force, but martial force, as we see in the national dealings with strikes and riots, both in this country and abroad.

Passing from the consideration of temporary crowds to that of permanent organizations of nations, we are met by the same difficulties in the application of legal forms of control. When sovereign nations dispute, it is usually over some question in which the collective interests of the people are involved, or seem to be involved, and usually the real, if not the apparent, basis of the dispute is found to be in some economic rivalry. It is to gather the fruits of the earth in more abundance that nations clash in their sovereign capacity. As group interests excite mass-emotion, the situation passes beyond the control of reason and of law. These crowd-emotions may be reduced by skilful diplomacy until harmony is reached, or else martial methods must be held in threat or put in action to force agreement.

There are many jurists who hold that it is desirable that law should be made supreme in international relations. A layman may venture to dissent from this view. Law, in the sense that it is the ultimate, or finally fixed

recourse, is not supreme in municipal and national affairs, but it is subordinate to politics inasmuch as it is determined by, and expressive of, policies. It is not meant to disparage the rule of law nor its necessity; nor the necessity of obedience to the law of the day. But economics rules politics and politics makes the law. The chief preoccupation of every man is to earn his living and to make the conditions of his life as satisfactory as he can. For this purpose governments are established, and through politics men control governments and enact and enforce the laws which seem best to promote good order and prosperity.

As the systems of laws are subordinate to the economic and political conditions of nations, so in international relations the contracts, which, in the form of treaties, pass as international law, will remain subordinate to the economic requirements of states politically expressed through diplomacy.

It is much to be suspected that some of the great nations of the world are not anxious for a world rule of law, as we understand municipal law. They prefer freedom of diplomacy to settle matters as they arise rather than a court decision. It is the expressed purpose of the Court of International Justice to give impartial decisions. But aroused opposing nations can not both be satisfied by an impartial decision. Each disputant country wants what it wants when it wants it, and the national loser in a judicial decision will consider war (although it may reject it) as an alternative to accepting the loss.

In spite of all the high sounding language of publicists and foreign ministers, nations and governments are not moral creatures, but opportunists. Morals and morality are distinctive of individuals, but not of groups of men. Collective responsibility of a people weakens both the sense of national responsibility and of national morality. So when writers suggest that governments are guided by morality, it very often is a euphemism for the government's habit of "letting I dare not, wait upon I would." However, the enlightened expediency of governments is often in accord with the moral principles of individuals.

In international matters the first duty of every government is to its own people. It exists to preserve good order among them and to promote the prosperity of all its nationals to the extent of its power. In an international dispute it very seldom yields more than it must. In private morality we recognize upon suitable occasions the duty of self-sacrifice for public good or for that of others. But it is seldom that self-sacrifice is imperative, more often it is generous. But governments are trustees of their peoples. They have no right to yield the national interest except when unavoidable or for a *quid pro quo*. It seems to be the present feeling of the governments of great nations that it is their duty to maintain the prosperity of their peoples by diplomatic methods rather than to accept the rigidity of law which may require them at some future time to yield they know not what. Flexible diplomacy forming suitable balances of power to meet emergencies as they arise seems to them preferable to the conservatism of law, whose enactments

can not fail to lag somewhat behind the requirements of each new occasion. The great nations of the League preferred to act at Locarno rather than at Geneva, the home of the League.

The small nations place more hope in the rule of law for the preservation of peace and settlement of disputes than do the great nations. For although it is a tenet of international law that sovereign states are equal, yet it is only true in some respects. In practice there is great inequality among nations; some are great and powerful and others are smaller and weaker. As to the acceptance of a rule by international law completely codified and declared by a Court of International Justice, the smaller nations look more favorably on such an accomplishment, because in the nature of things they prefer to yield to a court's decision rather than to face the violence of a strong power.

But as for the great Powers, Russia, Germany, England, France, Italy, Japan and the United States, the situation is quite different. If they accept by treaty a code governing their relations, the progress of time and change in social and economic conditions may render the contractual engagement of the treaty very onerous to one of them, and if such a contract has the force of law, modification will be difficult without a revolution. An example from our own country is illustrative: In some of the older States in the United States, the constitutions drafted many years ago fixed the voting districts. The cities have grown more than the rural districts and an undue voting strength rests with the rural districts. As the city majorities do not think the situation is worth a revolution, it continues, for the minority has not yet shown a generosity or morality capable of the surrender of vested interests in deference to justice.

In the same way the great Powers of the world seem likely to cling to individual power as most conducive to the prosperity of the nation and to the maintenance of peace.

To be sure, diplomacy did not succeed in preventing the late war, but the law as expressed in the Covenant of the League has not done any better. Diplomacy, like other means of administration, is not perfect, but at least it averted general war at Algeciras in 1906, and again in 1911 it aborted the Agadir incident. These were great deeds of conciliation due to diplomacy, and we have no evidence that a code of international law and a court of international justice would have been more effective if they had then been in existence.

As an example of the unwillingness of great nations to accept the codification of those parts of international law governing the relations of states in their sovereign capacity, let us consider the Declaration of London. In drafting this code of maritime warfare, there were opposing views,—those of the continent of Europe and those of England. In the agreement as concluded, the Continental view had the advantage. It is said that England receded from her traditional position because the Liberal Government of the day expected England to be neutral in the next war, and in that case the

Declaration would favor her position as neutral. But when the treaty went before the conservative Upper House, the Lords refused assent because they believed England would probably take part in the next war, and as belligerent would wish to proceed in the old way. The employment and extension of the traditional English practice as to blockade and contraband in the war which opened a very few years later was regarded by some as a most important factor in winning the war for her and for us. It can not be said that the Allies would have lost the war had the Declaration of London been ratified, but it would very probably have been fatal to them to have observed it, and to have broken it would have lost them much prestige. The point is, that England retained freedom of action to her own advantage and that of the United States by refusing to assent to the codification of this branch of international law.

The conclusion seems to be that there is little reason to expect the acceptance of codification of international law in the branches dealing with the relations of sovereign states acting as national units for the economic or other interests of the collective body of their citizens. This branch of international law will not be codified because the great nations prefer a balance of power and a free hand for diplomacy; and this is shown by the course of events since the Armistice.

We come now to a more promising field for codification. It is where the accepted treaty of codification regulates the action of individuals by a law common to all nations. It is apparent at once how different are these matters from the differences of sovereign states who acknowledge no coercive authority about matters of national importance. Here it is the question of arranging a method of national coöperation rather than of adopting a plan for settling disputes in advance. The object is to reach international agreement as to a common law to be applied to the individual citizens of all nations for the greater good of the communities of all nations. It is a much simpler task.

In this coöperation of all nations for the same desirable objective, there are at least two classes of subjects which are capable of codification. In one class the difficulties arise from lack of any national rule, and the other is where the difficulties arise from diversity in the national laws. The committee appointed by the League of Nations is examining subjects in both these classes. If, and when, the committee arrives at definite conclusions, they will probably be submitted to the League for adoption.

Some Americans who do not desire to see the United States join the League of Nations are averse to any action in these matters under the auspices of the League, because they fear that such conventions would be drawn in terms disadvantageous to the United States; but nothing serious in this line is much to be apprehended because the subjects do not involve the competitive rivalry of nations. On the contrary, they are common rules to be applied to individuals of all countries that are sought. In such matters any fairly good rule identical in all nations is usually better for each nation than no rule

or diversity of national rules. It is individuals who profit to their own nation's disadvantage which these codes are meant to regulate. On such subjects the United States has already found means of working with the League without joining it, and will probably do so again, although it would be preferable to deal with codification through Hague Conferences, as has been the policy of the country heretofore.

As examples of the need of codification, we may take the case of control of products of the sea as an instance of the evil of no law, and that of disputed nationality as illustrating the difficulties arising from conflict of laws.

In the first case, we may take the particular instance of the whaling industry. The improvements in the technique of whaling and in steam transportation during the past generation are threatening the industry with destruction by extinction of the animal. All communities should desire continuance of the industry by proper restrictions against overworking it. But no nation will undertake national restriction of its own citizens to their loss, when men of other nationalities profit thereby. Common action restraining all is desirable for the maintenance of the industry for the general profit of mankind. An international code governing the whaling industry for its own preservation does not seem to offer insuperable obstacles.

As an example of the second type of cases in which a single international rule effected by concurrent national regulation is better than diversity of national laws, we may take the subject of nationality and naturalization. Here the conflict of state laws results in international controversy as to nationality, in dual nationality and in lack of nationality. It produces uncertainty in the application of law, although certainty is one of the most desirable elements in its administration. Yet, except perhaps as to national military service, no great national question is involved. Individuals are concerned as individuals only, and no matter what reasonable rule is adopted for general acceptance by all Powers, the interest of no one state would suffer so much as to outweigh the general advantage of simplicity and certainty arising from uniformity. Here also there is good hope for codification.

As a layman and one of the general public for whom all laws are made, there is one other point on which I venture to touch. There is a more or less prevalent assumption among lawyers that when international law is under discussion, international jurists are the people most capable of making the law. The correctness of this assumption is open to question. Whatever the point at issue may be, the accepted decision will affect the national action and regulate the conduct and business of citizens. The business men of the nation know best what laws they need, and in these days of democracy the public wishes to be ruled by representatives of its own. Jurists as such cannot have full knowledge of particular conditions relating to the subject to be placed under international treaty control. They must seek technical information. Moreover, if jurists are admitted to be the best people to frame treaties and revise international law, it is too likely that they will unduly advance their

own class views as to proper international relations, and will not always act as attorneys to promote the greater good of the whole nation.

It appears to me, as a member of the public, that the plenipotentiaries representing this country at any conference for the codification of any branch of international law should include three classes: namely, government representatives knowing what the public wants, technical delegates knowing how to reach the objective and how to meet the opposing proposals, and finally the legal delegates to see that the agreement is well and truly drafted. This suggestion is not intended to imply that these different fields of work are sharply divided; on the contrary, they often overlap, and there must be good coördination and coöperation. But the jurists' part does not seem to be superior to that of the others. For example, in the illustrative case of the whaling industry, mentioned above, the plenipotentiaries to a conference on this matter should include representatives of the government, of the whaling industry, of zoölogy, and of the law.¹ For the codification of uniform laws of naturalization, government representatives for the public and lawyers for the drafting would seem to be sufficient. Indeed, in this case, the government representatives would probably be lawyers, since for this subject the technical and governmental sides are legal matters.

As an example of the insufficiency of jurists to handle an international conference without technical assistance, mention may be made of the work of the Commission of Jurists at The Hague in 1922-23 to formulate rules of war for aviation and radio, at which the writer was present. This conference was summoned in obedience to a resolution of the Washington Conference of 1922. It is said that Mr. Elihu Root framed this resolution, and that he meant to take the making of rules of war out of the hands of military people. If such was his intention, he failed, even with jurists as plenipotentiaries. In the first place, the plenipotentiaries were representatives of their nations and were quite as intent on getting strategic advantage for their respective nations as they were on making war difficult. They were politicians as well as jurists. In the second place, the subjects dealt with war and the technical delegates knew better than the plenipotentiaries what the objectives of war were and how they might be reached. Consequently, the technical committees laid down the rules to meet the consensus of technical opinion of various nationalities, and when their drafts were referred to the plenary conference,

¹ The convention of 1892 between the United States and Great Britain for the protection of the seal herd about the Pribiloff Islands failed to protect the herd because the jurists appointed thereunder to draw up suitable regulations did not think it necessary to call for the commission of experts authorized by the convention, that they might tell the jurists what regulations would suit the conditions of seal life. The jurists settled the legal questions before them satisfactorily, and the treaty was legally precise but quite ineffective, because the American representatives did not know that the seals' fishing grounds were outside the treaty-protected area. The permanently protected area had a radius of 60 miles, but the feeding grounds were 100 miles at sea. Consequently, the day after the closed season ended outside the 60 mile radius, the naval guards began to hear the cries of starving pups on the beach.

the jurists did little more than correct the verbiage. Although in the aviation code, agreement was difficult on one important article, even there it was a technical divergence rather than a legal one. The result was a code satisfactory in substance to the military people and in due legal form. But the jurists did not make it, although they influenced it.

The conclusion suggested by the foregoing discussion is that codification is possible only in progressive steps, taking up different subjects separately and successively. At present nothing can be done by restating the accepted ordinary platitudes of international law, and little can be done by attempting to compromise or harmonize the divergent traditions of the policies and interests of great nations. The great nations will refuse to yield to the smaller nations' demand for a rule of law instead of the present rule of diplomacy. On the contrary, an international conference at The Hague, so often recommended, would very probably be able to deal successfully with all that class of subjects relating to uniform legislation for the control of individuals in their action affecting other nations and other nationals. However, even here, some subjects might have to be considered at a second conference.

ARE THE LIQUOR TREATIES SELF-EXECUTING?

BY EDWIN D. DICKINSON

Of the Board of Editors

In an earlier issue of this JOURNAL the writer called attention to some of the questions raised by the recent liquor treaties and among them to the question whether legislation is required to make Article II of the treaties effective. It was noted that there had been a contrariety of opinion among the lower federal courts on the question. And it was suggested, without elaborating an argument, that the article ought to be regarded as self-executing.¹ In the present comment it is proposed to take note of the cases bearing directly upon the question and to indicate briefly some of the considerations which will need to be weighed carefully before the answer can be regarded as finally settled.

Article II is substantially identical in all the liquor treaties concluded to date,² and for convenience the text as it appears in the convention with Great Britain may be taken as typical. It reads as follows:

(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.³

¹ See this JOURNAL, Vol. 20, pp. 111, 113-114.

² See this JOURNAL, Vol. 20, pp. 340, 342-343.

³ 43 Stat. L. 1761; also this JOURNAL, Supplement, Vol. 18, p. 127.

Numerous seizures of foreign ships have been made in reliance upon the above article and in several instances claimants have contended that the article is not self-executing. In the case of *The Pictonian*, a British ship had been arrested fourteen miles from the coast, while attempting, as it was alleged, to make contact with rum runners from shore, and had been libelled for violations of the Internal Revenue Act, the National Prohibition Act, and the Tariff Act, all by virtue of Article II of the treaty with Great Britain. It was objected that the acts alleged were not violations of law because Congress had not made them violations of law when committed beyond the three-mile or, at most, the twelve-mile limit. The United States District Court for the Eastern District of New York overruled the objection, holding that Article II was self-executing and required no further legislation to give it effect.⁴

In the case of *The Over the Top*, on the other hand, another British ship had been found hovering off the coast, selling liquor to small boats from shore, and had been arrested some nineteen miles from land and libelled for various violations of the Tariff Act. The United States relied upon a purchase of liquor made by a special agent of the government to bring the seizure within the one-hour zone. The District Court for the District of Connecticut held that the ship was not within the one-hour zone and that, in any event, the treaty was not self-executing.⁵ Judge Thomas said:

As a treaty, there was no need of congressional legislation to make it effective, and in this sense all treaties are self-executing. But if it was the intent of the government to make it a crime for a ship of British registry to unlade liquor within a sea zone on our coast, traversable in one hour, then that intent was not effectuated by the mere execution of the treaty. It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing.⁶

The more recent case of *United States v. Henning*, in the District Court for the Southern District of Alabama, was a criminal prosecution of the master and crew of a British vessel arrested sixteen miles off the Florida coast. The defendants were convicted of possessing, transporting and attempting to import intoxicating liquor into the United States in violation of the National Prohibition Act. In overruling a motion for a new trial, Judge Ervin said:

The effect of the treaty is to extend the territorial waters of the United States from three marine miles to the one hour's travel, as to the liquor laden vessel and persons on her, when the United States laws are intended to be violated.⁷

Still more recently the same question has been raised in a case decided by the United States Circuit Court of Appeals for the second circuit. *The*

⁴ (1924) 3 F. (2d) 145.

⁵ (1925) 5 F. (2d) 838. See 24 Michigan Law Review, 281.

⁶ 5 F. (2d) 838, 845.

⁷ (1925) 7 F. (2d) 488, 490.

Sagatind, a Norwegian steamer, had loaded a cargo of liquor in Belgium and cleared for St. Pierre, with instructions to proceed to a point off the coast of the United States, there to discharge the cargo as directed. About twenty miles off the New Jersey coast *The Sagatind* trans-shipped a quantity of the liquor to *The Diamantina*, a British steamer out of Halifax in ballast. It was not proved that either vessel ever came voluntarily within four leagues of the United States coasts. There was no evidence of contact with the shore and none that any part of *The Diamantina's* cargo had been landed in the United States, though the court was satisfied that it was intended to peddle the liquor along the coast. An agent of the Internal Revenue Service made a purchase of liquor from *The Diamantina*, both steamers were arrested more than twenty miles from shore, and vessels and cargoes were libelled for violations of the prohibition and revenue statutes. The United States District Court for the Southern District of New York dismissed the libels⁸ and the Circuit Court of Appeals affirmed the decrees.⁹ Delivering the opinion of the court, Judge Hough said:

We are not called on to consider the international effect of our hovering statutes or the power of Congress to prescribe what is commonly called the twelve-mile limit. Nor are we required to pass on congressional authority specifically to extend our customs, internal revenue and prohibition laws to a distance at sea measured by the speed of a hypothetical boat, for nothing of the kind has been attempted. But we do hold that no such extension of territorial jurisdiction is created by the treaty; in that sense the treaty is not self-executing, and on this point we cannot agree with *The Pictonian*, 3 F. (2d) 145, nor with *United States v. Henning*, 7 F. (2d) 488; but we do agree with *The Over the Top*, 5 F. (2d) 838, and *The Panama*, 6 F. (2d) 326, and the court below.

It appears, therefore, that to date two district courts have held Article II self-executing, two have held that it is not self-executing, and the Circuit Court of Appeals for the second circuit has approved the latter decision. A few scattered *dicta* have been divided. In no case has the question been carefully considered, and when it has had to be answered the answer has been given summarily without supporting reasons or authorities. It is submitted that the question is much too important, more because of its relation to the nature and scope of the treaty power than because of its immediate effect upon prohibition enforcement, to be thus summarily dismissed.

The Constitution of the United States provides as follows:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby;

⁸ *United States v. The Sagatind* (1925), 8 F. (2d) 788.

⁹ April 5, 1926. Unreported at the time of writing. Since reported in 11 F. (2d) 673.

anything in the Constitution or laws of any state to the contrary notwithstanding.¹⁰

And elsewhere the Constitution stipulates that the judicial power of the United States shall extend to "all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."¹¹

It has been evident from the first that it is perfectly possible, under the above constitutional provisions, to make law in the United States by exercise of the treaty power without aid from Congress. Speaking of the extradition of Jonathan Robbins under the Jay Treaty, in the House of Representatives on March 7, 1800, John Marshall declared that "the treaty, stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of Congress making the same declaration."¹² A year later it was Marshall's lot, as Chief Justice of the United States Supreme Court, to deliver the opinion of the court in the case of *The Peggy*. The Supreme Court held in that case that a French ship condemned in the circuit court as lawful prize on September 23, 1800, must be restored by reason of the treaty signed with France on September 30, 1800.¹³ "Where a treaty is the law of the land," said Chief Justice Marshall, "and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress."¹⁴

The classic statement of the principle was formulated by Chief Justice Marshall some years later in *Foster v. Neilson*, a case arising out of a suit to recover a tract of land in Louisiana in which the plaintiff relied upon a Spanish grant of 1804 and Article VIII of the Florida cession treaty of 1819 providing that grants of land should be "ratified and confirmed to the persons in possession."¹⁵ Delivering the opinion of the court, Chief Justice Marshall said:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty

¹⁰ VI, 2.

¹¹ III, ii, 1.

¹² *Annals*, 6th Cong., 614; *Crandall, Treaties*, 2d ed., 230.

¹³ (1801) 1 Cr. 103.

¹⁴ 1 Cr. 103, 110.

¹⁵ 2 Malloy, *Treaties*, 1651, 1654.

addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.¹⁶

In *Foster v. Neilson* the Supreme Court held that Article VIII of the Florida cession treaty was not intended to be self-executing; but this construction of the treaty was later repudiated, in *United States v. Percheman*, after comparing the Spanish text, and it was said that the treaty was intended to ratify and confirm prior grants *ex proprio vigore*.¹⁷ Similar treaty stipulations have been held in several instances to be decisive of private property rights without legislative interposition.¹⁸

The principle formulated in *Foster v. Neilson* is admirably epitomized by Crandall in the terse statement that, while treaties are the supreme law of the land, "they may either by their terms or from their nature require legislative action to give them full effect."¹⁹ In such instances Congress must execute them before they can be given effect by the courts.

Treaties not infrequently stipulate in terms that they shall be put into effect by legislative enactment. The agreement may be drafted briefly, and in very general provisions, leaving the details to be filled out by statute, or some of the contracting parties may be constitutionally incapable of making a self-executing treaty on the subject of agreement, or expediency may indicate that part of the subject only should be regulated in detail in the treaty, leaving the rest to legislation.²⁰ Whatever the reason for proceeding by this avenue may be, if the treaty by its terms requires legislative action to make it effective, the result is clear. The treaty is not self-executing.

Occasionally, as Crandall suggests, the nature of a treaty may be such that legislative action is required before it can become effective.²¹ Treaties

¹⁶ (1829) 2 Pet. 253, 314. See *Pollard v. Kibbe* (1840), 14 Pet. 353, 415; *Head Money Cases* (1884), 112 U. S. 580, 598; *Maiorano v. Baltimore and Ohio Railroad Co.* (1909), 213 U. S. 268, 272; 38 Cyc. Law and Proc. 961, 972. "Although a treaty is primarily a contract between nations it operates by virtue of Article VI of the Constitution as a municipal law and so far as it prescribes a rule by which rights of individuals under it may be determined the courts look to the treaty as they would to a statute for a rule of decision." Crandall, *op. cit.*, 160.

¹⁷ (1833) 7 Pet. 51.

¹⁸ See *Little v. Watson* (1850), 32 Me. 214; *Puget Sound Agricultural Co. v. Pierce County* (1861), 1 Wash. Terr. 159.

¹⁹ *Op. cit.*, 162.

²⁰ See the treaty with Russia of April 17, 1824, Art. V (2 Malloy, Treaties, 1512, 1513), and the Act of 1828 (4 Stat. L. 276); the Convention for the Protection of Submarine Cables of March 14, 1884, Art. XII (24 Stat. L. 989, 996), and the Act of 1888 (25 Stat. L. 41); the Convention for the Protection of Fur Seals of Dec. 14, 1911, Art. VI (37 Stat. L. 1542), and the Act of 1912 (37 Stat. L. 449); the Convention for the Protection of Migratory Birds of August 16, 1916, Art. VIII (39 Stat. L. 1702), and the Act of 1918 (40 Stat. L. 755), sustained in *Missouri v. Holland* (1920), 252 U. S. 416.

²¹ See the treaty with Spain of Feb. 22, 1819, Art. IX (2 Malloy, Treaties, 1651, 1655), and *Humphrey's Adm'x v. United States*, *Devereux's Court of Claims Reports*, 164.

requiring an appropriation of money are of this class.²² Legislative practice would indicate that treaties involving a modification of the revenue laws are also in the same category, though in principle the case is not so clear.²³ There are other kinds of treaties to which Congress has expressly given effect by law of which it can hardly be said, the question never having been adequately tested, that legislative interposition was necessary.²⁴

Generally, unless a treaty contains an express stipulation for legislative execution, or belongs to that exceptional category of treaties which cannot from their nature be given effect as law *ex proprio vigore*, it would appear that the question is simply one of construction. If the treaty was intended to be self-executing, it has immediately the effect of law. If not, it requires legislation before it can become a rule for the courts. Judge Thomas' remark in *The Over the Top*, quoted above, would seem to have been much too broad. A more reliable statement is that of Judge Putnam, delivering the opinion of the United States Circuit Court of Appeals for the first circuit in an earlier case.²⁵ Judge Putnam said:

An examination of the decisions of the Supreme Court on this topic will show there is no practical distinction whatever as between a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted with certain powers with reference thereto. The same may be said with regard to a treaty. Both statutes and treaties become presently effective when their purposes are expressed as presently effective.²⁶

Treaties intended to be presently effective may, without the aid of legislation, add territory to the United States,²⁷ supersede conflicting state²⁸ or federal statutes,²⁹ create exemptions from jurisdiction,³⁰ invest aliens with the privilege of entering the United States,³¹ or provide for the surrender of fugitives from justice.³² It has been suggested that treaties defining crimes

²² See Crandall, *op. cit.*, 164-182; *Turner v. American Baptist Missionary Union* (1852), 5 McL. 344, 347.

²³ Crandall, *op. cit.*, 183-199.

²⁴ See 4 Stat. L. 359; *In re Sheazle* (1845), 21 Fed. Cas. 1214, 1217; 9 Stat. L. 78; 2 Moore, Digest, 298; 9 Stat. L. 175; Crandall, *op. cit.*, 233 ff.

²⁵ *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.* (1906), 148 Fed. 31, (1907) 155 Fed. 842.

²⁶ 155 Fed. 842, 845.

²⁷ Crandall, *op. cit.*, 200 ff.

²⁸ *Ware v. Hylton* (1796), 3 Dall. 199; *Hauenstein v. Lynham* (1879), 100 U. S. 483; *Asakura v. City of Seattle* (1924), 265 U. S. 332; Crandall, *op. cit.*, 153-160.

²⁹ Crandall, *op. cit.*, 161.

³⁰ *Ibid.*, 235.

³¹ *Chew Heong v. United States* (1884), 112 U. S. 536.

³² See *United States v. Robins* (1799), 27 Fed. Cas. 825; *In re Sheazle* (1845), 21 Fed. Cas. 1214; *In re Metzger* (1847), 17 Fed. Cas. 232; *In the Matter of Metzger* (1847), 5 How. 176.

and extending criminal jurisdiction, although by nature self-executing, require legislation to make them effective because of historical traditions and constitutional interpretation.³³ But the evidence in support of such historical traditions seems meager; and really authoritative constitutional interpretation is lacking.

Forfeitures and the jurisdiction to decree forfeitures bear many resemblances to crimes and criminal jurisdiction.³⁴ There is an interesting example of the amplification of jurisdiction over forfeiture proceedings by treaty in the convention of 1862 with Great Britain for the suppression of the slave trade. The convention provided in detail for the reciprocal visit and search of suspected slavers in certain areas of the high seas, indicated what should be regarded as *prima facie* evidence of being engaged in the slave trade, provided for the return of persons arrested to the country of the ship's flag for trial and punishment, and incorporated instructions for ships employed in suppressing the trade and regulations for the mixed courts to be set up at Sierra Leone, Good Hope, and New York to entertain forfeiture proceedings.³⁵ The treaty with its annexes occupied eleven pages of the Statutes at Large. The statute passed to give effect to the treaty occupied only one-half page and did but little more than to authorize the appointment of judges for the mixed courts and fix their salaries.³⁶ Apparently the treaty was assumed to be self-executing as to its more detailed provisions.

Another interesting illustration of the fixing of jurisdiction in forfeiture proceedings by treaty was passed upon by the Supreme Court in the case of *United States v. Forty-Three Gallons of Whiskey*, decided in 1876. An act of 1834, as amended by an act of 1864,³⁷ prohibited with appropriate penalties and forfeitures the introduction of liquor into the Indian country and the sale of liquor to Indians. Article VII of a treaty of cession of 1863 with the Chippewa Indians provided that "the laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States."³⁸ The case arose out of a proceeding to forfeit a quantity of liquor alleged to have been introduced into Crookston, Polk County, Minnesota, with intent to sell to the Chippewa Indians. It was objected that the liquor had been seized in territory

Cf. In the Matter of Metzger (1847), 1 Barb. 248. The cases cited arose before the Act of 1848, in 9 Stat. L. 302. See also *United States v. Rauscher* (1886), 119 U. S. 407, 419; *Charlton v. Kelly* (1913), 229 U. S. 447, 464.

³³ Wright, *Control of American Foreign Relations*, 355; also this JOURNAL, Vol. 12, pp. 64, 83.

³⁴ See 36 Harvard Law Review, 609.

³⁵ 12 Stat. L. 1225.

³⁶ *Ibid.*, 531.

³⁷ 13 Stat. L. 29.

³⁸ *Ibid.*, 668.

subject to the jurisdiction of Minnesota and not in or near any Indian country. The court below sustained a demurrer, but the Supreme Court reversed the court below and directed that the demurrer be overruled.³⁹ Delivering the opinion of the court, Mr. Justice Davis said:

The power to define originally the "Indian country," within which the unlicensed introduction and sale of liquors were prohibited, necessarily includes that of enlarging the prohibited boundaries, whenever, in the opinion of Congress, the interests of Indian intercourse and trade will be best subserved.

It is true, Congress has not done this; but the Constitution declares a treaty to be the supreme law of the land; and Chief Justice Marshall, in *Foster and Elam v. Neilson*, 2 Pet. 314, has said, "That a treaty is to be regarded, in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." No legislation is required to put the seventh article in force; and it must become a rule of action, if the contracting parties had power to incorporate it in the treaty of 1863. About this there would seem to be no doubt. From the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations, dependent, it is true, but still capable of making treaties.⁴⁰

The recent liquor treaties do not by their terms stipulate for legislative execution. The only express reference to legislation is the stipulation in Article VI that the treaty shall automatically lapse if either party is prevented from giving full effect to its provisions by judicial decision or legislative action.⁴¹ There is nothing in the nature of Article II which requires legislative interposition. It would seem, therefore, that whether the article is self-executing or not is to be determined solely by construction.

The construction of Article II requires at the outset a thorough understanding of the peculiar situation with which the treaties attempt to deal. It must be appreciated that there is no international usage or agreement defining precisely either the extent of territorial waters or the scope of jurisdiction for various purposes in the marginal seas.⁴² While the American executive has upheld the three-mile limit with a degree of consistency, and American courts have adopted it from time to time on appropriate occasions, there is an absence of general agreement on the three-mile or any other line. Though widely approved as marking the minimum extent of territorial claims, the three-mile line is neither an all-sufficient nor an arbitrary boundary.

³⁹ 93 U. S. 188.

⁴⁰ 93 U. S. 188, 196.

⁴¹ Query: Will the treaties lapse under Article VI if the decision in *United States v. The Sagatind*, *supra*, is approved and Congress fails to act?

⁴² See Crocker, *The Extent of the Marginal Sea* (1919); Paulus, "La mer territoriale," *Revue de Droit International*, 3d series, V, 397 (1924); Wilson, *Les eaux adjacentes aux territoires des états* (1925); and this JOURNAL, Vol. 20, pp. 340, 341-2.

In this situation, for the prevention of liquor smuggling, Article II redefines certain jurisdictional limits in the marginal seas. It creates no new inhibitions, but at most attempts to make existing inhibitions, with the penalties and forfeitures already prescribed by law, effective in the newly defined zone. To say that this cannot be accomplished by treaty in the United States would be to recognize an unprecedented limitation upon the treaty power. To conclude that it has not been done by these treaties would be to adopt an interpretation leading to some rather extraordinary results.

The provision in Article II that the other contracting state will "raise no objection" to visit and search in the one-hour zone eliminates the only serious jurisdictional obstacle. It is clear that the executive may go ahead, in reliance upon the treaties, to visit, search, and seize. It may visit, search, and seize, not only those foreign vessels which have committed or are committing an offense within United States territorial waters, but also those which are attempting to commit an offense. Unless the treaties make the inhibitions of United States revenue and prohibition laws effective in the one-hour zone, there must result a rather extraordinary situation in which the executive is expressly authorized by international agreement to search and seize foreign vessels which are guilty of no offense. Such a situation is not lightly to be assumed if the liberal principles of interpretation always invoked in construing treaties may fairly lead to a different result.

It is perhaps of some significance that Article II is drafted in rather obvious contrast with Article IV, which clearly is not self-executing, and that it is followed by Article III, embodying the *quid pro quo* for the concessions made, which is just as obviously a self-executing stipulation. It is some evidence of the treaty-making authority's intention and understanding that these treaties were concluded and promptly invoked as law without seeking aid from Congress. There can be little doubt, indeed, that the treaties were expected to facilitate the suppression of smuggling at once and without further legislation.

It is unfortunate that the liquor treaties could not have been less ambiguously drafted. It will be equally unfortunate if the question of their effect is decided without a thorough examination of all aspects of the problem. It has not been possible within the compass of this comment to subject the treaty texts to the close analysis which they require, nor to do more than sketch the precedents which deserve to be studied. It is hoped that enough has been written to suggest that the problem is one which merits a more searching consideration than it appears to have received thus far, either from the executive departments or from the courts.

THE MOSUL DISPUTE

BY QUINCY WRIGHT
Of the Board of Editors

The Mosul dispute involved the disposition of some 35,000 square miles of territory with a population of about 800,000. Iraq's claim to the territory had been substantially supported by the unratified Treaty of Sèvres, but no agreement being reached at Lausanne in 1923, the treaty there negotiated and later ratified provided for maintenance of the military *status quo* and submission to the League of Nations Council, if nine months further negotiation proved fruitless.¹ Under this article, the League Council was seised of the dispute, on request of Great Britain, August 6, 1924, and gave a decision on December 16, 1925, awarding the territory to Iraq provided Great Britain negotiate a new treaty with that state ensuring the continuation of the mandate for at least twenty-five years, unless Iraq becomes a member of the League at an earlier date.²

The Council's consideration of the question proceeded in three stages. At Geneva, in September, 1924, it authorized a technical commission to investigate the facts of the disputed area on the spot (M. Wirsén, Swede, chairman; Count Teleki, Hungarian; Col. Paulis, Belgian) and at Brussels, in October, it appointed a Council committee to attempt mediation and report on the question (Sweden, *rapporteur*, Spain, Uruguay), and fixed a provisional frontier line slightly south of the northern boundary of the Turkish vilayet of Mosul defining the military *status quo*.³ At Geneva, in September, 1925, it examined the Wirsén commission's ninety page report recommending the Brussels line provided Great Britain retained the man-

¹ "The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months.

"In the event of no agreement being reached between the two governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations.

"The Turkish and British Governments reciprocally undertake that, pending a decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision." Treaty of Lausanne, Art. 3, par. 2.

² League of Nations Monthly Summary, Dec. 1925, Vol. 5, pp. 325-326. The new treaty was promptly negotiated, was approved by the British Parliament on Feb. 18, 1926, and the disputed territory was finally awarded to Great Britain by the Council on March 11, 1926. Great Britain then began negotiations with Turkey which resulted in the signature of an agreement on June 5, 1926, whereby Turkey recognized the boundary with slight rectifications in return for 10% of Iraq oil royalties and neutralization of the frontier. The Iraq minister of war signed the agreement as well as plenipotentiaries from Great Britain and Turkey.

³ League of Nations Official Journal, Oct. 1924, pp. 1291, 1360, 1463; Nov. 1924, pp. 1659, 1670.

date for twenty-five years, and accorded cultural autonomy to the Kurds, requested an advisory opinion of the Permanent Court of International Justice on the Council's powers and procedure under the Lausanne Treaty, and dispatched another special commission (General Laidoner of Esthonia) to the Mosul frontier to report on alleged violations of the military *status quo*.⁴ At Geneva, in November and December, 1925, it examined the Court's advisory opinion holding the Council competent under the Lausanne Treaty to give a final decision by unanimous vote, not counting the votes of the disputing states, examined General Laidoner's report holding that Turkish action north of the Brussel's line was of a character to cause "agitation and nervousness" among the Christian population south of that line, and accepted a report of the committee of three holding that the Council being competent by the Court's opinion, and mediation having failed, a decision should be given substantially in accordance with the Wirsen commission's report.⁵

Apart from settling the dispute, the discussions have served to clarify certain knotty questions of procedure in the Council and the Court and to illustrate some tendencies in the progress of pacific settlement of international disputes.

The controversy was undoubtedly looked upon as an important one by both Iraq (represented by Great Britain) and Turkey, and in both cases national integrity seems to have been the most important consideration.⁶ Iraq felt that if the Turkish frontier were advanced beyond the natural barrier of the mountains, she would be unable to prevent further advances. In addition, the fact that the Mosul area supplies wheat, road-making material and sources of water necessary for irrigation upon which central and southern Iraq's agriculture is dependent, was important.

Turkey, on the other hand, regarded Mosul as within the terms of her National Pact of 1920,⁷ all other parts of which had been achieved. Furthermore, she was afraid that Kurdish nationalism would thrive in Mosul under the British mandate policy, with a consequent disturbing effect upon her own large Kurdish population.

The prospect of oil in the area increased the eagerness of each to possess it, but this consideration seems to have been less important than the others mentioned.

Study of the relative needs of each country for the area for strategic, political or economic reasons throws little light upon the legal title to it, but each did present a legal claim. Iraq claimed it on the ground that it had

⁴ *Ibid.*, Oct. 1925, pp. 1310, 1377, 1383, 1434.

⁵ League of Nations Monthly Summary, Dec. 1925, Vol. 5, p. 325.

⁶ This opinion is based on personal conversations in Iraq and Turkey during the fall of 1925, as well as upon the Wirsen commission's report and statements of the British and Turkish representatives at Geneva.

⁷ Printed in *Current History*, Nov. 1922, p. 280.

been historically considered part of Iraq, had been administered from Bagdad in Turkish times and had been occupied by British and Iraq troops during the war. To these arguments the Wirsén commission attached little weight. The geographical meaning of Iraq was vague. Though the Turkish vilayet of Mosul had been administered from Bagdad, its boundaries were not exactly coincident with the disputed area. Military occupation does not give title unless recognized by treaty or long acquiescence, especially when established after the armistice, as was partly the case here.⁸

Turkey claimed sovereignty of the area on the ground that she had had it and had never renounced it. With this the Wirsén commission agreed. "The commission," it said, "is of the opinion that from the legal point of view the disputed territory must be regarded as an integral part of Turkey until that Power renounces her rights," adding that "it did not feel competent to decide what weight should be given to these legal considerations," but would leave them to the Council.⁹ This was undoubtedly a very strong point for Turkey, and the Council seems to have considered asking the Court's opinion on it. This was not done directly, but it would seem that the Court's opinion, holding that Turkey had by the Lausanne Treaty given the Council final power to determine the boundary, effectively disposed of it. By the treaty Turkey clearly had renounced all title to territory south of that prospective boundary.¹⁰

Thus the Council concluded that legal title to the area was in suspense pending its decision, and indeed the fact of submission of the dispute to such a political body as the League Council would be evidence that the parties themselves agreed to this.

The decision was actually based mainly on the principles of nationality and self-determination which have been increasingly popular as principles of political settlement during the nineteenth century and especially since the world war. The Turks apparently recognized the propriety of these principles in demanding a plebiscite, but the British said a plebiscite would be impracticable in view of the social and educational conditions of the people and would add nothing to the information already available on their national character and wishes. In this the Wirsén commission, after investigation, agreed with the British and found that ethnologically the Kurds, who were the dominant element, were neither Arabs nor Turks, but an Aryan people, and that they preferred to remain with Iraq, provided they could count on the security and cultural autonomy assured by continuance

⁸ League of Nations, *Question of the Frontier between Turkey and Iraq*, 1925 (cited Wirsén Commission report), pp. 24-29, 58-60, 84-85.

⁹ *Ibid.*, p. 88.

¹⁰ *Supra*, note 1. By Art. 16 of the Lausanne Treaty, "Turkey hereby renounces all rights and titles whatsoever over or respecting the territories situated outside the frontiers laid down in the present treaty." See statement by Amery, British representative, League of Nations Official Journal, Oct. 1925, p. 1311, and by Tefvic Rouschdy Bey, Turkish representative, *ibid.*, p. 1381.

of the British mandate. The Arabs in the region who favored Iraq were more numerous than the Turks. The Christians, Yezidas, and Jews also favored Iraq, but, like the Kurds, wished continuance of the British mandate.¹¹

This conclusion, coupled with the greater strategic and economic importance of the area to Iraq, and its geographic and historic unity which counseled against a partition, was the basis of the Wirsén commission's recommendation and of the Council's decision.¹² The British wish to have a small bit of territory north of the Brussel's line included in Iraq to settle the Assyrians whose home it had been, was not seriously considered either by the commission or the Council because of the late date at which it was manifested and the general recognition that it was not in the disputed area.¹³

With this exception, the decision favored the British-Iraq point of view, and the Turkish Government at first refused to accept it on the assumption that the Treaty of Lausanne contemplated mediation, not decision by the Council.¹⁴ It considered itself competent to repudiate the commitment of its representative, Fethi Bey, made in the Council in September, 1924,¹⁵ because this commitment had never been ratified by the Turkish Grand National Assembly, which alone had power to bind the Turkish Government under its constitution.¹⁶ Though the government, if not the state, is generally considered bound by the political commitments of its authorized agents, doubtless a right of repudiation exists within a reasonable time.¹⁷ In any case, the British case rested on the treaty rather than on Fethi's statement, and the Court whose advisory opinion was asked seems to have had sound legal grounds for finding that by the treaty, which had been ratified by the Turkish Grand National Assembly, Turkey had agreed in advance to accept the Council's decision.¹⁸

Treaties, it held, should be interpreted first from the text, and it found the meaning of Article 3, paragraph 2, clear when read in the light of the general purpose of the treaty. Not mediation or recommendation, but decision by the Council, was intended. Thus, examination of the negotiations, or of subsequent practice, as evidence of the intention of the parties, was not necessary, though in the Court's opinion both sustained its view.

¹¹ Wirsén Commission Report, pp. 31-53, 75-78.

¹² *Ibid.*, pp. 86-89.

¹³ *Ibid.*, pp. 79-83. See statement of Amery, British representative, *loc. cit.*, p. 1315.

¹⁴ League of Nations Monthly Summary, Dec. 1925, Vol. 5, p. 325.

¹⁵ League of Nations Official Journal, Oct. 1924, pp. 1337-1338, 1358-1359.

¹⁶ *Ibid.*, Oct. 1925, p. 1381.

¹⁷ Wright, *Control of American Foreign Relations*, pp. 44, 235. Where the agent's commitment recognizes a responsibility, it is of a more binding character than where it makes an agreement. *Ibid.*, pp. 58-65.

¹⁸ Permanent Court of International Justice Publications, Series B, No. 12, Nov. 21, 1925. See Hudson, this JOURNAL, Vol. 20, pp. 19-24; League of Nations Monthly Summary, Vol. 5, p. 278, Nov. 1925.

The strongest Turkish argument, based on a statement of Lord Curzon in the first Lausanne conference,¹⁹ was not considered pertinent because it dealt with a different text from that adopted, and was made under wholly different circumstances from those which surrounded the negotiations which led to the actual treaty. The further decision that, when disputes are submitted to such a body as the Council, with an established organization, powers, and procedure, these will be considered applicable, unless expressly altered by the treaty, seems to flow from the accepted principle that treaties ought to be construed in harmony with existing international law and treaties involving third parties, so far as possible.²⁰ Thus the procedure of Articles 15 and 17 of the Covenant, requiring unanimity of vote but not counting the votes of the disputants for effective recommendations, was to be applied even though the Treaty of Lausanne gave the recommendation the character of a decision in this case.²¹

These and other procedural questions decided during the controversy are of more than passing interest. International institutions differ from national institutions in that their powers and procedure flow, not only from their organic acts, but from special treaties. It would not be considered proper for a national court or parliament to extend its competence or modify its procedure because two or more individuals had made a contract requesting it to do so with respect to a controversy between them. There is perhaps some analogy to such a procedure in the occasional agreements between organizations of labor and capital appointing the President, or some other official, arbitrator or mediator between them; but, strictly speaking, the official accepting such a mission would not act in an official but in a merely personal capacity. The powers and procedure of national institutions are established by general law and can be changed only by general legislation.^{21a}

¹⁹ See British Parl. Pap., Turkey No. 1 (1923), Lausanne Conference, p. 401, where Lord Curzon, British representative says: "Article 5 of the Covenant provides that the decisions of the Council upon which the Turkish Government will be represented will have to be unanimous so that no decision can be arrived at without their consent." See also, League of Nations Official Journal, Oct. 1925, p. 1380.

²⁰ Wright, "Conflicts between International Law and Treaties," this JOURNAL, Vol. 11, p. 579, July, 1917.

²¹ Great Britain had urged that as the decision had the character of an arbitral award, the majority rule, usually applied in arbitrations, should prevail. See also, *infra*, notes 33 and 34.

^{21a} Commercial arbitration agreements are not an exception because such agreements do not modify the powers or procedure of courts; they merely waive certain rights of the contractants. (*Hood v. Hartshorn*, 100 Mass. 117; *Hamlyn & Co. v. Tahsker Distillery*, L. R. (1894) A. C. 202.) Some early common law decisions held such agreements invalid, because they ousted the courts of jurisdiction (*Vymor's Case*, 8 Coke 81 (1609); *Riley v. Jarvis*, 43 W. Va. 43) but these have been reversed by British courts, and while the old rule prevails at common law in the United States, statutes have set it aside in many states. (Mich. L. R., Vol. 23, p. 882.)

International institutions, however, generally accommodate themselves to special agreements between the parties, and in the absence of a world legislation it seems expedient that they should. Thus the powers, organization and procedure of commissions of inquiry and tribunals of arbitration set up under the Hague Convention for the Pacific Settlement of International Disputes have often departed from the terms of that convention because of such special agreements.²² The same is true, but to a smaller degree, of the Permanent Court of International Justice, which has compulsory jurisdiction of many disputes because of special treaties, though none is given it by its Statute.²³ Furthermore, the procedure of advisory opinions, wholly unmentioned in the Statute, has been conferred upon it by an outside agreement, the League Covenant.²⁴ So also, the League's organs may be given special powers by treaty, as was done by the Court statute (Article 4), which gives the Council and Assembly power to elect judges and as was done in this case by the Treaty of Lausanne. Articles 15 and 17 of the Covenant confine the Council's powers to recommendation, though if unanimous except for the litigants, the members of the League agree not to go to war with any party which complies with such recommendation.²⁵ The Treaty of Lausanne went even further, in the Court's opinion, and converted such recommendation into an award, and the Court recalled that a similar effect had been agreed to before submission of the Upper Silesian question.²⁶

It must be noticed that the difference between international and national organs in this respect is more apparent than real, because in each of the

²² The *compromis* in the Dogger Bank inquiry extended the commission's functions to location of responsibility and degree of blame (Art. 2) in spite of the limitation of the functions of such commissions to "a statement of facts" by the convention (1899, Art. 14, 1907, Art. 35). In the *Grisbadarna Case* two of the three arbitrators were not members of the Permanent Court, though the convention (1899, Art. 24, 1907, Art. 45), said they "must be chosen from the general list of Members of the Court." See Scott, *Hague Court Reports*, pp. 121, 411.

²³ De Bustamente, *The World Court*, pp. 207-218; Fachiri, *Permanent Court of International Justice*, pp. 71-89.

²⁴ *Infra*, note 28.

²⁵ This differs from a binding decision in that the members of the League are not obliged to apply the sanctions of Art. 16 to enforce it, as they are in the case of arbitral or judicial decision under Art. 13 of the Covenant. However, if any party to the dispute fails to comply with the recommendation, the other has the right of self-help after expiration of the period contemplated in Art. 12, and the recalcitrant state is bound not to resist by going to war. If it does resist and a war results, the sanctions of Art. 16 forthwith become applicable against it. As a non-member accepting the League procedure under Art. 17 becomes a member for that case, the same rules apply to it, "with such modifications as may be deemed necessary by the Council."

²⁶ The request in this case came from the Supreme Council, authorized by Arts. 87 and 88 of the Treaty of Versailles to fix the frontier, and referred to Art. 11, par. 2, of the Covenant. That article gives less authority to the Council than Arts. 15 and 17. See *Minutes of Extraordinary Session of the Council on the Question of Upper Silesia*, Aug. 29 to Oct. 12, 1921, p. 8.

international institutions mentioned, the organic act itself, either expressly or by fair implication, authorizes modifications of its powers or procedure by special agreement. Thus the first Hague Convention of 1907 provides "*unless an understanding is made to the contrary*, commissions of inquiry shall be formed in the manner determined by Articles 45 and 57 of the present convention," (Article 12), and "The contracting Powers undertake to maintain the Permanent Court of Arbitration, accessible at all times and operating, *unless otherwise stipulated by the parties*, in accordance with the rules of procedure inserted in the present convention" (Article 41).²⁷ So also the Statute of the Permanent Court of International Justice (Article 36, par. 1) provides that "The jurisdiction of the Court comprises all cases which the parties refer to it and *all matters specially provided for in treaties and conventions in force*." The latter clause undoubtedly authorizes the Court to give advisory opinions as provided in Article 14 of the League Covenant,²⁸ and to assume compulsory jurisdiction under the forty odd special treaties and agreements which have been concluded.²⁹ The following paragraph, known as the Optional Clause, gives it such jurisdiction with respect to certain controversies between states parties to the special protocol. In the League Covenant, the broad competence given the Assembly and the Council by Articles 3 and 4 over "any matter within the sphere of action of the League affecting the peace of the world" would seem to permit them to undertake, on the basis of special treaty, any mission tending toward

²⁷ See also Arts. 10, 53, 82, 83.

²⁸ Judge Moore, Publications of the Court, Series D, No. 2, pp. 385, 512; Fachiri, *op. cit.*, p. 67. Hudson seems to base this jurisdiction upon the historical connection of the Court Statute with Art. 14, evidenced by Art. 1 of the Statute. "The Advisory Opinions of the Permanent Court of International Justice," International Conciliation, Nov. 1925, No. 214, p. 328; The Permanent Court of International Justice, p. 153. See also De Bustamente, The World Court, pp. 253-254. This opinion gains support from the express limitation of the advisory procedure to requests from the League Assembly and Council by Art. 72 of the Rules of Court and by the rejection by the League, when considering the Statute, of suggestions that single states, the Labor Office and International Labor Conferences be entitled to ask advisory opinions. (League of Nations, Documents concerning the action taken by the Council of the League of Nations under Art. 14 of the Covenant and the adoption by the Assembly of the Statute of the Court, 1921, pp. 68, 79.) This evidence, however is not conclusive. The fact that the Court is based on an independent statute, ratified as such by states wholly apart from their connection with the League, makes it necessary to discover its jurisdiction within that Statute. The statement in Art. 1 that "The Permanent Court of International Justice is hereby established in accordance with Article 14 of the Covenant of the League of Nations" is not a grant of jurisdiction, but a description of the origin and character of the institution. Doubtless it empowers the Court to refuse jurisdiction where its exercise would be incompatible with this character (*infra*, note 31), and since advisory opinions are not a normal judicial function (Moore, *supra*, De Bustamente, *op. cit.*, pp. 265-266), perhaps requests from bodies other than those mentioned in Art. 14 should not be entertained. Apart from this general discretion to protect its judicial character, the writer sees no reason why future treaties might not authorize requests for advisory opinions by international bodies other than the League Assembly and Council.

²⁹ *Supra*, note 23.

peace, international coöperation, or other object mentioned in the preamble.³⁰

But there must be a limit to this capacity of states to enlarge the powers and modify the procedure of international organs by treaty. It can readily be seen that such special treaties might wholly change the character of an institution, thus virtually amending its organic act by a small minority of the signatories. The institution can protect itself from such abuse by refusing, where it has discretion, to accept burdens which it considers contrary to its objects and character. In the case of the Court, such prudence is especially necessary, and it has indicated in the Eastern Carelia case its determination to refuse requests for advisory opinions which it thinks would lead it to action of a non-judicial character.³¹ The League has similar power to protect itself, and in fact has sometimes passed special resolutions accepting new burdens imposed upon it by treaty, thus indicating its capacity to reject them if it sees fit.³² Modifications of its normal procedure requested by special treaties should undoubtedly be scrutinized with extreme care, for they are more likely to change its character than are enlargements of its competence. Thus the Court was on sound practical ground when it refused to imply any change in the League's normal procedure for settling disputes from the terms of the Lausanne Treaty.

Several procedural questions with regard to advisory opinions were decided during the Mosul controversy. The Council decided that its vote

³⁰ "The right of the Council of the League of Nations to make a recommendation when requested by one or several of its members is not explicitly laid down in Article 11 of the Covenant, but is implied, I may say, by the whole Covenant." Viscount Ishii's report on the Upper Silesian question, Minutes, cited *supra*, note 26, p. 7.

³¹ *Infra*, notes 36, 37. Fachiri (*op. cit.*, p. 69) says in respect to litigations referred by the parties "the court cannot refuse to entertain and decide the case provided it has jurisdiction. But upon a matter referred by the Council or Assembly for advisory opinion the court is free to decline to give an opinion." The latter conclusion he draws from the words of Art. 14 of the Covenant. But Art. 36, par. 1, of the Statute (quoted *supra*, note 28) upon which both jurisdictions ultimately rest, makes no such distinction; consequently, with Fachiri's interpretation, the League might destroy the Court's discretion by amending Art. 14 of the Covenant. In the present writer's opinion, the Court's discretion in the matter rests on its inherent power to protect its character, described in Article 1 of the Statute, which is dependent on Article 14 as it stood at the time the Statute went into effect, and can never be limited except by amendment to the Statute. For analogous interpretation of inherent powers of United States courts, see *Gordon v. U. S.*, 2 Wall. 561; *Chicago and Grand Trunk Ry. Co. v. Wellman* (1892), 143 U. S. 339; Willoughby, *Constitutional Law of the United States*, pp. 13, 1275; Wright, *Control of American Foreign Relations*, pp. 98, 117.

³² A Council resolution of September 26, 1924, after reciting the minority provisions in the Lausanne Treaty, reads: "This clause renders it necessary for the Council of the League of Nations to decide whether the League should undertake to give the guarantees in question." Official Journal, Oct. 1924, Vol. 5, p. 1344. See also, World Peace Foundation, Year Book of the League of Nations, 1925, Vol. 8, p. 569. Referring to the request of the Supreme Council for a recommendation on the Upper Silesian question, Viscount Ishii reported on August 29, 1921: "I consider that under the circumstances it is not only the right but also the duty of the Council to accept the rôle which, in the spirit of the Covenant, it has been asked to assume," but he was probably thinking of a moral rather than a legal duty. Minutes, cited *supra*, note 26, p. 458.

need not be unanimous, either to request an advisory opinion³³ or to adopt one,³⁴ though it was not clear whether these acts should be construed as procedural, requiring only a majority, or as steps in the solution of a dispute requiring unanimity with exception of the litigants. In the present instance, the Council was unanimous, with the exception of Turkey, so either view might apply and both were in fact suggested.³⁵

In giving its advisory opinion, the Court did not discuss the question whether or not it is obliged to give an advisory opinion when requested. Judge de Bustamante holds that it is,³⁶ and Judge Moore that it is not.³⁷ The latter view is supported by the English text of Article 14 of the Covenant and by the majority opinion in the Eastern Carelia case.³⁸ It would seem

³³ Turkey opposed this submission, which was nevertheless decided upon (Official Journal, Oct. 1925, Vol. 6, pp. 1381-1382; Hudson, this JOURNAL, Jan. 1926, Vol. 20, p. 22). Fachiri (*op. cit.*, p. 163) thinks that decisions to submit must be unanimous under Art. 5, par. 1. of the Covenant. The opinion in the Eastern Carelia case referred to the matter, but did not decide it. (Publications of the Court, Ser. B, No. 5, p. 27.) In a dispute between Hungary and Roumania in 1923, Roumania objected to a proposal for an advisory opinion and none was requested, though Lord Robert Cecil of Great Britain had no doubt that concurrence of parties to the dispute was not necessary for the purpose. (Official Journal, June 1923, p. 608.) In a dispute between Poland and Germany in connection with treaty minority provisions in 1923, Poland opposed the request for an advisory opinion, but it was nevertheless made by the Council, and Poland acquiesced and argued the case before the Court. (*Ibid.*, Aug. 1923, pp. 881-883, 935.) See also Hudson, International Conciliation, No. 214, pp. 349-351; Sir John Fischer Williams, "The League of Nations and Unanimity," this JOURNAL, Vol. 19, p. 484; and Lord Coke, in Dr. Bonham's case (8 Rep.), holding that for a party to be judge in his own case is so contrary to natural justice that an act of Parliament to that effect is void, approved in *City of London v. Wood*, 12 Mod. 687; *Day v. Savadge*, Hob. 87, and many other cases cited in Thayer, *Cases on Constitutional Law*, Vol. 1, pp. 50-51. This question is of peculiar interest to Americans because the Senate's fifth reservation to the Court Statute gives the United States a veto in "any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest," thus going beyond the power in this respect of any other state, even members of the Council.

³⁴ On this question there was some debate. Munir Bey of Turkey insisted that under the Covenant (Art. 5, par. 1) the vote must be unanimous, including the litigants. Unden of Sweden, *rapporteur*, disagreed holding that "the question should be dealt with in the same way as the main dispute." Munir Bey responded that this would assume the validity of the Court's opinion on the main question before it was adopted. Scialoja of Italy, the chairman, thought this was a question of procedure to be settled by majority vote under Art. 5, par. 2 of the Covenant. Munir Bey denied this and read a declaration that if the Council adopted the Court's decision excluding the Turkish vote, his powers would end. The Council then adjourned for an hour, after which the chairman reiterated his opinion that it was a question of procedure, adding that the Council might even follow the stricter rule of Art. 15 requiring unanimity, but not counting the litigants' votes. The Court's opinion was then adopted unanimously, with the exception of Turkey, whose delegate withdrew from further participation in the dispute. (Provisional report of meeting of Council, Dec. 8, 1925.)

³⁵ *Supra*, note 34.

³⁶ De Bustamante, *op. cit.*, p. 254.

³⁷ Moore, *op. cit.*, note 28. Judge Weiss thought the Rules of Court recognized this opinion. Publications of the Court, Series D, No. 2, p. 161.

³⁸ *Supra*, note 31.

necessary to protect the judicial character and independence of the Court. In the present case Turkey did not appear before the Court, but submitted certain documents on request; thus the principle of refusing advisory opinions when one party interested does not submit, suggested in the *Carelia* case, was not wholly applicable. Furthermore, it may be doubted whether the *Carelia* case actually laid down so broad a principle. There are in reality no parties to advisory opinions.³⁹ Consequently, the only principle of that case would seem to be that the Court can always refuse to give such opinions when circumstances are such that it would be incompatible with its judicial character to do so. In the present case there seemed to be no such circumstances. All the material necessary for interpreting the Treaty of Lausanne was before it.

For reaching its decision in the controversy the Council pursued the procedure which has become habitual. Turkey sat at all meetings as a special member of the Council, and her representatives, as well as those of Great Britain, were given ample opportunity to state their cases. The detailed handling of the case, efforts at mediation between the parties, and preparation of reports for consideration by the Council, were in charge of a Council committee of three members with no apparent interest in the dispute, while the discovery of facts was intrusted to special commissions of experts, of similar impartial character, sent to the spot. The reports of these commissions were exhaustive, and it does not seem that any facts of importance failed to be drawn to the council's attention. The procedure was thus in part litigious, in part mediatory, in part investigatory, and in part deliberative. It would seem that such a combination of methods would be best adapted to reaching a decision of maximum satisfaction, not only to the litigants, but also to the numerous other interests involved.

The Council's handling of the affair illustrates again its recognition of the distinction between the political and legal aspects of international controversies and its determination to seek and abide by the opinion of the Court in the latter.

Superficially, any dispute may be called legal if provisions of law or treaty require its submission to a court,⁴⁰ but fundamentally the legal character of a dispute depends upon the existence of definite legal sources, the impartial application of which will yield a result reasonably satisfactory to all interests.⁴¹ The ideal legal system provides a convenient body of rules, principles

³⁹ This is evidenced by the fact that Art. 31 of the Statute, providing that parties will be entitled to judges of their own nationality on the Court, has not been applied to them. Hudson, *International Conciliation*, No. 214, p. 351; Bustamante, *op. cit.*, p. 259. The fifth American reservation requiring due notice to all adherents to the Statute and interested states and public hearing or opportunity for hearing to any state concerned, seems not to modify this interpretation and accords with the actual practice.

⁴⁰ *Rhode Island v. Mass.*, 12 Pet. 657, 736 (1838); Scott, *Judicial Settlement of Controversies between States of the American Union*, 143, 542.

⁴¹ See Wright, *Proc. Am. Soc. Int. Law*, 1924, p. 58; Field, "The Doctrine of Political Questions in Federal Courts, *Minn. Law Rev.*, Vol. 8, p. 512."

and standards which, if applied to any possible dispute, will give a maximum of satisfaction to the interests involved; but few actual systems reach that ideal, and none can long continue to, unless legislation or other means of changing the law keeps the system continually abreast of conditions and interests in an ever changing world. International law has lacked instruments of steady development and adaptation; consequently, in many disputes it can supply only the vaguest guides, while in others its precepts, though clear, would yield highly unsatisfactory solutions. Thus many international disputes may be classed as political, which means that the applicable legal sources are inchoate or obsolete.⁴² With this in mind, it is not surprising that statesmen have been unwilling to commit themselves to universal judicial settlement of international disputes, and since in principle international law covers all possible disputes not domestic,⁴³ they have found it difficult to define in advance limited categories of a non-political character.⁴⁴

The result has been the system of arbitration, whereby the submission of a dispute is not decided on until after it has arisen, and even then arbitrators have been chosen by the parties with a careful eye to their political wisdom, as well as to their knowledge of the law. As was to be expected, they have paid rather more attention to the political consequences of possible decisions and rather less to the sources of law than would a true court.⁴⁵ They have indeed frequently found themselves in a difficult position. Sometimes the law is so clear that they have felt obliged to follow it, with resulting failure to satisfy valid interests, like that of the United States to prevent indiscriminate dynamiting of fur seals in Bering Sea, but more frequently they have rather neglected the law in order to reach what is thought to be a practical settlement, as in the Tacna and Arica arbitration of 1925.

The procedure illustrated by the Mosul case is an alternative to this process. Legal aspects of the controversy were handled in a wholly judicial way at The Hague without preventing the utilization of political wisdom in the ultimate disposition of the case at Geneva. A comparison of this process with that utilized in the somewhat similar Tacna-Arica case may be instructive. Each dispute involved territory claimed by adjacent states. Each involved the interpretation of a treaty between the parties which prescribed a process of settlement.

There is an abundance of legal material applicable to the solution of boundary disputes, but little of it seemed applicable to either of these cases.

⁴² Wright, *loc. cit.*, p. 60.

⁴³ See Opinion of Court in Tunisian Nationality Decrees case, Series B, No. 4, p. 24, and Brierly, "Matters of Domestic Jurisdiction," British Year Book of Int. Law, 1925, pp. 10-11.

⁴⁴ Art. 13 of the Covenant and Art. 36 of the Statute contain the most important efforts in this direction.

⁴⁵ Dennis, "Compromise—the Great Defect of Arbitration," Columbia Law Rev., Vol. 11, p. 493 *et seq.* Hudson, The Permanent Court of International Justice, pp. 12-14, tends to minimize this tendency. See also, Humble, Mich. L. R., Vol. 19, pp. 684-685.

There was no treaty describing either boundary. There was no claim on grounds of discovery, occupation, prescription or accretion. While each controversy had arisen out of war and military occupation, claim to title on this score seems in each case to have been waived by the treaties prescribing other modes of settlement. In fact the treaties, which in the one case suggested a plebiscite and in the other negotiation and eventual submission to the League Council, both political methods of settlement, might be considered express recognition by the parties that the boundary disputes were political rather than legal in character.

The interpretation of treaties, however, is a subject on which there is not only an abundance of legal material, but which numerous agreements have declared to be universally susceptible of judicial determination.⁴⁶ In the Tacna-Arica case⁴⁷ a single arbitrator was authorized to determine the meaning of the treaty, but with the express stipulation that, if he found it did not require the plebiscite, the *status quo* would return with, as he remarked in his opinion, "recurrence of a not improbable disastrous clash of opposing sentiments and interests which enter into the very fibre of the respective nations,"⁴⁸ and that if he found it did require the plebiscite he would have to perform the political tasks of deciding who should vote, how the voting should be controlled, when the plebiscite should be held, and of supervising it until complete. In him were vested judicial, and contingent legislative and executive powers.

In the Mosul case the Permanent Court was requested to give an advisory opinion on the meaning of the treaty, with the understanding that this would terminate its powers and responsibilities in the matter, but that the League Council would continue its work of mediation, eventuating in a binding decision if the Court found it had that power under the treaty. Here was a clear separation of judicial and political powers.

There has been criticism of the legal conclusions of both tribunals.⁴⁹ Whether any or all of these criticisms are justified, experience and theory are agreed that the delegation of political powers to the authority which interprets the law is not likely to make for good law. Separation of judicial and political functions has been generally approved in national governments. The present breakdown of the Tacna-Arica settlement compared with the general acceptance of the Mosul settlement suggests that such a separation may be expedient in international government. At any rate, a study of organic and social evolution discloses that a process of differentiation and specialization once begun usually continues.

⁴⁶ *Supra*, note 44.

⁴⁷ See this JOURNAL, Vol. 19, p. 393 *et seq.*; and Wright, "The Tacna-Arica Dispute," *Rev. de droit Int. et de Lég. Comp.*, 1925, pp. 295-309, and *Minn. Law Rev.*, Vol. 10, pp. 28-40.

⁴⁸ Opinion and Award of the Arbitrator, p. 36, this JOURNAL, Vol. 19, p. 415.

⁴⁹ See Wright, *Minn. Law Rev.*, Vol. 10, p. 35, and Turkish statement on Mosul opinion, in League of Nations Council, Dec. 8, 1925.

ORIGINS OF THE THEORY OF TERRITORIAL WATERS

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I

To discover the origins in legal theory of the modern principle of territorial waters it is necessary to go back to the theory of the Glossators. There one finds stated for the first time in terms of law some of the elements which made the development of this principle possible.

The classical theory of the glosses is to be found in a comment on D.1.8.10. pr. It follows: *Aristo) Casus. Hic dicit . . . sicut quando quis aedificat in maris efficitur edificium privatum: ita si mare aliquid occupet, sit commune et publicum id quod occupatur.* The position of the Glossators is stated here in flat disregard of the existence of an important body of practice which was in conflict with this doctrine, and which will be noticed below.

On the other hand, a gloss which reflects the influence of the period in which it was written is that on D.1.8.2. The text reads: *Mare est commune, quo ad usus: sed proprietas est nullius: sicut aer est communis usu: proprietas tamen est nullius . . . sed iurisdictio est Caesaris.* . . . The statement that the sea is common so far as the use thereof is concerned and that the *proprietas* thereof belongs to no one is obviously in full accord with the doctrine of the *Digest*.¹ But the addition of the statement that Caesar possesses the jurisdiction exercised over it represents the crystallization in jurisprudence of a practice which had been developing since ancient times. The practice referred to is, of course, the suppression of piracy by the naval forces of a state, together with the exercise of some jurisdiction over offenses committed at sea. Celsus had attributed to the *populus Romanus* the position of *arbitror* of the seashore.² The Glossators give the Emperor the right of jurisdiction over the sea.

The gloss on *alioquin*, D.48.9.9, offers a definition of the sea. *Mare comprehendere etiam amnem et flumen, cum mare sit congregatio aquarum multarum.* Bartolus, the great founder of the school of the Post-Glossators, took over this definition with the addition of one word and the substitution of a synonym for *congregatio*: *Mare est collectio aquarum multarum salsarum.*³

The definition of the sea presented no difficulty. The point of conflict was

¹ For this doctrine see article, "Justinian and the Freedom of the Sea," by the present writer, this JOURNAL, Vol. 19, No. 4, p. 716.

² D.43.8.3.

³ Bartolus de Saxoferrato, *Tractatus de Fluminibus*, Bononiae, 1576, p. 54.

reached when the jurists attempted to define the sources of the rights, or the methods of acquiring rights in the sea. The denial of the legality of these rights left the problem of their existence unsolved. This attitude was, in the main, that of the classical jurists. As contrasted with them, the Post-Glossators and the jurists of the practical school after them, *Die Praktiker*, undertook the work of grounding these rights solidly in the law. Then the doctrine of Paulus in D.47.10.14 became disputed ground between those who recognized no problem and those who adopted a realistic view. The text begins as follows: *Sane si maris proprium ius ad aliquem pertineat: uti possidetis interdictum ei competit, si prohibeatur ius suum exercere*. Azo has left this gloss on *Sane*:—*Pertineat: per privilegium, vel per longam consuetudinem*. In other words, the sea is open to some sort of appropriation in two different ways, either by the grant of a privilege, or through long continued custom. Because Azo thus recognizes the legality of a violation of the communal character of the sea, he must take rank as the first jurist among those who have been influential in forming a theory of the territoriality of coastal waters. His contribution is that which is necessary to any other.

In their observations on the jurisdiction of the Roman people or of "Caesar" over the sea, it seems impossible that any modern idea of sovereignty could have entered.⁴ The middle ages missed the conception of the personality of the state. The location of the supreme power proved a moot question until the modern period. There were conflicting theories not only as to the source of the power and authority of the Prince, but also as to the scope thereof. Always he was restricted by the *ius divina* (transformed into terms of ecclesiastical law) and probably in general by the *ius naturale*. In the later middle ages there were difficulties over the question whether the princely authority was lodged in the office or in the man. Furthermore, the attitude of jurisprudence toward the law was unlike the modern position. Legislation in the sense of lawmaking was foreign to mediaeval thought. Law was interpreted, not created; discovered, not made. The approach to law was judicial, not legislative. When the sea was declared to be by the law of nature incapable of becoming the object of private property, the matter was closed. When the shores of the sea were declared free of access to all men for the exercise of the right of fishery, by the *ius gentium*, there was no sovereign power which could override this law and annul it. It is in the light of these considerations that the exercise of jurisdiction over the seashore or over the sea should be understood.

It has been noted that, after the Glossators, there arose a class of jurists whose work was to interpret the classic Roman law in the light of contemporary practice. Evidence of the practice referred to is to be found in the mass of acts, *constitutiones*, capitularies and treaties which have come down to the present day. This practice shows a marked development from the position

⁴ Gierke, Otto, *Political Theories of the Middle Age*, transl. by R. W. Maitland, Cambridge, 1922, *passim*.

of the classic Roman law, indicating a growth of the belief that the Emperor, king, or state possesses some kind of inchoate property rights in the sea adjacent to the territories of the same. The growth alluded to took the following general forms: the grant of river fisheries to private persons or bodies; the grant of sea fisheries to similar persons or bodies; the use of the sea to mark a boundary to a domain or to an estate; the exemption of specified persons or people from the payment of port or harbor dues; and the grant of freedom of commerce or of travel or of both to specified parties. Such acts as these indicate a personal freedom of the monarch to dispose at will of the use of public property even though it be located in the sea. This freedom did not, apparently, extend to the right to alienate public property, title to which remained vested in the body politic, or in the monarch as the embodiment of the state, or in the monarch as the titular landowner of the national territory, according to the theories of the period. It should be noted that actual practice along the lines indicated does not show a break with the past; nor does it mark a rupture in legal theory. The development referred to is rather evidence of the gradual acceptance as a general rule of a policy which had been at its inception due either to the exigencies of a particular situation or the desire to placate potential antagonists. This development was accelerated by the steady concentration of power in the monarch, and in particular by the rise of feudalism which, while actually decentralizing the power of the Crown, vested in him those prerogatives which are to be derived from the position of titular landowner and overlord of the realm. The rivalry between the Emperors and the Popes affected this development by causing the former to emphasize the royal prerogatives and by causing them to use every means at their disposal to increase, as well as to preserve, imperial authority.

The results of this practice proved to be far-reaching. The uninterrupted custom of granting to loyal subjects or vassals portions of the lands of the state or of the Empire, together with the frequent grants of exclusive rights of use in public property, eventually became endowed with the sanction attaching to long-established usage. The minds of the people became habituated to a new idea of the relation of the state or the monarch to public property. The idea of the nature of public property underwent a corresponding change. It became possible to include within the term things which had hitherto been excluded. The acceptance of these new relationships as fact created in due time theories to justify and to explain them, theories of politics and theories of law. While the breakup of feudalism and the rise of intensely national states destroyed much, much also remained preserved and took fresh root in the municipal law of the young nations and in the new science of the law of nations. The idea of the possibility of acquiring ownership of, or sovereignty over, the sea adjacent to the territory of a state, though it had heretofore existed in but a primitive form, was one of the ideas which was projected into the modern era, there to take concrete

form under the powerful interaction of conflicting practice and opposing theories.⁵

It should be recalled that the practice of granting exclusive rights of use within the public domain, or in the sea adjacent to the coast, did not carry with it an extension of territorial jurisdiction seaward. It was possible for a state to own, for example, a fishery in coastal waters without that ownership involving a claim to the ownership of those waters.⁶ Not before the time of the Glossators is there an expression in the law books of a right of jurisdiction over such waters. Even then there is no claim to sovereignty or dominion. A claim to sovereignty in the modern sense was of course impossible, as has been pointed out, for the concept was lacking to the mediæval mind. The course of development summarized above ended logically in a claim to sovereignty; but this culmination did not reach definite expression in legal thought until the sixteenth century.

One other body of practice must be noted before passing to the jurists. There is evidence which points to, if it does not prove, the existence of property rights in the bays and smaller indentations along the coasts. Venice is, in truth, as nearly every writer on the subject from the thirteenth to the sixteenth century points out, the example *par excellence* of the appropriation of the sea. Allowing for an element of exaggeration, the evidence of these writers indicates clearly that the Venetians owned the bays and gulfs adjacent to the land which they occupied, and claimed jurisdiction over the upper Adriatic by right of ownership. The claim to ownership of the bays and gulfs through which their islands were sprinkled seems to

⁵ For the acts, treaties, capitularies, and so forth, which form the evidence referred to in the above summary, see the following citations. They are taken from the *Monumenta Germanica Historica* (M.G.H.).

For grants of fishery rights:

Mühlbacher, *Die Urkunden Pippins, Karlmanns und Karls des Grossen*, M.G.H., *Diplomatum Karolinorum*, Hanover, 1908, tom. i, p. 161.

Die Urkunden Otto des II, M.G.H., *Diplomatum*, Hanover, 1888-1893, tom. II, i, p. 120.

Die Urkunden Otto des III, *ib.*, p. 554. Also, p. 615. Also, p. 655.5. Also, p. 707.

Die Urkunden Heinrichs II und Arduins, M.G.H., *Diplomata*, Hanover, 1900-1903, tom. iii, p. 662.

Constitutiones et Acta publica Imperatorum et Regum, M.G.H., *Legum Sectio IV*, Hanoverae et Lipsiae, 1910, tom. viii, pars prior, p. 185.

Breslau, *Die Urkunden Konrads II*, M.G.H., *Diplomata*, tom. iv, Hanover und Leipzig, 1909, p. 71-72.

For the use of the sea as a boundary:

Mühlbacher, *op. cit.*, p. 346.

Boretius, *Capitularia Regum Francorum*, M.G.H., *Legum Sectio II*, Hanoverae, 1883, tom. i, p. 122. Also, p. 128.

Die Urkunden Otto des III, *op. cit.*, p. 603.

Die Urkunden Heinrichs II und Arduins, *op. cit.*, p. 226.

Breslau, *op. cit.*, p. 299-300.

⁶ For a detailed discussion of the Roman law on this point reference must be made to the present writer's article in this JOURNAL, cited above.

have been accepted by the jurists, who advanced a theory of ownership by prescription. The claim to ownership of the sea itself seems to have been a later development, and was not readily accepted, if indeed it ever secured general consent. The situation seems to have been that while the Venetians had the naval power with which to assert respect for their claims, foreign nations could only accept them under protest; and that these claims declined in cogency with the decline of the power of Venice. The same general situation was true of Genoa.

That the smaller bays and indentations were owned by the Prince or by the great vassals (under royal patents) does not seem open to doubt. The evidence of the classical Roman jurists⁷ and the observations of the older literary men⁸ proves that it was a common habit to enclose portions of the sea to form fish preserves.⁹ This practice received formal approval from the Emperor Leo in the East, four of whose *Novels* make express provision for the protection of the property rights so acquired.¹⁰⁻¹¹

As in the case of the grants of rights of use in public property, the long continued and uninterrupted practice of enclosing portions of the coastal waters culminated in the claim to jurisdiction over those waters, a claim which was inevitably followed by the assertion of sovereignty. The possession by the great lords of vast domains, many of which must have had an extended frontage on the sea; the possession of private fisheries in the sea; the grant of privileges and immunities in connection with jurisdiction over the land and the cities on it which had come into the lord's possession by virtue of a royal or imperial grant; the right to levy customs and taxes on foreigners in ports—all of these rights and powers would naturally produce in the mind of the ruler possessing them a sense of proprietorship of the things over which he exercised them.

A survey of feudal law is as barren of results for the topic in hand as a study of feudal practice is fruitful.¹² The acquisition of property rights in

⁷ Those holding the position taken by the lawyers under Justinian.

⁸ Strabo, *Geography*, xiv, I, 26; iii, I, 6-9; iii, II, 6-8; ii, V, 33. *Plutarch's Lives*, Dryden's transl. revised by A. H. Clough, 5 vols., London, 1859, *Poplicola*, in i, 214; Livy, ii, 9, 30; Ulpian, in D.50.16.17.1; Böckh, *Die Staatshaltung der Athener*, 2d ed., 4 vols., Berlin, 1851, vol. i, p. 414 (and see p. 145). See also Maynz, *Cours de Droit Romain*, 4th ed., 3 vols., Bruxelles, 1876, vol. i, p. 145, and Halicarnassensis, D., *Operum volumen quintum*, curavit Io. Iac. Reiske, Lipsiae, 1774-1777, vol. v, *De Lystia Iudicum*, p. 522.

⁹ As early as the time of St. Chrysostom, Bishop of Milan, this practice was general. *sibi* his *Hexaameron*, ed. by R. O. Gilbert, Lipsiae, 1840, bk. v, sec. 27, p. 116: *Spatia maris See vindicant iure mancipii, pisciumque iura sicut vernaculorum conditione sibi servitii subiecta commemorant. Iste, inquit, sinus maris meus est; ille alterius. Dividunt sibi potentes.*

¹⁰⁻¹¹ *Corpus Iuris Civilis*, ed. by Gothofredus, D., 3 vols., Amstelodami, 1663. See the title *Justiniani Edicta*, item, *Novellae Constitutiones Imperatoris Leonis Augusti*, in vol. ii. *Novels* 56, 102, 103, 104.

¹² It will be readily apparent that the feudal period is of critical importance. The weight of the classic Roman law as enshrined in the law books of Justinian was thrown against any appropriation of the sea in spite of the existence of some practice to the contrary. The

the sea presented a problem which feudal jurisprudence could not overcome. The classical Roman law stated expressly that the sea was open to all men, and that it was incapable by nature of becoming the object of private property. The Roman lawyer must adulterate his sources before he could countenance any ownership, any dominion of the sea. Feudal law could not take any other than a negative position. It could take no cognizance of the sea for the reason that the sea was not the object of private property. Feudalism was based on the ownership of land. Feudal jurisprudence contemplated a system of personal and contractual relationships resting on this basis.¹³ Two principles governed feudal relationships, the principle of personal loyalty and devotion or reverence, and the principle of the contractual relation of lord and vassal.¹⁴ The system which was in theory the expression or the carrying into effect of these two principles embraced almost every aspect of mediaeval life.¹⁵

Now until the mediaeval idea of law as being founded on custom should be supplemented or replaced by the concept that law may be made or created, no legal doctrine sanctioning the extension of territorial jurisdiction over the sea could be formulated. Much less could the principle of sovereignty be discovered. In the ninth century there are traces of a conception of law as being made,¹⁶ but this idea dies out. In the thirteenth century the idea reappears. It is believed that law may be made under certain conditions and by the proper authority.¹⁷ The old idea of customary law does not disappear. The growth of the new idea is gradual. The significant thing is that both conceptions exist together, for this time the new idea does not again disappear. "We have here arrived at the beginnings of the modern conception of sovereignty, that is, of the conception that there is in every independent society the power of making and unmaking laws, some final authority which knows no legal limits, and from which there is no legal appeal."¹⁸ With the appearance of this conception it became possible to arrive

Glossators, though flourishing in the age of feudalism, confined themselves so closely to their texts that they failed to bring this law into touch with the customs of their time. It is the practice of the feudal period, crystallising and intensifying as it did the customs of the past, which contributed the chief elements which later jurists were to combine into a theory which paved the way for the modern principle of the territoriality of the waters adjacent to a state.

¹³ An excellent definition of feudalism is to be found in Maitland, F. W., *Constitutional History of England*, Cambridge, 1908, p. 143.

¹⁴ On this see Carlyle, A. J., *History of Mediaeval Political Theory in the West*, 4 vols., New York. Vol. iii, 1916, p. 21.

¹⁵ *Ibid.*, p. 19.

¹⁶ Carlyle, *op. cit.*, p. 41 and note. Gierke, *Political Theories of the Middle Age*, transl. by F. W. Maitland, Cambridge, 1922, *passim*.

¹⁷ Carlyle, *op. cit.*, p. 45.

¹⁸ See note 17. Cf. Wilson, G. W., *International Law*, 8th ed., New York, 1922, p. 47: Sovereignty is that "supreme political power beyond and above which there is no political power."

at a theory by which a territorial sovereign might extend his sovereignty over the coastal waters surrounding his territory.

The king or the emperor was the ultimate landowner in the feudal state. In him was vested the title to all the lands of his subjects. If there was to be ownership of the sea, then he must be the first owner. Later on, as the modern state rose on the ruins of feudalism, the king, as the representation and embodiment of the state, must own the sea. In the first instance the king, in the second instance the kingship (and finally, once more, the king) would have to possess all proprietary rights. The method taken to justify and to sanction such a proprietorship would naturally be that of an expansion of the territorial idea with an accompanying appeal to customary law, or to usage, or to both. Jurisdiction over the sea there had, of course, always been. But it had been exercised for purposes which set it apart from territorial jurisdiction. Its objects had been to suppress piracy and to make the sea safe for navigation and commerce. If there was to be a legally recognized proprietary right in the sea, then this jurisdiction must be rooted on land. In effect, there must be an extension of territorial jurisdiction over the sea. The coastal waters would be the first to feel the authority of the sovereign. The adjacent sea would be the first over which proprietary rights would be asserted. These coastal waters would then become, according to the developing theory, territorial waters. The classic Roman doctrine of the freedom of the sea offered an uncompromising opposition to the development of such a theory. Feudal law, though also inhospitable ground for the growth of this doctrine, offered an obstacle less difficult to overcome, because of its silence.

Feudal law did more than this. It provided a means by which the necessary sanctions could be obtained. Feudal law attributed to the king *Regalia*,—exclusive rights, privileges and prerogatives. He was the focus of the life and power of the state, the ultimate lord, the source of concessions and privileges, the proprietor of his realm. He was the pivot of the feudal system. Through him, then, a property right in the sea could be asserted. He provided in a system of proprietary rights the necessary lodging place for a similar right in the sea. Feudal theory was unhampered by a statement that such rights were unknown to the law. With feudal practice favorable, with feudal law silent, with the conception of sovereignty making its appearance, the course towards a formulation of a theory of territorial waters lay through a fresh interpretation of the Roman law unhampered by authority, pliable under contemporary usage.¹⁹

¹⁹ The sources of feudal law which contribute to the topic in hand are as follows:

As *ius*, custom, customary law, feudal custom: *Consuetudines feodorum*, or the *Libri Feodorum*, 2.99, 2.102, 2.1, 2.101, 2.1.5. To be found in Gothofredus' ed. of the *Corpus Iuris*, at the back of vol. II.

Appointment of an Admiral to punish offenses committed at sea: Afflictis, Matthaei de, *Commentarius super tres libros Feodorum* (title page missing), Francofurti? 1598? See index under *Regalia*, and *Amiratus*, for discussion.

II

A juriconsult of the fourteenth century who is cited with great frequency by his successors is Baldus of the Ubaldi. Although most of his work lay in other fields, he wrote a commentary on feudal law. He defines the *Regalia* as *iura praecipua Regis, vel Imperii, seu fisci Romanorum, vel cuiuscunque Regis, qui in regno suo est monarcha, licet Imperatore minor ambitu circuli. . . .* The Prince is lord of his territory and of the sea subject to him. The portion of the sea subject to him is adjacent to the coasts of his territory. *Porro territorium non est aliud quam terrae spatium minutum et armatum iurisdictione. In mari autem non dicitur territorium . . . sed dicitur districtus, id est, aquae spacium, seu latitudo similiter munita iurisdictione et imperio . . .*²⁰ Here is the beginning of the doctrine of territorial waters in feudal law. Jurisdiction is no longer to be exercised anywhere over the sea; is to be exercised in the sea adjacent to the territories of the Prince exercising it. As yet there is no claim to *dominium* or *proprietas* in it. It is a "district," in which the Prince has a right of jurisdiction, a district attached for certain purposes of government to the nearest territory. The source of this jurisdiction is to be found in the Prince—the king or emperor—himself. It is a royal or imperial prerogative. It is, in a word, numbered in the *Regalia*. This theory arose in the later days of feudalism, for Baldus died in 1400.²¹ Baldus' doctrine is a significant illustration of the indirect aid which feudal law as manipulated by a liberal or practical jurist could be made to give to the theory in question. It, feudal law, offered two fundamental elements for

Definition of the *Regalia*: Baldus Ubaldi, *Usus Feudorum Commentaria*, Lugduni, 1585, p. 85.1.2.

Origin of the *Regalia*: Amicangelo, I., *Quaestiones Feudales*, Neapoli, 1653. Contains his *Tractatus de Regalibus Officiis*, here cited, p. 3.3.

Law of royal grants in public waters: Arumaeus, D., *Discussionum Academicorum, De Iure Publice*, 5 vols., Jenae, 1621, vol. iii, p. 603. De Isernea, A., *In Usus Feudorum Commentaria*, Lugduni, 1579, p. 305.72. Gudelinus, P., *Opera Omnia*, Antverpiae, 1685. Consult index under *Pisces, Regalia*, and derivatives. Alvarottus, I., *De Feudis*, Francofurti, p. 339.7.

For a further study of the feudal law, the following commentators should be noted:

Afflictis, M. de, *Sanctiones, et Constitutiones Novissima Praelectio*, 2 vols., Venetiis, 1562. *Allgemeines Juristisches Oraculum*, 12 vols. and 6 Bände, Leipzig, 1747.

Brussio, A., *Principia Juris Feudalis*, Edinburgi, 1713.

Cragii, Thomasii, *Jus Feudale*, 3d ed., Edinburgi, 1732.

Herve, *Theorie des Matieres feodales et censuelles*, 8 vols., Paris, 1788.

Rosenthal, Hen. a., *Tractatus et Synopsis totius Juris Feudalis*, 2 vols., Francofurti et Lipsiae, 1721.

Senckenberg, H. C. F. von, *Corpus Iuris Feudalis Germanici*, Halle im Magdeburgischen, 1772.

T., L., *Collection de Jurisprudence sur les Matieres Feodales et les Droits Seigneuriaux, nouvelle ed.*, 2 vols., Avignon, 1773.

²⁰ For citation, see preceding note 19. P. 85.1.2.

²¹ *Biographie Universelle, ancienne et moderne*, Paris, 1811 and after. Article, Baldus.

the construction of a theory which was essentially foreign to its spirit, and upon which it contains no pronouncement.²² The first of these elements is of course the *Regalia*, fertile lodging place for an incipient doctrine of sovereignty. The second element is that indicated by Baldus' use of the word, "district." Feudal law, a law of proprietorship of land, a territorial law, provides a category into which coastal waters may be placed. Of course the use of the term "coastal waters," anticipates the development which is implicit in the conception of Baldus. His doctrine is little more than the recognition of the existence of a special interest of a monarch in the neighboring waters, with an accompanying right of a more particularized jurisdiction than that monarch could exercise over the sea at large. The existence of this latter jurisdiction was of ancient date and, as has been pointed out, was noted by the Glossators, the suppression of piracy and the protection of the traffic lanes being given as the reason for its exercise. It continued to exist while the new theory was taking form. One hundred years after Baldus, another commentator on the feudal law, De Afflictis, recorded the existence of an officer new to the law, the Admiral, who was appointed by the Prince, and who ranked as the third officer of the realm. Consequently, De Afflictis includes among the *Regalia* the *authoritas faciendi amiratum, vel amiragium in mari*. *Et credo*, he writes, *quod officium istud admiratus sit nomen novum, quia non memini me legisse in iure*. The duty of the Admiral is to punish offenses committed at sea, and to suppress piracy. The sea for this purpose is a district of the nation or kingdom. The Admiral *cognoscit de delicto facto in mari, quod est de districtu regni, nam in mari est etiam districtus*. He goes on in explanation: *Nam sicut praeses in terra debet purgare provinciam malis hominibus, ita amiratus debet purgare cum classicis mare malis hominibus et piratis. Et hoc verum est, si ille delinquens in mari contiguo regni inveniatur*.²³

De Afflictis seems to recognize by this comment the existence of an ill-defined jurisdiction over the high seas, and of a more certain jurisdiction over what he calls *mare contiguum*. Whatever may be the case in regard to the former, *hoc verum est*, that the Admiral possesses a punitive power in the latter waters. The process of separation and definition proved to be a stormy and difficult one.

III

Such, then, is the contribution of the feudal age to the origins of the theory of territorial waters. For the actual work of fashioning the theory one must turn to that long line of jurisconsults of the practical school which was begun by the Post-Glossators. They worked with the Roman law. They were those who believed that this law in the form given it under Justin-

²² That is, no pronouncement is to be found in the actual text of the feudal law; commentators after Baldus are not included. Commentators before Baldus are not important here for they do not depart from the text of the law.

²³ See note 19, Afflictis.

ian was not fitted to satisfy the requirements of the present time. To these men the pure Roman law was in reality a rigid system which had become in certain aspects of its doctrine archaic and therefore incapable of promoting justice. It is not that they felt, apparently, a lack either of reverence for or belief in the law. They seem to have been as interested in preserving it as were their colleagues of the opposite conviction, those, that is, who maintained that the ancient law was sufficient for the needs of the time. The fact is, rather, that they did not believe that a clarification of the old texts, or even a reintegration of the entire fabric of the law, such as the more devoted of the classicists undertook to make, could prove efficacious. The remedy which they advanced for the preservation of the life of this law was, fundamentally, a restatement of its tenets in terms of contemporary thought and practice. Accordingly, they undertook the adaptation or reinterpretation of the old system in the light of the customs and usages and laws (from whatever source) of the present. They shifted the emphasis in doctrine from past theory to present practice. Where the old theory was obsolete, they built a new theory. This procedure naturally involved a looking to sources outside of the law of Justinian and outside of the work of the Glossators, those two great fountain heads of law for the jurists of the classical school. It will be readily perceived that this method was one of profound significance for the future. *Use* was, consciously or unconsciously, made the criterion of the law.

The judicious application of this criterion presented a problem of subtle difficulty. An appeal to international practice, or to the customs of the nations, was valid. Immemorial custom could provide an unimpeachable sanction on which to ground a law. Yet all customs were not lawful. It was, further, debatable whether the mere passage of time could make an unlawful practice lawful. John Selden was to demonstrate what a powerful weapon the appeal to custom and usage could be in the hands of a clever man to justify a claim not only contrary to the received law but at variance with the facts. There were other difficulties. It was necessary to find an answer to the question, What constitutes good usage? It was necessary to solve the problem presented by divergent customs which were themselves the embodiment of conflicting doctrines. The appeal to current practice was frequently an appeal to an inchoate and unstable element in national and international life.

Bartolus of Saxoferrato, or Sassoferato, 1314-1357, the first of the school of the Post-Glossators, was an Italian jurist and teacher of law at Pisa and Perugia, and a counsellor of Charles IV. His fame excels that of any other jurist of the middle age. He gained his reputation by his public lectures²⁴ and by his comments on the various parts of the Roman law. Abandoning the system of notes which had become the traditional method of exposition,

²⁴ Baldus, who has already been cited for his position in the feudal law, was Bartolus' favorite pupil.

he and those who followed him wrote vast works on the law and on the glosses themselves.²⁶ First and foremost, he used the *Corpus Iuris* for his starting point. In the next place, he drew freely from other jurists, adapting their teachings to the needs of a law which should be practically effective for the Italy of his time. In the third place, he drew from his own experience, not hesitating to cite his own decisions as precedents. In Spain and Portugal his opinions were for a long time given the force of law. Not only is he reputed to have held first place in the schools during his lifetime, but it is said that in the courts his authority was so great that the judges did not dare to contradict him.

This unique influence was due not merely to Bartolus' preëminent ability. He lived at the close of one period and at the beginning of another. In the thought of the middle age there is a borderland where theology, politics and law meet. In the controversies between Church and State, and in political theory generally, this relationship is conspicuous. The peculiar product of the fusion of these three systems had a profound influence on the leading principles which guided men's minds. It was influential in determining the structure of the modern state. Almost any discussion of the *ius naturale* will show an interplay between these three systems of thought. The *ius gentium* is obviously dependent on them. A cursory reading of the early works on international law will show how deeply the leading principles of that young science were influenced by them.

Bartolus was the great, if not the only, channel through which this type of thought flowed into the modern world.²⁶ The work of the middle age had been fully developed by the time of Bartolus. The Papacy had won its conflict with the Empire; Thomas Aquinas had polished off theology; scholastic philosophy had taken its authoritative shape; the *Corpus Iuris Civilis* had achieved an ossified sanctity. The new birth was at hand. The world was in transition. Bartolus dominated juristic thought in this period.

*Mare sub cuius territorio comprehenditur.*²⁷ In a concise and formidable manner Bartolus injects this doctrine formally into jurisprudence. It is given more fully in the *Gemma*, a collection of his sayings,²⁸ as follows: *Mare dicitur illius Domini, sub cuius territorio comprehenditur.* It was

²⁶ The dates given are those of Savigny. For the life of Bartolus, see his *Geschichte*, vol. vi, cap. 53; Figgis, J. N., "Bartolus and the Development of European Political Ideas," in *Transactions of the Royal Historical Society*, vol. xix, or in the appendix to his book, *The Divine Right of Kings*, 2d ed., Cambridge, 1914; Woolf, C. H. S., *Bartolus of Sassoferato*, Cambridge, 1913, Introduction. The latter book contains a detailed study of Bartolus' political theories, with copious citations from his works.

²⁶ In the work of Bartolus is the beginning of international law. This is evident in his two works, *De Captivis et Postliminio*, vi. 237, and *De Represaliis*, x. 117. See on this Figgis, *op. cit.*, *Transactions*, vol. xix, pp. 156, 159.

²⁷ *Omnium Iuris Commentaria*, ed. by P. Mangrelia, 10 vols., Venetiis, 1602. *Ad decimum lb. Codicis, De Classicis, Additio, Aliz. Quidem Habent.* Vol. viii, p. 33. (C.11.13.)

²⁸ *Gemma legalium seu Compendium aureum*, Venetiis, 1602. See under *Mare*.

pointed out that Baldus was the first commentator on the feudal law to make a place for this doctrine in that system. His master, Bartolus, must be credited with having inspired him. In commenting upon the practice of certain states of driving *homines males* off the sea, Bartolus justifies it by an argument from analogy. As it is fitting for the *Praeses* to drive off or to punish evil doers on land, so it is fitting for him to do so at sea. This is the analogy which, it will be recalled, De Afflictis used, with the difference that by his time a new officer had been created, called the *Amiratus*, who relieved the *Praeses* of this duty. The word, *congruo*, probably conveys more than a mere sense of appropriateness. The *Praeses* is fit to undertake this work. It is proper that he should do so.

But Bartolus does not confine himself to the subject of crimes committed at sea. He gives his opinion upon a question of the first importance for the development of a theory of territorial waters. He holds that a state owns the islands located not far from its coasts: *Et sic quaelibet insula quae est in provincia, est pars provinciae. Et per hoc semel Pisis dixi contra quosdam piratos qui derobabant in mari, et reducebant se in quandam insulam prope Pisas: quod licet dicatur, quodam mare est commune, et sic ibi non possunt conveniri: tamen ego dico, quod illa insula est pars illius provinciae, qui adhaeret: ut hic.*²⁹ The *tamen ego dico* is emphatic. This opinion is also an excellent example of Bartolus' modernity. He does not hesitate to cite his own judgment.

Neither in the case of the *Praeses* nor of the islands is Bartolus arguing for a property right in the sea itself. In the first case the state's jurisdiction has its source in what may be called the police power. Bartolus arrives at his position simply by not restricting this principle or power to the land. The effect, however, is to grant *exclusive* jurisdiction to the territorial sovereign. It is at this point that Bartolus abandons the classic position and makes inevitable some theory of sovereignty over the waters involved. In the second case his train of thought is not dissimilar. An island is regarded, as it were, sticking to the mainland. It is a fragment of the territory nearest to it. The state *extends* (for it is extension, and not the exercise of some other kind of) jurisdiction; the state also extends its right to hold property. Bartolus is aware of the classic doctrine that because the sea is common to all, things in the sea are also common to all. But he waves this difficulty aside. The origin of the property rights seems to be in the nature of the island's relation to the mainland.

The query arises, How near must an island be in order to come within the territory of the neighboring state? Bartolus gives an answer to this question in his tract on rivers:³⁰

²⁹ *Opera*, ed. by P. C. Brederodius, 10 vols., Basileae, 1589. In *Primam Digesti Veteris Partem Commentaria, ad lib. quintum Digest., De Iudiciis*, lex IX, vol. i, p. 492. In the Venetian ed. of 1602, vol. i, p. 151.

³⁰ *Tyberiadis, Tractatus de Fluminibus*, Bononiae, 1576, p. 53.1.

Ad quod videndum est, a qui habet iurisdictione in territorio coherenti mari, habeat in ipso mari, et usque ad quod spacium: et videtur quod non: quia mare est commune omnibus. In contrariam est veritas, imo sicut praeses provinciae debet purgare provinciam malis hominibus per terram . . . congruit, ita etiam per aquam. Et hoc apparet quod etiam in mari habet iurisdictionem, et in Insulis, quae sunt in dicto mari, multo magis, Insulae enim illae; quae a provincia modice spacio distant, illius provinciae esse dicimus, ut sunt Insulae Italiae . . . modico autem spacio distare puto, quando distant percentum miliaris: vicinus enim locus dicitur . . . quo inter duas dietas non dicitur locus remotus. Constat autem quod centum miliaria per mare minus est duabus dietis. . . .

Sed si Insula esset in mari alto, et a qualibet regione distans, tunc videndum esset, an posset dici propinqua alteri Insulae, ut dicatur nobis vicinus, vel propinqua. Et ideo Insula Sardiniae Italiae dicitur, licet ab Italia magno spacio distet, sed est propinqua insulae Corsicae; quae ab Italia modicum distat. Secundum alios autem si nec alicui regioni, nec Insulae alterius vicina est, tunc non possumus dicere, quod aliquis in ea habet iurisdictionem nisi Imperator; qui omnium dominus est . . . dico igitur, quod talis insula occupanti conceditur quo ad dominium.

Bartolus puts a double question: whether he who has jurisdiction in territory adjoining the sea has also jurisdiction in the sea itself; and (if so), to what distance seaward. The first question is answered in the affirmative. To answer the second question, Bartolus puts another, namely, How distant must an island be to come under such jurisdiction? Those islands are said to belong to a "province" which are but a "moderate distance" from it. He defines a moderate distance as 100 miles.

This passage from the *De Fluminibus* is frequently cited by later jurists.³¹ The general impression seems to be that Bartolus is laying down a hundred-mile limit to the jurisdiction of a state over the adjoining sea. A long line³²

³¹ The fullest and most exact treatment is to be found in Caepolla, B., *Tractatus de Servitutibus*, 4th ed., Coloniae Agrippinae, 1660, pp. 305-6.

³² For the further development of this theory see: Baldus, *Commentaria In primam Digesti Veteris partem*, Lugduni, 1585. *Ad lib. primum Digest.* p. 48.3. (D.1.8.1.) *Commentaria in VII-VIII-IX-X-XI Codicis Libros*, Lugduni, 1585. *Ad lib. vii. Codicis.* p. 54.6. (C.7.44.1.) *Commentaria in quartum et quintum Codicis lib.*, Lugduni, 1585. *Ad lib. quartum Codicis.* p. 113.18. (C. 4. 33.4(3).) *Commentaria in primam Digesti Veteris partem*, Lugduni, 1585. *Ad lib. primum Digest.* p. 29.6. (D.1.4.3.) *Ib.*, p. 51. (D.1.8.2.) *Commentaria in Sextum Cod. Lib.*, Lugduni, 1585. p. 178.13. (C.6.36.7(6).)

Caepolla, B., *De Servitutibus rusticorum praediorum*, in the *Tractatus Illustrum*, Venetiis, 1584, vol. VI., Pt. ii. *De Servitutibus*, etc., 4th ed., Coloniae Agrippinae, 1660.

Alteserra, A. D., *Expositio in Institutionum Iustiniani*, Tolosae, 1664.

Gregorius, P., *Syntagma Iuris Universi*, 2 vols., Lugduni, 1587.

Pasquier, d'E., *L'Interpretation des Institutes de Justinian*, Paris, 1847.

Rebuffus, I., *Lectura super tribus ultimis libris Codicis*, Augustae Taurinorum, 1591.

Garsia, I., *De Expensis et Molerationibus*, in the *Tractatus Illustrum*, op. cit., vol. XVII.

Ansalis, A. de, *De Commercio et Marcatura Discursus Legales*, Romae, 1689.

Ponte, F. de, *De Potestate Proregia*, Neapoli, 1611.

Carpanus, H., *Rerum Omnium et Vocem Memorabilis*, 2 vols., Mediolani, 1588.

Vinnius, A., *In quatuor Libros Institutionum*, ed. by Heineccius, Lugduni, 1726.

Fortescue, Sir John, *Governance of England*, ed. by C. Plummer, Oxford, 1885.

of jurists now takes up the theory of Bartolus. The relation of a state to *mare adiacens* is stated and restated. The laws of prescription are analysed. The case of Venice is discussed. Yet the essence of the theory remains as it came from his mind, until Albericus Gentilis is reached.³³

Gentilis introduces an essential change: he includes the sea within the meaning of the word, territory. His doctrine is to be found in the eighth chapter of the first book of his *Hispanicae Advocacionis*,³⁴ which bears the significant title, *De marino territorio tuendo*. He begins by referring to a controversy between Spain and the Dutch. The latter had made a strong protest because a Dutch vessel had been stopped on the high seas by a Spanish ship and had been forced to surrender certain booty which, it appears, had been taken from Spanish subjects. Gentilis takes an unfavorable view of their representations and states that the word "territory" is applied both to land and sea. *At ego, quod olim scripsi in libris bellicis, territorium et de terris dici, et de aquis.*³⁵ He cites the doctors in general as saying that the Venetians and the Genoese, and others having a port or harbor, are said to have jurisdiction and *imperium* in the whole sea near them to a distance of 100 miles, or even more, if there are no other "provinces" near. And he adduces Bartolus in support of his statement.³⁶

The passage in his *De Iure Belli* to which he refers is as follows:

*Athenienses suo mari permisissent transire Spartanos hostes. Iusta expostulatione quoniam mare portio terrae: ut gymnosophista respondit, et agnoscunt nostri. Mare adiacens pars ditionis est, et territorium de terris dicitur et de aquis. Ne quid dicam de Venetis aliisque, qui integra maria sibi vindicarunt: sed et proditor dicitur feudatarius, qui permittit gentem transire inimicam.*³⁷

Let the Dutch, he proceeds, and everyone use the sea, but without violating foreign jurisdictions. Let them remember that there are things heretofore undefined which are defined today; and that the distinction in the *ius gentium* between dominions and jurisdictions must be carefully observed.³⁸ Gentilis credits Baldus with his theory of *mare adiacens*, and with justice, for the adjacent sea, in the thought of the latter, was a judicial district appertaining to the land, in which the *ius civilis* was operative.

In addition to this doctrine from Baldus, and the use of the hundred-mile limit from Bartolus, Gentilis lays down his own position, that contained in the phrase, *mare portio terrae* and the application of the word *territorium* to the sea. After Gentilis, it is literally correct to speak of territorial waters in international law. It need hardly be pointed out that Gentilis is writing in-

³³ 1550-1608.

³⁴ *Libri duo*, Amstelodami, 1661.

³⁵ Gentilis, *op. cit.*, p. 32.

³⁶ Gentilis, *op. cit.*, p. 33.

³⁷ *De Iure Belli, libri tres*, ed. by T. E. Holland, Oxonii, 1877, vol. iii, c. 17, p. 369.

³⁸ *Hispanicae Advocacionis, op. cit.*, p. 37.

ternational law itself at this point, and, in contrast to the later philosophical and deductive method of Grotius, is empirical and inductive. His doctrine is given additional significance by the fact that he is observing international practice and appraising it.³⁹

The question as to the limits of the adjacent sea does not meet with anything like wide recognition in the writings of the jurists previous to the seventeenth century controversy over *mare liberum* and *mare clausum*. Even then no attempt is made to place precise limits which shall be at once workable and applicable to all nations. Even Venetian lawyers did not begin seriously to defend the notorious claims of their republic to the Adriatic until the ability of their government to act effectually on them had become undermined by decay. It may safely be said that up to 1648 the problem of setting limits to *mare adiacens* received slight attention from the jurists.

The first limit to make its appearance is that of Bartolus. He had his followers here, most notable of whom is Gentilis. Jean Bodin advocated a different limit and for a different purpose. While treating of the sovereignty of the Prince, he writes:

*Sed quoniam æquor ac mare ipsum privatorum proprium esse non potest, iure quodammodo Principum omnium maris accolarum communi receptum est, ut sexaginta miliaribus a littore, Princeps legem ad littus accedentibus dicere potest. . . . At etiam ancoras alienis littoribus sine Principis concessu iniicere non licet: quae tamen olim iuris gentium fuerint.*⁴⁰

The passage referring to the sixty-mile limit is given in the French edition as follows: *Mais les droits de la mer n'appartiennent qu'au Prince souverain, qui peut imposer charges iusque a xxx lieues loing de sa terre, s'il n'y a Prince souverain plus pres qui l'empesche.*⁴¹ Antonius Matthaeus, in referring to Bodin's sixty miles, remarks, *admodum dubito, an id ipsum obtineat.*⁴²

Plowden, in his argument in Sir John Constable's Case, suggested a method by which to apportion the adjacent sea:

'And to take all this matter, we ought to consider to what place the bounds of England extend. . . . Firstly, the bounds of England extend to the middle of the sea adjoining which surrounds the realm; but the Queen has all the jurisdiction of the sea between France and this realm by reason of her title to France, and so it is of Ireland; but in other places, as towards Spain, she has only the moiety. . . .

³⁹ For the expression of Gentilis' theory in the field of Roman jurisprudence, see Klockius' C., *Tractatus Juridico-Politico-Polemico-Historicus de Aerario, Libri duo*, Norimbergae, 1671, pp. 754.16 and 938.1 (vols. paged consecutively).

Other jurists including the sea within the meaning of *territorium* are:

Decianus, T., *Responsorum*, 3 vols., Venetiis, 1579.

Caponus, J., *Controversarium Forensium*, Coloniae Allobrogum, 1732.

(Probably) Pacianus, F., *Consilia*, Augustae Vindelicorum, 1605.

Vinnius, *op. cit.*, notes the presence of this and opposed theories on p. 143.

⁴⁰ Bodinus, I., *De Republica, libri sex*, Francofurti, 1622, p. 267.

⁴¹ *Les Six Livres de la Republique de I. Bodin*, Paris, 1576, p. 215.

⁴² *Commentarius ad Institutiones*, Trajecti ad Rhenum, 1672, p. 541.4.

But although the Queen has jurisdiction in the sea adjoining her realm, still she has not property in it, nor in the land under the sea, for it is common to all men, and she cannot prohibit any one from fishing there. . . .⁴³

With the famous controversy over *mare liberum* and *mare clausum*, in which Grotius and Selden were the great antagonists, the present study is not concerned. That conflict was between theories which had become familiar, the elements of one of which have been exposed here. The other was the great doctrine of the classic Roman law which finds expression in that vague phrase, "the freedom of the seas." The conflict was serious primarily because the advocates of *mare clausum* placed an extravagant interpretation upon the meaning of the term "adjacent sea." Grotius himself admitted the right of a state to the ownership of its gulfs and bays. What agitated him was the claim of Spain and Portugal to divide the ocean between them. Selden was on sound ground when he championed the theory of territorial waters. The menace in his argument lay in his definition of them. Save for a small group of Continental jurists, the arguments are guided by the interests of the parties to them, and are thus particularistic to a high degree.

The first indications, then, of the germ of a legal theory capable of developing into one of territorial waters are to be found in the work of the Glossators. The beginning of a beginning may be seen in that express recognition by the Glossators of the inchoate jurisdiction over crimes which were committed at sea which the Mediterranean states had exercised from time immemorial, and which found its largest field in the suppression of piracy. A jurisdiction which had heretofore been based on the tacit consent which accompanies uninterrupted practice was now given legality and vested in the person of the Emperor. With this material at hand, Azo, one of the greatest of the Glossators,⁴⁴ makes the first contribution. A private right may be granted in the sea in either of two ways: by the bestowal of a privilege, or by long continued custom. This means, of course, not only that the communal character of the sea is limited, but also that the monarch possesses the authority so to limit it. A practice originally infrequently indulged in had become intensified before 1230 (the latest possible date for Azo's death) to the point where it found expression in law.

An examination of the evidence shows that the private right referred to might take one of two forms. It might be the right to the exclusive use of some thing in the sea, as, for example, an offshore fishery. Or it might be the private ownership of a portion of the sea, as, for example, the bays and inlets indenting the coast of an estate or fief.

The next step toward the formation of a theory of territorial waters is

⁴³ Moore, S. A., *History and Law of the Foreshore*, 3d ed., London, 1888. "The case of *Atty v. Sir John Constable* occurred in 17 Elizabeth, A. D. 1575. The defendant was charged with taking 'wreck of the sea' in Holderness," p. 224.

⁴⁴ According to Savigny, he died before 1230. *Geschichte des Römischen Rechts in Mittelalter*, 6 vols, 2d ed., Heidelberg, 1834 and after, vol. v, p. 8.

made in the middle of the fourteenth century by Bartolus of Sassoferrato, the greatest jurist of his time. The influence of the practice of the feudal period is clearly to be discerned in his thought. He places coastal waters under the exclusive jurisdiction of the ruler of the territory adjoining, and gives the ruler (or state) the right of ownership over the islands near the shore. He holds that islands to a distance of one hundred miles out to sea belong to the adjacent territory. Within this distance a state exercises its jurisdiction.

Toward the end of the century, Baldus, the famous pupil of Bartolus, incorporates his teacher's theory in the feudal law. He terms the adjacent sea a judicial district, in which is applied the civil law of the state possessing the adjoining territory.

The fact that the feudal system was a territorial system, in which the king was the ultimate owner of all the land in his realm; the placing of the power to grant the rights and privileges referred to above within the *Regalia* or royal prerogatives; and the rise of the modern theory of sovereignty,—these were the influences which caused the existing theory of the adjacent sea to develop into that of the territorial sea.

This final step was taken by Gentilis in the latter part of the sixteenth century. Significantly enough, he stated his doctrine as part of the law of nations. Coastal waters are, he says, a part of the territory of the state whose shores they wash. It follows that the territorial rights of sovereignty which exist in the head of the state are extended *in toto* over the sea adjacent to his coasts.

There remains the problem of placing a limit to these waters. The theory, however, is complete with Gentilis. The delimitation of the territorial waters is a mere matter of detail, and becomes a problem for statecraft and not for lawyers to settle.

The contributors to the completed theory may be arranged to satisfy the sympathies of the student. The most inclusive list must begin with the name of Paulus, the Roman jurisconsult who contributed the text in the *Digest* which stimulated Azo. The Glossators as a group may be given a place for their doctrine of the punitive power of the Emperor over offenses committed at sea. Then follow Azo, Bartolus, Baldus, and Gentilis. Azo, because he recognized the authority of the Emperor to limit the communal character of the sea; Bartolus, because he asserted the right of the monarch to exclusive jurisdiction over the adjacent sea to the extent of one hundred miles; Baldus, because he transferred this doctrine to the feudal law, terming the adjacent sea a judicial district.⁴⁵ It may be noted that he did not contribute an original element to the theory. And, finally, Gentilis, who brought the work to completion. But the greatest names are three: Azo,

⁴⁵ It is regretted that lack of space has prevented a full consideration of the position of Baldus. Full citations from his works were given under his name as a partial remedy for this omission.

THE VILNA DISPUTE

By W. J. BROCKELBANK

Of the many post war problems of Europe few have presented such difficulty as the problem of Poland's boundaries with Lithuania. Article 87 of the Treaty of Versailles reads in part, "The boundaries not laid down in the present treaty will be subsequently determined by the Principal Allied and Associated Powers." Since the eastern boundaries of Poland are not laid down in the Versailles Treaty, this task has remained for the Principal Allied and Associated Powers.

During the World War the Germans took possession of Vilna, where they remained until their military collapse in 1918. On February 16, 1918, the Lithuanian State Council proclaimed the independence of Lithuania at Vilna, and was established there after the Armistice of November 11, 1918. In January, 1919, the Bolshevik army descended on Vilna, and the Lithuanian Government was forced to retire to Kovno. Both the Polish and Lithuanian military machines assumed the offensive; but the Polish army was able to organize more quickly and succeeded in driving the Bolsheviks back and in occupying Vilna on April 20, 1919. The Lithuanian Government regarded this as a seizure of its capital and protested warmly. Some fighting then took place between the Polish and Lithuanian forces. Thus we see the problem before the Allied and Associated Powers was that of fixing a boundary line on each side of which stood an army ready at any moment to vindicate what it considered its rights. To approach this problem on its merits one must realize something of the background that is embedded in the history of the Polish and Lithuanian peoples. The present antagonism is the more unexpected because these two peoples have for centuries been united, and their history seems to have especially intended them to be friends.

Until the thirteenth century Lithuania remained a pagan and unimportant country. Aroused by the hostile Teutonic knights, Lithuania then became aggressive and powerful, and spread her conquests until at the end of the fourteenth century her territory extended from the Baltic almost to the Black Sea, a vast territory in which only about one-tenth of the people were Lithuanian by origin. In 1386 Janiello, the Grand Prince of Lithuania, married Jadwiga, the young Queen of Poland. This was the beginning of a union between Poland and Lithuania which lasted until the final partition in 1795. On July 1, 1569, the Act of Lublin further brought the two peoples together into a perpetual organic union, and the Constitution of May 3, 1791, effected a complete fusion. There are few examples in history of such a complete union of two peoples. During these two centuries they shared in common many struggles against both Germans and Russians.

Within the two countries the Polish people came to dominate, due perhaps to their greater wealth and consequent higher culture. The Lithuanians spoke a peculiar language akin to Sanskrit, hard to understand and little used in writing. The Polish language, on the other hand, was a Slavic tongue more easily understood by the surrounding nations and used more on the printed page. Little by little the educated Lithuanian was forced by circumstances to use Polish as the language of culture. The Lithuanian language was relegated to the unwritten jargon of peasants. The fact that Kosciuszko, the Polish national hero, and Micewicz, the great Polish poet, were both born in Lithuania but yet were assimilated by Polish culture bear witness to this fact. This cultural assimilation of Lithuania by Poland was gradual and in no way disturbed the harmony of the two peoples, but, if anything, increased it. That harmony was further increased by a common religion, Roman Catholicism. So completely did their religion fill the lives of the peasants of both countries that it was common for a peasant to confuse his religion with his nationality and when asked what was his nationality to reply "Catholic." The great community of interests thus created, and fostered by four centuries of a common religion and a common political life, remained even after the final partition. As late as 1863, when a revolution broke out in Russian Poland, both peoples strove together in the common cause of their longed-for independence.

The first suggestion of discord came about 1883 when the national movement began in Lithuania by the publication of the *Auszra* in Tilsit. Soon other publications were added, including books and magazines published by Lithuanians in America. The object of the movement was to disseminate a knowledge of the written Lithuanian language among all hitherto illiterate Lithuanians, to increase the appreciation of Lithuanian literature, and above all to spread the knowledge of certain facts among the masses in such a way and to such an extent that they could no longer be exploited. At first the movement met with some opposition from both upper and lower classes of Lithuanians. The Poles opposed it instinctively and soon formed a self-conscious group of "Polanizers," who tried to retain the cultural domination so long conceded. The "Lithuanianizers," encouraged by Russia, as ardently tried to overthrow it. This struggle was in full sway at the outbreak of the war and has formed a rather unhappy background for all efforts of conciliation between the two peoples.

The World War worked havoc with the economic life of both Lithuania and Poland. Their territories were the scenes of many battles and the greater part of all the buildings and improvements was totally destroyed.

In July, 1920, the Bolshevik forces were able once more to occupy Vilna, and on July 12, 1920, the Lithuanian and Russian Governments concluded the Treaty of Moscow.¹ By this treaty Russia gave over the Vilna district and parts of the former provinces of Grodno and Suwalki to Lithuania.

¹ 113 British Foreign and State Papers, p. 1121.

Thus the territory granted to Lithuania by Russia overlapped the territory allotted to Poland by the Supreme Council on December 8, 1919 (the "Curzon Line"). Poland resented this at once, and her resentment was increased by a rumor that the Lithuanian Government had granted to Russia by certain addenda to the treaty the right to use Lithuanian territory in military operations against Poland during "military strategic necessity."² During August, 1920, the Polish army suddenly repulsed the Bolshevik forces, and in pursuit came upon territory occupied by the Lithuanian forces, where some fighting took place.

On September 5, 1920 the Polish *Chargé d'Affaires* telegraphed the League of Nations making certain complaints about Lithuanian treaty concessions to Russia, describing the existing military situation, and begging the League to use its influence to put an end to further bloodshed. On September 8, 1920, the Lithuanian *Chargé d'Affaires* in London wrote to the League justifying Lithuania's actions and denying any understanding with the Russians against the Poles. The note also stated that the Lithuanian Government had appealed to the British Government for consent to hold a conference in London with British participation in order to settle all Polish-Lithuanian differences, and that if this conference should not take place, the Lithuanian Government would be glad to submit the whole case for arbitration to the League. On September 8, the Polish-Lithuanian dispute was placed on the agenda of the Council meeting to be held in Paris September 16. Poland duly appointed M. Paderewski, and the Lithuanian Government duly appointed M. A. Voldemar, as their respective representatives at the Council.³

When the dispute came up for discussion at the Council meeting, M. Léon Bourgeois raised the question as to the exact capacity under which the League of Nations should attempt to intervene, and inquired whether Lithuania would accept the responsibilities of a member of the League for the purposes of the dispute as provided for in Article 17 of the Covenant. After a good deal of discussion, representatives of both governments were able to accept a resolution formulated by M. Hymans, the Belgian member

² This rumor was most probably true because later Professor Voldemar, who represented Lithuania at the meeting of the Council of the League in Paris on September 17, said: "Par une déclaration annexée au traité, la Lithuanie a en effet, autorisé les troupes Bolshévistes à utiliser son territoire. Mais comment pouvait-elle refuser aux Bolshéviques une faculté qu'elle avait dû laisser aux Polonais eux aussi, alors établi sur son territoire et notamment à Vilna? La situation militaire à la date de la signature du traité, était d'ailleurs augoissante. Les troupes Bolshévistes étaient déjà sur territoire Lithuanien, où s'arrêteraient-elles? Comment limiter l'avancement?" League of Nations Official Journal, Dec. 1920, p. 65. This is a rather remarkable admission against interest in the face of a telegram of only a few days previous denying any understanding with the Bolsheviks against the Poles. See also *Documents Diplomatiques concernant les Relations Polono-Lithuanienes, Décembre 1918-Septembre 1920*. Document 31, p. 42.

³ League of Nations Official Journal, December, 1920, Special Supplement *Différend entre la Pologne et la Lithuanie, passim*.

of the Council, by which the Lithuanian Government consented to accept for this dispute the obligations of a member of the League. Both governments accepted provisionally the "Curzon Line," and in view of the fact that the zone of Grodna and Lida was still occupied by Soviet troops which the Soviet Government was willing to withdraw provided Lithuania could guarantee that the neutrality of Lithuania would be respected by Poland, and in view of the fact that direct negotiations between the two governments were actually proceeding at Kalwarya, the Council offered to appoint a commission entrusted with the duty of insuring on the spot the maintenance of the terms of the resolution. Everything seemed favorable to a speedy settlement. The League commission, consisting of Colonel Chardigny (France), Major Hersé (Spain), Major Keenan (Great Britain), Captain Yanamaki (Japan), and Colonel Vegera (Italy), was sent out about September 30, 1920, arriving October 4.⁴

Negotiations between the two governments began on September 30 at Suwalki, and continued through the first days of October. Even during these negotiations a certain amount of fighting continued. On October 7 the Suwalki agreement was signed by the representatives of both governments.⁵ The agreement accepted the Curzon line as a provisional line of demarcation and continued it in an easterly direction as far as Bastouny, about forty miles south of Vilna, leaving Vilna to the Lithuanians. The agreement provided for the mutual exchange of prisoners and was to remain in force "until all litigious questions between the Poles and Lithuanians shall be definitely settled." But the ink was scarcely dry on the paper when a new development took place and a new chapter commenced in this eventful history.

On the same day the agreement was signed, the Polish General Zeligowski attacked Lithuanian troops at Orany, and two days later entered Vilna and proclaimed a government called "Central Lithuania." Numerous assertions have been made by the Polish Government that General Zeligowski was a rebel having no official connection with the government;⁶ but, there is much evidence from Lithuanian sources that, if Zeligowski's actions were not officially ordered by the Warsaw Government, they were at least acquiesced in,⁷ and there is also much evidence to the effect that the Polish

⁴ *Ibid.*, pp. 64, 65, 74, 75, 95.

⁵ The Lithuanian-Polish Dispute, Lithuanian Delegation, Second Assembly of the League of Nations at Geneva, 1921, p. 55.

⁶ *Différend entre la Pologne et la Lithuanie*, *ibid.* Note from Polish Minister of Foreign Affairs, pp. 136, 138.

⁷ Letter and telegram from the Lithuanian Chargé at London, *ibid.*, p. 148; letter from the Lithuanian Delegation at Paris, *ibid.*, p. 129; statement of the Lithuanian Chargé at London, *ibid.*, p. 131; note from the Lithuanian Government, Oct. 12, 1920, *ibid.*, p. 133; telegram received by the Secretary General from Kovno, Oct. 13, 1920, *ibid.*, p. 142. See also the very interesting depositions of Lieutenant Grodski, Captains Buczynski and Jovorski and Sous-Lieutenant Slovikovski in The Lithuanian Polish Dispute, Lithuanian Delegation, Second Assembly of the League of Nations at Geneva, 1921.

Government kept Zeligowski supplied with necessary materials.⁸ An eye witness' vivid account of the events following the occupation states that Zeligowski, a native of the Vilna district, was at the head of regiments recruited entirely from the Vilna district in the struggles against the Soviets, and entered Vilna in October, 1920, in response to the people's cry for deliverance.⁹ Whatever may be said of Zeligowski's official connections, subsequent events show that he was at Vilna as the people's representative and hero, and that his initiative had been approved by the whole Polish nation.¹⁰ Nearly a year later, in the Council meeting of September, 1921, Mr. Balfour said "To this day it is very difficult even for the most impartial spectator of events to know precisely what the attitude of the Polish Government is to the ex-Polish general. Is he a rebel deserving military sentence? Is he a patriot deserving the patriot's crown? We know not. Whenever the exigencies of debate require one answer, that answer is given. When they require the other answer, the other answer is given."¹¹

Now, what was the situation? Had Poland as a member of the League of Nations "resorted to war in disregard of its covenants" under Articles 12, 13 or 15 of the Treaty of Versailles so as to be deemed to have committed an act of war against all other members of the League and therefore to be subjected to the severance of all trade and financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking state, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking state and the nationals of any other state, whether a member of the League or not?

At the meeting of the Council held in Brussels on October 26, 1920, the Lithuanian representative took this position and asked the President of the Council to summon immediately a plenary meeting of the League of Nations in order that it might express an opinion with regard to the application to Poland of the penalties laid down by Article 16 of the Covenant. Also at various later periods Lithuania requested the application of the penalties of Article 16 to Poland. On the other hand, the Polish representative, M. Askenazy, took the position that Zeligowski's forces were not officially

⁸ *Différend entre la Pologne et la Lithuanie, ibid.*, Statement of M. Voldemar at the Council meeting at Brussels, Oct. 26, 1920, p. 151; also telegram of Voldemar to the League, p. 161.

⁹ Article by Mrs. Cecil Chesterton in *The New Witness*, Vol. 18, No. 469, p. 266. Nov. 4, 1921.

¹⁰ *Différend entre la Pologne et la Lithuanie, ibid.*, p. 151. Statement of M. Askenazy, p. 151.

¹¹ League of Nations, *Collection des Documents relatifs au Différend entre la Pologne et la Lithuanie. Archives. Documents* Oct. 1920 to Apr. 1921. Document 86. Procès Verbal of the seventh meeting of the fourteenth session of the Council. (The collection of documents here cited have been assembled by the secretariat of the League in seven large volumes. In this collection are placed either the original documents themselves or a copy from the original document. Thus they form the chief authoritative source of information on this question. The documents placed in these volumes are numbered, and hereafter in this paper the collection will be cited simply "Archives" with the document number.)

Polish forces, that the armistice agreement of Suwalki of October 7 had thus resulted in a cessation of hostilities between Polish and Lithuanian troops, and in view of the armistice and peace preliminaries between Poland and the Soviet Government signed at Riga on October 12, 1920, the Polish-Lithuanian dispute as submitted by the Polish Government to the League on September 5 may be considered as no longer existing. This position was not at all acceptable to the Council, M. Léon Bourgeois pointing out that when two states had submitted a dispute to the League of Nations, one of the parties on its own authority could not withdraw. The Polish representative later withdrew from this position and accepted the competence of the Council. However, the Council showed no disposition to attempt to apply the penalties of Article 16 of the Covenant, but preferred to seek a more amicable settlement, and since both governments had expressed their wish that the possession of the contested territories should be decided in accordance with the wishes of the population, M. Hymans, the Belgian representative on the Council, proposed the holding of a plebiscite to be carried out under the supervision of the League of Nations. Both governments accepted the proposal, making certain observations as to the extent of territory to be covered by the plebiscite, and the Council began its preparations for a plebiscite commission and an international force to insure the proper carrying out of the plebiscite.¹²

The Plebiscite Commission was instructed to attempt to bring about an agreement between the two countries as to what territory should be included within the plebiscite, to prepare regulations and to supervise the taking of the popular expression of opinion.¹³ Many difficulties were met. Questions arose as to whether a vote by secret ballot should be taken, or whether mass meetings should be held in the towns at which popular opinion might be expressed. The most difficult situation of all was in the city of Vilna itself where General Zeligowski and his troops were still stationed. How to disarm them so as to allow a free expression of opinion?

The commission began its work, and on November 29, 1920, succeeded in having an armistice signed by the Lithuanian and Polish Governments, the latter government guaranteeing that General Zeligowski would observe its conditions.¹⁴ Many attempts were made by the commission to obtain some agreement between the two governments as to the territory to be included within the plebiscite, but these attempts proved futile; and on December 31, 1920, the two governments informed the Plebiscite Commission that they regarded an agreement between themselves on this question as impossible.¹⁵

In the meantime, preparations for an international force of 1500 men were

¹² League of Nations Official Journal, Special Supplement, December, 1920. *Différend entre la Pologne et la Lithuanie*, pp. 152, 153, 169, 181, 194.

¹³ Archives, Vol. 1-2, Documents 3, 16, and 17.

¹⁴ Archives, Vol. 1-2, Document 2; Vol. 3, Documents 86 and 97.

¹⁵ *Ibid.*, Document 31.

being made by the Council. On behalf of the Council, the French Government approached the Governments of Switzerland, Austria and Czechoslovakia for their consent to the passage across their territory of the international force. Austria and Czechoslovakia gave their consent, but Switzerland announced that it could not consent to the request.¹⁶

The Plebiscite Commission met with constant difficulty. In Lithuania there occurred certain intrigues against the government with the object of provoking a ministerial crisis and of bringing about a rupture with the League of Nations. Lithuania had previously laid certain complaints before the League to the effect that it was at a disadvantage in not having *de jure* recognition as Poland had, and the fact that the Supreme Council on January 26, 1921, decided to give *de jure* recognition to Esthonia and Latvia and withheld it from Lithuania pending the settlement of the questions now under consideration, caused a painful impression in political circles, as the decision was regarded as the result of Polish intrigues.¹⁷

Moreover, the Lithuanian Government constantly seemed to fear Soviet intervention on account of Article 4 of the Treaty of Moscow of July 12, 1920, by which Lithuania undertook "not to permit on their territory the formation and sojourn of governments, organizations, or groups who have for their object armed warfare against the other contracting party . . ." and used this as a pretext to delay the work of the commission. The Russian Government informed the Lithuanian Government that it considered the presence of Allied troops which had supported Kolchak, Judenitch, Denikin and Wrangel as coming within the above provisions of Article 4. This difficulty, whether real or only fancied, was at all events used as a pretext for delaying the coming of the international force.¹⁸ In the meantime many acts of aggression were taking place between the armies of the two countries, which only made the task of peace the more difficult.

On December 20, 1920, in view of the many difficulties, the Council asked both governments if it could rely on their support in the task of carrying out the plebiscite. A reply was had from Lithuania only on January 21, 1921, which stated that Lithuania was ready to give its whole-hearted support to the carrying out of the plebiscite in an equitable manner, but stipulated five indispensable conditions to insure the fairness of the plebiscite: (1) complete withdrawal of all Polish troops from the territory in question; (2) administration of the plebiscite area by states entirely disinterested in the dispute; (3) guarantee that a repetition of the *coup de force* of General Zeligowski would not take place; (4) a delay sufficient to allow the influence of Polish propaganda to subside; (5) *de jure* recognition of Lithuania. The note repeated that intervention by Soviet Russia was feared, and until the

¹⁶ *Ibid.*, Document 4.

¹⁷ *Ibid.*, Documents 41 and 43; *Différend entre la Pologne et la Lithuanie*, *ibid.*, letter from the Lithuanian Chargé in London, p. 141 and letter from M. Voldemar, p. 195.

¹⁸ Archives, Vol. 1-2, Document 22; Vol. 3, Document 85.

matter could be adjusted with Russia it would be impossible to allow foreign forces to enter the disputed area.¹⁹

In view of this attitude and in view of the many difficulties arising by virtue of General Zeligowski and his forces, the League Council decided to change its tactics, and on March 3, 1921, adopted a resolution inviting both governments to undertake direct negotiations within one month at Brussels under the presidency of M. Hymans in order to arrive at an agreement that should settle all territorial, economic and military questions in dispute between the two countries. On March 14 the Polish Government, and on March 15 the Lithuanian Government, accepted the invitation to the Brussels conference.²⁰

The conference opened at Brussels on April 20, 1921, with Count Sobanski as head of the Polish delegation and M. Galvanauskas as head of the Lithuanian delegation. The effort made by M. Hymans to bring about some agreement at this time was a determined one. From the beginning of the negotiations it was evident that the territorial question and the general problem of the future relations of the two countries were interdependent. The territorial question was highly charged with passions engendered by bloodshed and unsuccessful negotiations, and thinking to overcome the consequent mistrust, M. Hymans proposed to discuss the problem of future relations first, provisionally assuming the territorial question to be solved. The problem was first discussed from the point of view of military defence, then of

prepared to resume direct negotiations.²¹ The reasons for this action by Poland were brought forward at the next Council meeting on September 10, 1921, by the Polish delegate M. Askenazy. These reasons were based on what were regarded as essential differences between the new draft and the draft of the Brussels conference, *viz.*, the new draft substituted for the idea of a federation between two sovereign states a proposal for the incorporation of

same date.²⁷ This at once drew a protest from the Lithuanian Government. That Government also protested against the many acts of cruelty and aggression committed by Polish troops, which were explained or denied by the Polish Government.²⁸ The only response to the protests of Lithuania was the insertion in the resolution of January 13, 1922, of the statement that the League could not accept any solution of the dispute which might be reached without regard to the recommendations of the Council or without the consent of both parties concerned. The resolution recommended the resumption of diplomatic relations and the delineation of a provisional boundary line, reminded Poland (under the Treaty of Versailles) and Lithuania (under her declaration of September 14, 1921) that they were bound to apply the principles of the minorities treaties for the protection of minorities within their territories, and ended: "As regards the Vilna district, as the League of Nations has the duty of seeing that protection is afforded to minorities in Poland and Lithuania, the Council is convinced that both parties will consent to its sending representatives to the spot should it see fit to do so, to collect the necessary information for a report to the Council on the subject."²⁹

Each government continued its barrage of complaints of acts of cruelty and aggression by the other, and explanations and denials of its own alleged acts. Nearly three quarters of the archives for the next year are taken up with these complaints and requests for intervention. The Lithuanians complained that the Polish authorities had closed several schools, an orphanage, a coöperative society and a Lithuanian bank; had prohibited the publication of a Lithuanian newspaper, and offered every opposition to the White Russian nationalist movement and had made many arbitrary arrests. The Poles complained that the Lithuanian state had confiscated forests, ponds and turf-pits without compensation, had confiscated many fine private libraries and taken them to Kovno, that Polish estates had been divided up among the farmers, or seized to supply demobilized soldiers with land, that arbitrary police searches and illegal arrests had been carried out, and that the only Polish newspaper in Kovno had been suspended and fined.³⁰ The usual result was a letter from the Secretary-General of the League or the President of the Council to the party against whom the complaints were made and a reply from the latter denying the facts. However, some real regulation was effected by the Military Commission of Control until its withdrawal on February 17, 1922. After that date the neutral zone fell into a state of anarchy. The population was abandoned to its fate, having neither a government nor a regular administration. Troublesome propagandist organizations from both Poland and Lithuania entered the zone under the guise of

²⁷ *Ibid.*, Documents 113 and 127.

²⁸ *Ibid.*, Documents 98, 103, 110, 112, 119, 120, and 125 bis.

²⁹ *Ibid.*, Document 129.

³⁰ *Ibid.*, Documents January to August 1922, Document 115a.

were only a small part of the Polish political prisoners then in Lithuanian prisons.⁴⁰

At the Council meeting held at Geneva on February 1, 1923, the Polish delegate proposed that all questions relating to the protection of minorities in the Vilna region should be brought before and dealt with by the League in accordance with the normal procedure applicable under the rules laid down in the Minorities Treaties of June 28, 1919. This proposal was adopted by the Council, with the additional statement that "this decision in no way modifies the terms of the recommendation of the Council of January 13, 1922, concerning the territorial question."⁴¹

On February 3, 1923, the Council adopted a resolution laying down a provisional line of demarcation to be observed by the two governments after February 15. It follows the line laid down in the Saura report, except the region traversed by the Grodno-Vilna railway, where the whole zone was placed under Polish administration because it was considered that the protection of the line would be better insured if it were all put under the same administration. Accordingly, the line gave to Poland all the districts situated in the neutral zone up to and including in the north the districts of Kolpanasziski, Uscleje and Skobska. The resolution further declared that the present recommendation is its final recommendation on the question submitted for its consideration.⁴² Thus, after more than two years of repeated attempts to settle this question, the Council definitely washed its hands of the whole affair.

The recommendations of the Council were at once accepted by Poland, which proceeded on the appointed day to occupy the portion of the zone assigned to it, although they were met by organized opposition near Lejpuny and Klepaczi and fighting continued for about ten days.⁴³ But Lithuania both at the time and ever since has expressed its opposition in principle. On February 10 the Lithuanian Government addressed a telegram to the Council formally refusing to accept the resolution, and stating that "in view of the fact that no question regarding the partition of the neutral zone and the fixing of an administrative line has ever been submitted to the Council by the Lithuanian and Polish Governments in the manner provided for in the Covenant of the League of Nations, the Lithuanian Government considers that the resolution adopted by the Council on February 3 with regard to the partition of the neutral zone . . . is contrary to the provisions of the Covenant." The telegram further requested the Council to submit the question of its competence in the matter to the Permanent Court of Inter-

⁴⁰ *Ibid.*, Document 122.

⁴¹ *Ibid.*, Document 149.

⁴² *Ibid.*, Document 150.

⁴³ For comment on this, and the fact that France found it convenient to lend 400,000,000 francs to Poland "for the purpose of improving Poland's financial and economic situation," see "The Polish-Lithuanian Semi-War" in the Outlook, March 7, 1923 (133:431).

national Justice.⁴⁴ The Council decided to disallow the request of the Lithuanian government.⁴⁵

On March 15, 1923, the Conference of Ambassadors, meeting at Paris, made its momentous decision regulating the whole question. The line thus established recognized the Russo-Polish frontier as fixed by the Treaty of Riga, and for the boundary between Poland and Lithuania followed the line drawn through the neutral zone by the Council in its resolution of February 3, 1923.⁴⁶ This final stroke was a great victory for Poland. It meant practically Europe's official sanction for all that Poland claimed. American sanction was not long delayed. On April 7, Hugh Gibson, the American Minister to Poland, delivered on behalf of his government a note extending recognition by the United States of Poland's newly established eastern frontier.⁴⁷ Poland thus gained recognition for her sovereignty over a territory of approximately 6000 square miles.

On April 16, 1923, Lithuania addressed a note to M. Poincaré, President of the Conference of Ambassadors, formally refusing to recognize the validity of the decision of March 15.⁴⁸ Its arguments may be summarized as follows:

1. Any right in the Conference of Ambassadors to fix Lithuania's boundaries comes from Article 87 of the Treaty of Versailles, which Lithuania did not sign, and hence as against Lithuania no right exists.

2. The Conference of Ambassadors itself being aware of this principle, has recognized it with regard to Russia because its decision follows the line laid down by the Treaty of Riga.

3. The decision of the Conference of Ambassadors refers to Lithuania's note of November 18, 1922, as being a voluntary submission of the question to the conference. But this note asks the Powers to use the right conferred on them by Article 87 of the Treaty of Versailles to fix the Eastern boundaries of Poland "taking into account the solemn engagement of that state towards the Lithuanian state and the vital interests and rights of Lithuania." The Conference of Ambassadors quotes only the first part of the note and does not quote the part quoted here, and since the decision does not take into account the "solemn engagement of Poland towards Lithuania" (the Suwalki agreement) the decision is beyond the powers given by the note of November 18, 1922.

4. The right to be exercised by the Powers naturally involved the assumption of an agreement by the states involved who are not signatories to the Treaty of Versailles.

⁴⁴ Archives, Documents, 1923, February to September, Document 1.

⁴⁵ League of Nations Official Journal, Council Minutes, Fourth Year, pp. 580 to 586.

⁴⁶ Archives, Documents, 1923, February to September, Document 56; League of Nations Treaty Series, Vol. 15, p. 261.

⁴⁷ Current History, 18:303.

⁴⁸ Archives, Documents, 1923, February to September, Document 62.

5. Any reliance by the Conference of Ambassadors on the resolutions of the Council of the League of Nations of January 13, 1922, May 17, 1922, and February 3, 1923, is invalidated by the fact that Lithuania never accepted them and the Council had no power to impose them without Lithuanian consent. Thus the conference is trying to legalize a *de facto* situation.

6. There was no representative of Lithuania at the Conference of Ambassadors, and no chance was given to be heard.

On April 23, 1923, Lithuania addressed a note to the Secretary-General of the League asking that there be put on the agenda of the Fourth Assembly two questions, the first of which was later withdrawn and the second which was as follows:

The request by the Lithuanian Government to the Assembly of the League of Nations asking the Assembly to apply to the Permanent Court of International Justice for an advisory opinion on the two following points:

"(1) Has the Council of the League of Nations the right when a dispute is submitted to it under paragraph 1 of Article 15 of the Covenant to address to the parties, with regard to incidental questions which have not been expressly submitted to it, recommendations having the force of the Council reports referred to in paragraphs 4, 6 and 7 of the same article?

"(2) If the recommendations of a report by the Council of the League of Nations have been adopted in the circumstances contemplated in the 6th paragraph of Article 15 of the Covenant of the League of Nations and have been accepted by one of the parties, are such recommendations binding upon the other party if it does not accept them? And, second if, within the period fixed by Article 12 of the Covenant, it goes to war with the party which accepts the report, is it liable to the penalties laid down in Article 16?"

This question was accordingly put on the agenda of the Fourth Assembly.

When it came to be considered at the Fourth Assembly, the preliminary question arose whether the Assembly could reopen a discussion previously acted upon at a meeting of the Council and closed by the formal adoption

and the matter on Lithuania's own contention. Second, suppose, however, that the court were to decide that the Council was not competent, what would be the situation then? We must notice exactly what such a decision would be. The court by that decision would have stated merely that the Council did not have "the right when a dispute is submitted to it under paragraph 1 of Article 15 of the Covenant, to address to the parties, with regard to incidental questions which have not been expressly submitted to it, recommendations having the force of the Council reports referred to in paragraphs 4, 6, 7 of the same article," in other words, that the Council in its final report of February 3, 1923, had no right to lay down a provisional line of demar-

that men are beginning to realize what is the price of international peace. The price of peace between nations is like the price of peace between private interests within a nation. In one sphere as in the other men must resort to the best tribunals that it is possible for human intelligence to devise; and when these tribunals have given their decision, that decision must be accepted respectfully as the nearest approach to justice of which man is capable.

COMPUTATION OF TIME IN INTERNATIONAL LAW

BY FRANCIS DEAK.

The Council of the League of Nations has recently appointed a committee to report on the possible codification of international law. There are no rules in international law determining computation of time, and the prevailing uncertainty opens the door for arbitrary interpretation of the interested parties, which can lead and has often led to unnecessary differences.

What does a year, month, or day mean in international law? How is the moment when treaties go into effect to be determined? Should the "civil" computation, which is concerned only with days, be taken into consideration? Or should the "natural" computation, which considers also hours, sometimes minutes, be applied? If the "natural" computation be applied in a treaty, between the United States and China for instance, should the treaty be considered effective according to American or Chinese time? In a fixed period, should the first and the last day be reckoned exclusive or inclusive?

This lack of certainty in the definition of time is not a new thing in international law. H. W. Halleck, in his *International Law*, writes that "general rules laid down by text-writers, respecting the interpretation and observance of truces and other compacts in war, are necessarily somewhat indefinite and questions *almost always arise in their application to particular cases*," and he insists upon the greatest possible exactness in such documents to avoid all ambiguity.¹ Undoubtedly the need for exact determination of time is most important in the period of a war, when hours and minutes are bearing the fortune or misfortune of millions and the lives of thousands of people.

Vattel shows in his *Law of Nations* that the word "day" might be employed with two meanings in one and the same treaty. "It might be stipulated in a treaty that there should be a truce for fifty *days* upon the condition that during eight successive *days* the belligerent parties should, through their agents, endeavour to effect a reconciliation; the *fifty days* of the truce would be *days* and *nights* or days of *twenty-four hours*, according to the ordinary legal computation; but it would be irrational to contend that the condition would not be fulfilled unless the agents of the belligerent parties were, during the eight days, to labor night and day without interruption."²

¹ H. W. Halleck, *International Law*, 4th ed., London, 1908, Vol. II, p. 353.

² Vattel, *The Law of Nations*, 1854, Philadelphia, p. 251, §280.

Fauchille calls attention to the dangers of uncertainty in armistices and also complains about the disagreement of writers on international law.³

David Dudley Field, in his outline of an international code, determines "year" as consisting of 365 days without considering the leap year, and the "month" according to the division of the Gregorian calendar. He goes a step further, taking into consideration the differences between local times and determines the mean solar meridian passage at Greenwich on January 1 as January 1 throughout the world.⁴

Notwithstanding the early discovery of this gap by the learned writers on international law, extremely few acts or documents are found requesting and determining an exact computation of time. The conventions of The Hague of 1907 could be considered as one of the bases for written international law, though they have not been ratified by all the contracting parties. There are in Convention XIII, Articles 12-20, certain definite prescriptions concerning the stay of vessels in neutral ports. Article 12 limits the stay of belligerent war vessels in a neutral port to twenty-four hours, and according to Article 16 the war vessels of the two belligerent parties can leave the neutral port in an interval of at least twenty-four hours. These articles seem to exclude all ambiguity. But reading Article 20, one may ask whether the three months, mentioned here, within which period the war vessel of a belligerent party can not renew its provisions, will mean calendar months or months of thirty days, and whether or not either or both of the first and last days should be included or excluded?

In the national legislation of some of the contracting Powers are to be found decrees or laws limiting with extraordinary exactness the stay of war vessels in their ports, according to Articles 12-20 of the XIII Hague Convention of 1907. The decree of the French Government of October 18, 1912,⁵ may be cited as an example of clearness and exactness. The decree limits the stay of war vessels at "three times twenty-four hours," and includes in this term the time necessary for administrative formalities (Art. 5). The duration of delay given to war vessels leaving the territorial waters under French sovereignty should be computed from the moment of notification to the respective vessel.

The Italian legislation requests the belligerent war vessels to leave out of cannon shot of the Italian artillery within twelve hours computed *from the moment of notification of the ordinance on board ship*.⁶

It is extremely important to avoid any ambiguity in computation of time in another field of international law: in the declaration of blockade

³ Fauchille, *Traité de Droit International Public*, 8 ed. 1921, Vol. II. (*Guerre et Neutralité*), p. 328, Art. 1251.

⁴ David Dudley Field, *Outlines of an International Code*, 2d ed., New York, 1876, §§ 522-524, 994.

⁵ *Journal officiel de la République française*, 1912, No. 286.

⁶ Décret of August 20, 1909. *Gazetta ufficiale*, 1909, No. 232.

and by the days of grace or indult granted to enemy ships to leave the blockaded territory. According to F. V. Liszt,⁷ it has been customary, since the Crimean War, to grant commercial vessels of the enemy staying at the time of the opening of hostilities in the ports of the adversaries a certain number of days to leave. The United States granted Spanish ships in 1898 thirty days indult; during the Russo-Japanese War in 1904 Japan allowed Russian ships seven days in which to leave Japanese waters.⁸

The VI Convention of The Hague of October 18, 1907, speaks in very vague terms, recommending only a "sufficient" delay of grace to leave the enemy's port. It is no wonder that the interpretation of "sufficient" could be very arbitrary, and as a matter of fact Turkey captured Italian ships on September 29, 1911, the day of the declaration of war. Indults were granted in the World War of 1914 in a very restricted manner; Russia granted no indult at all.

The Declaration of London, signed on February 26, 1909, which should be regarded, too, as one of the important documents of international law, requests that a notification of a blockade should contain the *date* when the blockade begins (Chapter I, Art. 9, al. 1), and the word "*date*" is understood as stating the day and hour, as it is clearly expressed later in Article 16: "The notification should be entered in the vessel's logbook, and *must state the day and hour*, and the geographical position of the vessel at the time."

How these rules are put into practice might well be considered. Some notifications of blockades in the last thirty years will demonstrate the want of fixed rules. The blockade of Cuba proclaimed by the President of the United States on April 22, 1898, does not mention the exact beginning of the blockade.⁹ The blockade proclaimed by Germany against the ports of Venezuela fixes the day of December 20, 1902, as the beginning of the blockade, without determining the hour.¹⁰ The blockade of Montenegro by Austria-Hungary began on August 10, 1914, at noon.¹¹

The notifications of blockade by the Allied Powers were usually very exact in their draft, excluding every possibility of ambiguity concerning computation of time. The indults granted were generally indicated in the notification of blockade. But, on the other hand, there is no uniformity at all in the determination of time in these declarations given during the comparatively short period of the World War and issued by one and the same authority.

⁷ *Das Völkerrecht*, 12th ed., 1925, §65, p. 519.

⁸ Imperial Ordinance XX of Feb. 9, 1904. See Sakuye Takahashi, *International Law Applied to the Russo-Japanese War*, English ed., 1908, p. 64.

⁹ 30 U. S. Stats. at L., p. 1769.

¹⁰ U. S. Foreign Relations, 1903, p. 435.

¹¹ *Journal off. de la Rép. franc.*, Aug. 12, 1914, p. 7337.

The blockade of the Cameroons begun on April 23, 1915, at midnight, means Greenwich time,¹² but the blockade of Asia Minor and Syria began on August 25, 1915, at twelve o'clock.¹³ Did the French commander mean here Paris time or East European time?

The blockade of Cavalla (September 16, 1916) granted an indult till September 21, 1916, 8 a. m. East European time.¹⁴ A few weeks later the blockade of Greece was declared effective from December 8, 1916, 8 a. m. Did this mean again East European time? There is no further indication in the notification of blockade.¹⁵

At the beginning of the war, France granted seven days to the German vessels staying in French ports, since and inclusive of August 3, 1914, eighteen hours, forty-five minutes, the seven days to be computed "from the date of the decree" (August 4).¹⁶ Did the delay expire on the 11th of August, eighteen hours, forty-five minutes, or at midnight?

The notifications of blockade issued by the British Foreign Office,¹⁷ i.e., the blockade of German East Africa on February 23, 1915, of the Coast of the Cameroons on April 24, 1915, of the coast of Asia Minor and the entrance to the Dardanelles on June 1, 1915, of the coast of Bulgaria on October 16, 1915, gave day and hour of the beginning and the hours of indult, counted "*from the moment of the commencement of the blockade.*"

Italy declared the blockade of the coast of Austria-Hungary and Albania on May 26 and 30, 1915, giving simply the *day* as the beginning of the blockade.

Germany, too, by the declarations of the war zone on February 4, 1915, January 31, 1917, and January 5, 1918, mentioned only the *day* of the beginning.¹⁸

Under these circumstances disagreements always arise between the opposite parties. It is not necessary to go further into the details nor to cite cases before prize courts, which were obliged to settle these disagreements in an arbitrary manner in the absence of definite rules. But a glance at the enormous amount of literature, which, for example, grew out of the Russo-Japanese War, when captures of enemy vessels were considered unlawful as a consequence of the difference in interpretation of the beginning of hostilities, delay of grace and so on, will show the need of an exact and definite rule in this question. Mr. Francis Rey, in his essay on the

¹² *Ibid.*, April 23, 1915, p. 2497.

¹³ *Ibid.*, Aug. 24, 1915, p. 8005.

¹⁴ *Ibid.*, Sept. 20, 1916, p. 8303.

¹⁵ *Ibid.*, December 8, 1916, p. 10599.

¹⁶ *Ibid.*, August 8, 1914, p. 7133.

¹⁷ London Gazette, Feb. 26, 1915, p. 1975; April 27, 1915, p. 4060; June 4, 1915, p. 5386; Oct. 19, 1915, p. 10261.

¹⁸ Naval War College, International Law Documents, 1917, p. 107 ff; U. S. Official Bulletin, No. 221, p. 4.

Russo-Japanese War, recommends a change in the legislation concerning indults and the fixing of a general delay to be applied to all cases.¹⁹

There are other documents of international law, where there is no uniformity at all in the computation of time, though such would be of just the same importance, for instance, in ultimatums and declarations of war.

The ultimatum addressed by the Republic of the Transvaal to Great Britain requested an answer of the British Government before October 11, 1899, 5 p. m.; but, regarding the geographical situation of Johannesburg, the time expired in Paris time at about 3 o'clock.²⁰ Should the Johannesburg or the West European time be considered as binding? Both presumptions would be admissible.

In the Russo-Japanese War, the Japanese Government broke off diplomatic relations with Russia before the Russian answer to its ultimatum arrived at Tokio.²¹

The Italian ultimatum to Turkey, presented in Constantinople, September 28, 1911, at 2 p. m., requested the answer in twenty-four hours "from the presentation of the note to the Porte."²² The note does not mention the hour of its presentation.

The Austro-Hungarian ultimatum to Serbia, and the ultimatum of Germany to Russia and France gives a delay of forty-eight and of twelve hours, respectively, without giving the hour of presentation of the ultimata,²³ and only the instructions given to the Ambassadors request the exact notification of time, computed in local times²⁴ (Russian, West European time, and so on).

Japan's ultimatum to Germany on August 15, 1914, requests the German reply before noon of August 23, 1914.²⁵ The question is whether "noon" should be computed according to Central European or Japanese time.

It would be still more important to state the moment when a war begins and ends, for this changes profoundly the juridical situation of each country. Many laws are suspended at the outbreak of war, and, on the other hand, many laws come into force precisely at that time. But when does the state of war begin? In the World War there were about fifty declarations of

¹⁹ "Japon et Russie," by Mr. Francis Rey, *Revue Générale de Droit International Public*: XIV, 1907, p. 302 ff.

²⁰ *Revue Gen. de Droit Internat. Public*, VII, 1900, p. 147.

²¹ For the difference in interpretation of time concerning the ultimatum and declaration of war by Japan against Russia, see Takahashi, *op. cit.*, and H. Ebrén, "Obligation juridique de la déclaration de guerre," *Revue Gen. de Droit Internat. Public*, XI, 1904, p. 145.

²² Karl Strupp, *Urkunden zur Geschichte des Völkerrechts*, I, *Ergänzungsheft*, pp. 72-73.

²³ For these documents see the Austro-Hungarian Red Book, No. 7, p. 7, and the German White Book.

²⁴ See *Die deutschen Dokumente zum Kriegsausbruch*, 1914. Deutsche Verlagsgesellschaft für Politik und Geschichte, Berlin, 1922.

²⁵ Austro-Hungarian Red Book, No. 66.

war, but very few of these give the exact time from which the state of war began between the two countries.

Until the World War most of these documents declared the war "from this moment" (*dès ce moment*), which could be interpreted in different manners. For instance, Italy declared war against Turkey on September 29, 1911, "from this moment," which raised the question discussed by a great number of international lawyers whether Italy had begun hostilities *after* the expiration of the ultimatum, but *before* the declaration of war.²⁶

On August 1, 1914, Germany declared to Russia that "she considers herself in a state of war with Russia".²⁷ The Chancellor instructed the German Ambassador to hand over the declaration at 5 p. m. *Central European time*, and to wire the time of the fulfilment of the instruction in *Russian time*. Also in the declaration of war against France we read only that "the German Empire considers itself in a state of war with France," but the exact beginning of the war in hour and minutes is given in a circular of the French Government.²⁸

English practice is not consistent. England considered herself²⁹ in a state of war with Germany from 11 p. m. on August 4, with Austria-Hungary from midnight, August 12,³⁰ but with Turkey "as from to-day" (November 5, 1914),³¹ and again with Bulgaria "as from 10 p. m. to-night" on October 15, 1915.³²

Italy simply declared war against Austria-Hungary on May 23, 1915, "from to-morrow."³³ This very vague definition allows for regarding each of the twenty-four hours of these days as the beginning of a state of war between Italy and Austria-Hungary.

Bulgaria on September 1, 1916, declared war against Roumania as existing "from this morning."³⁴ In the declaration of war of China against Germany and Austria-Hungary on August 14, 1917, there is given again a minute specification of the state of war by hours.³⁵

²⁶ See A. Rapissardi-Mirabelli, "La guerre italo-turque et le Droit des Gens," *Revue de Droit International et Législation comparée*, 2^e série, 1912, pp. 103, 424.

²⁷ German White Book, Annex 26, Russian Orange Paper, No. 76. "... Note handed in by the German Ambassador at St. Petersburg on July 19 (Aug. 1) 1914, 10 minutes past 7 in the evening."

²⁸ *Journal officiel*, Aug. 6, 1914, p. 7133. "... They have in consequence the honour of informing by these presents the government of . . . that a state of war exists between France and Germany, dating from 6.45 p. m. on August 3, 1914 . . ."

²⁹ London Gazette, Aug. 14, 1914, p. 6375.

³⁰ Austro-Hungarian Red Book, LXV, p. 111.

³¹ London Gazette, Nov. 5, 1914, pp. 8997, 9011.

³² London Gazette, Oct. 16, 1915, pp. 10229, 10257.

³³ Second Austro-Hungarian Red Book, No. 204.

³⁴ *Revue Gen. de Droit Internat. Public*, Documents 23, 199.

³⁵ Naval War College, International Law Documents, 1917, pp. 73-74. "... therefore now declares that a state of war exists between China and Germany from 10 o'clock a. m. of the 14th day of the 8th month of the sixth year of the Republic of China."

The few cited examples should be sufficient to prove that there is an urgent need for fixing the rules of computation of time in international law. But if it is important to determine the exact time of beginning of hostilities, the substitution of the state of peace for the state of war, it is equally so with the cessation of hostilities and the restitution of the state of peace. Of all international documents, probably the armistices are the most exact concerning the statement of the time. During the World War there were concluded several armistices, and it is indeed surprising what dissimilarity is found in these documents.

The armistice concluded at Brest-Litovsk, December 15, 1917, between the Central Powers and Russia, gives the ending in Central European time and Russian time; the date of the armistice does not mention the hour of its signature.³⁶

The four armistices concluded between the Allied Powers and the Central Powers show that in a short period of six weeks, documents drafted under the same authority are different because of want of a rule.

The armistice with Bulgaria is dated, on September 29, 1918, *twenty-two hours, fifty minutes*, and orders cessation of hostilities to be given *by the signature of the armistice*.³⁷

According to the Turkish armistice, concluded aboard *H. M. S. Agamemnon* on October 30, 1918, hostilities shall cease from noon, *local time*, on October 31, 1918. This means that hostilities continued fully 24 hours after the signature of the armistice.

The same stipulation is to be found in the armistice with Austria-Hungary concluded on November 3, 1918, which is computed in Central European time.

The armistice with Germany is a little more generous, as it suspends hostilities six hours after the signature; this armistice is concluded according to French time.

Two years later, the armistice concluded between Soviet Russia and Poland fixed the cessation of hostilities six days after the signature; the date of the document indicates only the day of signature (October 12, 1920) but it fixes the beginning of the armistice at midnight on October 18, according to Central European time.³⁸ Considering the technical equipment of an army of our century,—radio, telephone, telegraph,—this document contains one of the most inhuman stipulations in the history of the war; for it is unnecessary and horrible to massacre so many people during one hundred and forty-four hours after the conclusion of a truce.

The possibility of disunion concerning computation of time is undoubtedly

³⁶ *Deutscher Reichsanzeiger*, Dec. 18, 1917.

³⁷ For the original text of these armistices see *Guerre Européenne*, Documents, 1918. Paris, Imprim. Nationale, 1919.

³⁸ League of Nations Treaty Series, IV, p. 32. Annex 2 to the Treaty of Riga, Oct. 12, 1920.

the largest in treaties. In the Treaty of Versailles, for instance, almost all the articles contain some stipulation concerning time. When did the treaty come into effect? If the treaty says: "from the 1st of January" or "until the 31st of December," or "before" or "after" a certain date, will it exclude or include the first or the last day? In many articles there are stipulations that this should be or should not be done or happen in five weeks, in six months, in eighteen months, in fifteen years, and so on. Will a year, a month, mean a calendar year or month, or a year of 365 days and a month of 30 days?

As to the exact time that the treaty is to become effective, and as to the date which is to be decisive for the determination of the periods of time provided for in the treaty, there are different regulations in paragraphs 6-8 of Article 440 in the Treaty of Versailles. The first *procès-verbal*, mentioned in paragraph 6, was signed in Paris on the 10th of January, 1920, and it bears the date: "Done at 4.15 p. m., 10th of January, 1920." The treaty says that from the date of this *procès-verbal* the treaty will become effective. What is the meaning of 4.15 p. m. for the application of the treaty in other countries than France? The time which is actually simultaneous to 4.15 in Paris is 5.15 in Berlin, and some time in the night in Washington and in the territory of South American signatories. And it is still a different time in Japan and Siam, which are also parties to the treaty. However, it could be interpreted to mean that the treaty came into force at the end of the day of the signature or that the first moment of the 10th of January is the decisive moment.

A wholly satisfactory answer to these questions cannot be found. Germany, by a decree of February 14th, says simply that, in case of divergence in interpretation, January 10, 1920, should be regarded as the end of the war and the beginning of the peace.³⁹ In a notification of January 11, 1920, the German Government states that the first protocol of ratification was drawn up on January 10, 4.15 p. m. *West-European time*.⁴⁰ Does this mean that the treaty came into force in Germany at 5.15 p. m., *Central-European time*?

It is unnecessary to go over the several hundred articles of the Treaty of Versailles, in which there are stipulations effective from a certain date or certain period, and in which we should have undoubted rules concerning computation of time. But probably it would be useful to look at the municipal and common law. Here at the very beginning of codified law precise definitions of dates and time-computation are to be found.

The Roman law distinguishes between "civil" computation, which considers *day* as indivisible and does not regard the hours in legal actions, and between natural computation (*ad momenta numerare*), where time is counted

³⁹ *Reichsgesetzblatt*, 1920. No. 35. Verordnung No. 7311.

⁴⁰ *Reichsgesetzblatt*, 1920. No. 6. Bekanntmachung No. 6.

from hour to hour.⁴¹ Notwithstanding, the Roman law has exact definitions of year and month.⁴²

In German law generally civil computation is applied, though the natural computation is admitted, as for instance, by rent (*Miethe*). Articles 187-193 of the German Civil Code give exact definitions of computation of time, with very clear distinctions, by which the first or last day included or excluded by a contract may be determined. Here also are defined specifically the year or months in cases when the period is not continuous.⁴³

To avoid misunderstandings, a German law declares that the statutory time in Germany is that of Central European time.⁴⁴

According to the Austrian Civil Code, a day is twenty-four hours, a month thirty days, a year three hundred and sixty-five days.⁴⁵

Similar definitions of time, a month, half-month, day, are given in the Swiss *Code fédéral des Obligations* of March 30, 1911 (Arts. 76-80). Federal Judge Dr. H. Ofer, in his commentary on the laws of obligation of the Swiss Civil Code (1915), says that computation of time usually follows the civil computation, using as a basis the Gregorian Calendar; and when natural computation is applied, the Central European time is effective. It should be mentioned that, according to the Swiss Code, the fulfilment of an obligation should be executed and accepted during the customary business hours.

The German Commercial Code contains analogous prescriptions.⁴⁶

The English law contains numerous definitions concerning the determination and computation of time, appearing in all public and private statutes. The Calendar Act established by statute the Gregorian Calendar as a part of the English common law.⁴⁷ The "common year" means, in English law, the calendar year (with twelve calendar months), beginning on January 1st, taking into consideration the leap years;⁴⁸ but there are also other meanings of "year." For instance, "financial year," according to the Interpretation Act,⁴⁹ also means a year of 12 calendar months, although it ends on the 31st of March, "when used in any Act of Parliament passed after the year 1889, with reference to the Consolidated Fund, or money provided by Parliament or to the Exchequer or to Imperial taxes or finance."

⁴¹ The only case in Roman law, where natural computation is applied, is that of majority: "Minorem autem XXV annis natu videndum an etiam die natalis sui adhuc dicimus ante horam qua natus est, ut si captus sit, restitatur et cum nondum compleverit, ita erit dicendum, ut a momento ad momentum tempus spectatur." (L. 3 § 3 D. de minor [4, 4].)

⁴² Puchta: *Pandekten* (II. ed. Leipzig, 1844.) §§74, 75.

⁴³ *Deutsches Bürgerliches Gesetzbuch*, I, 1923. §§187, 188, 191.

⁴⁴ *Reichsgesetz*, March 12, 1893.

⁴⁵ *Österreichisches Allgemeines Bürgerliches Gesetzbuch*. Art. 902.

⁴⁶ *Deutsches Handelsgesetzbuch*, §332.

⁴⁷ Calendar Act, 1750, 24 Geo. 2, c. 23.

⁴⁸ Halisbury, *The Laws of England*, Vol. XXVII, §854.

⁴⁹ Interpretation Act, 1889, 52 & 53 Vict., c. 63, s. 22.

The 31st of March as the end of the year, when used concerning financial matters, had been fixed by an earlier Act of Parliament,⁵⁰ and this is also the last day of the local financial year.⁵¹ For the purposes of assessment of income taxes or of the inhabited home duty in England, the year is defined as running from the 6th of April to the following 5th of April.⁵² "Savings bank year" ends on the 20th of November in the case of a trustee savings bank.⁵³ "Year" always means, according to English law, twelve calendar months, but it may refer to the common year or to any period of twelve calendar months, according to the context in which it is used.⁵⁴

It has been provided by statute that the term "month" used in every legal instrument after the year 1850, is to mean calendar month.⁵⁵ As a general rule, when "month" is used in contracts or in statutes enacted before 1850, it is taken to mean a *lunar* month (a period consisting of 28 days).⁵⁶ There are similar determinations of "month" in several other statutes with due regard to the manner in which the term is to be construed for the purposes of the particular enactment, *i.e.*, the Bills of Exchange Act of 1882, s. 14 (4);⁵⁷ the Prison Act of 1898, s. 12 (1), in regard to sentences of imprisonment;⁵⁸ the rules of the Supreme Court in reference to judgments, orders, or other documents forming part of any legal proceedings in which time is limited by months.⁵⁹

A "week" means generally the time between midnight of two successive Saturdays, but the term is also applied to any period of seven consecutive days.⁶⁰ In the Unemployment Insurance Regulations, made by the Board of Trade⁶¹ under the National Insurance Act of 1911, the term "week" means "any six consecutive days, whether separated by a Sunday or not, or, in relation to a workman who, when in employment, is employed on Sunday, any seven consecutive days."⁶²

There are many acts of English legislation determining the word "day." It means properly the period of 24 hours which begins with one and ends with the next midnight, but it may also mean any period of 24 hours.⁶³ In

⁵⁰ Public Revenue and Consolidated Fund Charges Act, 1854, 17 & 18 Vict., c. 94, s. 2.

⁵¹ Local Government Act, 1888, 51 & 52 Vict., c. 41, s. 73.

⁵² Taxes Management Act, 1880, 43 & 44 Vict., c. 41, s. 48.

⁵³ Government Annuities Act, 1882, 45 & 46 Vict., c. 51, s. 14.

⁵⁴ For interpretation of "year" see: Pluralities Act, 1838, 1 & 2 Vict., c. 106, s. 120; *Bartlett v. Kirwood* (1853), 2 E. & B. 771; *Gibson v. Burton* (1875), L. R. 10, Q. B. 329; *Salton v. New Beesteen Cycle Co.*, (1899), 1 Ch. 775.

⁵⁵ 52 & 53 Vict., c. 63.

⁵⁶ *Halsbury, The laws of England*, Vol. XXVII, §863.

⁵⁷ 45 & 46 Vict., c. 61.

⁵⁸ 61 & 62 Vict., c. 41.

⁵⁹ R. S. C., Ord. 64, r. 1.

⁶⁰ Shops Act, 1912, 2 & 3 Geo. 5 c. 3, s. 19.

⁶¹ Stat. R. & O., 1912, p. 1002.

⁶² 1 & 2 Geo. 5., c. 55.

⁶³ *Cornfort v. Royal Exchange Assurance Association* (1904), 1 K. B. 40. C. A.

some cases "day" is determined as the period between sunrise and sunset; for instance, in the South Metropolitan Gaslight and Coke Company's Act of 1869, a day is defined as running from 9 a. m.⁶⁴ According to the Housing of the Working Classes Act of 1885⁶⁵ and the Public Health (London) Act of 1891,⁶⁶ "day" is the period between 6 a. m. and 9 p. m.

As to the last day of a period, in many cases it has been decided in English courts that when an act is to be done or a benefit enjoyed during a certain period, the act may be done or the benefit enjoyed up to the last moment of the last day of that period.⁶⁷ On the other hand, in case an act is to be completed on the expiration of a given period, it cannot be completed before midnight of the last day.⁶⁸

The Parliament, in order to avoid any ambiguity, provided by passing the Statutes (Definition of Time) Act of 1880 that for the purpose of legal instruments, expressions referring to time shall be taken to refer to Greenwich and not to local time.⁶⁹

Concerning computation of time by such expressions as "from such a day" or "until such a day," the general rule is to exclude the first day and include the last.⁷⁰ In many Acts of Parliament and other statutes provision is made for cases in which the day or last day on which an act is to be completed falls on a Sunday or other holiday. Such days are sometimes excluded in the computation of a period.⁷¹

According to the Interpretation Act of 1889, any Act of Parliament passed since January 1, 1890, and any rule or order made thereunder, is construed as coming into operation immediately on the expiration of the day previous to that on which it is designated to come into force.⁷²

In American law there are many cases determining dates, expressions and computation of time. The citation of only a few instances will suffice.

Though the calendar is not enacted as part of the American common law, the Christian calendar is understood when a year is mentioned in legis-

⁶⁴ 32 & 33 Vict., c. 130.

⁶⁵ 48 & 49 Vict., c. 72, s. 9.

⁶⁶ 54 & 55 Vict., c. 76, s. 141.

⁶⁷ *Chambon v. Heighway* (1890), 54 J. P. 520; *Steedman v. Hakim*, (1888), 22 Q. B. D. 16 C. A.

⁶⁸ *Page v. More* (1851), 5 Q. B. 684; *Weston v. Fidler* (1903), 47 Sol. Jo. 567.

⁶⁹ 43 & 44 Vict. c. 9. Art. 1: "Whenever any expression of time occurs in any Act of Parliament, deed or other legal instruments, the time referred shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time, and in the case of Ireland, Dublin mean time."

⁷⁰ *South Staffordshire Tramway Co. v. Sickness & Accident Assurance Association* (1891), 1 Q. B. 402 C. A.; *Goldsmith's Co. v. West Metropolitan Rail Co.* (1904), 1 K. B. 1., 4 C. A. 1.

⁷¹ Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 14. Casual Poor Act, 1882, 45 & 46 Vict. c. 36, s. 4; Municipal Corporation Act, 1882, 45 & 46 Vict. c. 50, s. 230, incorporated with the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 15; Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 141; London Government Act, 1899, 62 & 63 Vict. c. 14, s. 3, 24.

⁷² 52 & 53 Vict. c. 63, s. 36 (2).

lative or judicial proceedings, unless mention is made of any other system of reckoning.⁷³

"Year" means generally calendar year.⁷⁴

In a great number of cases "month" is defined as a calendar month.⁷⁵

"Week" is defined as seven consecutive days.⁷⁶

The "day" is either a civil day from midnight to midnight, or an astronomical day from noon to noon, each consisting of 24 hours,⁷⁷ but the legislature may designate a different period of time as a day for particular purposes.⁷⁸ The law does not recognize fractions of a day.⁷⁹

The term "date" means the day, month and year, when used in a statute requiring an instrument to be dated. Giving the year alone is insufficient.⁸⁰

As to computation when time is to be computed from or after a certain day, that day is to be excluded.⁸¹ According to the general rule, the time within which an act must be done should be computed by excluding the first day and including the last, just as in English law.⁸²

In a great many cases the question has come up whether in the case of statutes, laws and enactments taking effect "from and after publication," or "from and after passage," either or both the first and last day should be excluded or included.⁸³ According to the general rule, a statute taking effect "from and after its passage," takes effect at the beginning of the next day after its passage.⁸⁴ The same rule is applied in determining the time of passage of a law of Congress.⁸⁵

⁷³ *Engelman v. State*, 2 Ind. (2 Cart.) 91; 52 Am. Dec. 494 (1850).

⁷⁴ *Bell v. Lamprey*, 57 N. H. 168 (1876).

⁷⁵ *Gasquet v. Crescent City Brewing Co. (C. C.)* 49 Fed. 493 (1892); *Parkhill v. Town of Brighton*, 61 Iowa 103, 15 N. W. 853 (1883); *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512; *Oehler v. Walsch*, 28 Ohio Cir. Ct. R. 446 (1906): "When an act is required by statute to be performed within a certain number of months after a certain date, the word 'month' will be construed to mean calendar months, whether of 28, 29, 30, or 31 days . . ."

⁷⁶ *Steinley v. Bell*, 12 Abb. Prac. N. S. 171 (1872).

⁷⁷ *Miner v. Goodyear India Rubber Glove Mfg. Co.*, 62 Conn. 410, 26 Atl. 643 (1892); *Zimmermann v. Conoan*, 107 Ill. 631, 47 Am. Rep. 476 (1883); *Schwab v. Mayforth*, 1 City Ct. R. 177 (1879).

⁷⁸ *People v. Keating*, 93 N. E. 95, 247 Ill. 76 (1910); *Muckenfuss v. State*, 116 S. W. 51, 55 Tex. Cr. R. 229 (1909).

⁷⁹ *Town of Louisville v. Portsmouth Savings Bank*, 11 Fed. 765, note, (1882); *State v. McIntosh*, 122 N. W. 462, 109 Minn. 108 (1909).

⁸⁰ *In re Price's Estate*, 112 P. 482; 14 Cal. App. 462 (1911).

⁸¹ *Wood v. Commonwealth*, 74 Ky. (11 Bush) 220; *McCulloch v. Hopper*, 7 N. J. Law J. 336, (1884); *Frey v. Rhode Island Co.*, 91 A. 1, 37 R. I. 96, Ann. Cas., (1914).

⁸² *In re Computation of time*, 9 Colo. 632, 21 Pac. 475 (1886); *Richter v. State*, 47 So. 163, 156 Ala. 127, (1908); *Rogers v. Wilson*, 119 S. W. 369, 220 Mo. 213 (1909); *Eliot Nat. Bank v. Gill*, 210 F. 933, 218 F. 600 (1914).

⁸³ *Hill v. Kerr*, 78 Tex. 213, 14 S. W. 566 (1890); *Leavenworth Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114 (1891).

⁸⁴ *Parkinson v. Brandenburgh*, 35 Minn. 294, 28 N. W. 919 (1886).

⁸⁵ *In re Wellman*, Fed. Cas. No. 17, 407 (20 Vt. 653).

The exactness and accuracy of the common law and national legislation should be found in international law. By a serious effort for the codification of international law, which is now being made by the League of Nations, it should be considered essential to create fixed rules for computation of time to avoid all possible ambiguity or misunderstanding.

After the consideration of the cases cited above, it is necessary that the following propositions be worked out and defined:

(1) What documents in international law ought to be dated by stating day and hour and minute (like: ultimatum, declaration of war, notification of blockade, armistice, and so on), and in which would it be sufficient to state only the day?

(2) From what moment should treaties, agreements, international contracts go into effect? (For example, — from midnight of the day of signing.)

(3) In the usual stipulations in such treaties and agreements, as "from January 1st to February 1st," or "until April 30th," should the first and last day, either or both, be excluded or included?

(4) Whether the words "year" and "month" should be considered as calendar years and months, or as years of 365 days and months of 30 days, without considering leap years and the different lengths of months?

The question of the different calendars should be considered in connection with the interpretation of "year" and "month." Not only is the Gregorian calendar not accepted throughout the world as some of the Orthodox states still use the Julian calendar, but the Gregorian calendar itself has many inconveniences. It is not necessary to go into detail and discuss its imperfections, as, for instance, the cycle of leap years, the arbitrary nature of the beginning of the year now fixed at our present January 1st, and the inequality in the length of the divisions of the year. As a consequence of want of fixity in the calendar, the dates of periodical events can never be fixed with precision.

During the last thirty years there have been different international movements in favor of the reform of the calendar,⁸⁶ but the matter was discussed from religious, scientific, commercial and industrial points of view,—never with regard to international law.

It is not within the scope of this article to go over the voluminous and interesting literature on the history, development and proposed reforms of the calendar.⁸⁷ Upon the proposition of the Advisory and Technical Com-

⁸⁶ In 1900 the Evangelical Conference in Eisenach; in 1910 the London Congress of the Permanent International Committee of the Chamber of Commerce and of Commercial and Industrial Associations (the Swiss Government was requested by the Paris congress of the same associations, in 1914, to convoke an international conference on the question. The outbreak of the World War prevented the convocation); in 1919 and 1922 the congress of the International Astronomical Union.

⁸⁷ The following books written about the calendar may be referred to: Dr. Ferdinand Wüstenfeld, *Vergleichungstabellen der Mohammedanischen und Christlichen Zeitrechnung*. F. A. Brockhaus, Leipzig, 1854. Paul Delaporte: *Le Calendrier Universel*, Paris, 1913.

mittee for Communications and Transit, a special committee has been appointed by the League of Nations to make inquiries into the reform of the calendar. The investigations of this committee prove that at the time of the outbreak of the war in 1914, the Julian Calendar was retained only in countries of the Greek Orthodox Church. Since then, Russia and Turkey have also adopted the Gregorian Calendar. Any reform of the present calendar should therefore be a reform of the Gregorian Calendar, and it would be wise if this committee would make inquiries also from the point of view of international law.⁸⁸

(5) It would be of primordial importance to settle the differences between local times with a general rule. The necessity of a standard of time-reckoning throughout the globe was discussed at length about forty years ago. In October, 1884, upon invitation of the Government of the United States to all nations holding diplomatic relations with it, an international conference was held at Washington. The conference, at which 26 states were officially represented, passed a resolution recommending the universal acceptance of the meridian of Greenwich as a prime meridian. Furthermore, it adopted a plan for an universal day, under which arrangement the time in all parts of the world would be exactly the same. The very valuable deliberations of this conference should be taken into consideration.⁸⁹

These are elementary questions of any legal system and the removal of the uncertainty now prevailing would help create a general feeling of security and uniformity in international law, a feeling fundamental for the necessary enforcement of law and order.

Alexander Philip: *The Calendar: its History, Structure and Improvement*. Cambridge University Press, 1921. Dr. Wolfgang Schultz, *Zeitrechnung und Weltordnung in ihren übereinstimmenden Grundzügen bei den Indern, Iranern, Hellenen, Italiern, Kelten, Germanen, Litauern, Slaven*. Mannus Bibliothek, Nr. 35. Verlag von Curt Kabitzsch, Leipzig, 1924.

⁸⁸ Concerning the investigations of the League of Nations Committee, see: C. 712. M. 424. 1922. VIII. Geneva, November 1, 1922. Annex 10; A. 70. C. 574. 1923. VIII. Geneva, September 4, 1923, p. 4-5; C. 366. M. 129. 1924. VIII. (C. C. T./R. C./1st Session/P. V.)

⁸⁹ International conference held at Washington for the purpose of fixing a Prime Meridian and a Universal Day. Protocols of the proceedings. Gibson Bros., Washington. 1884. See also: *Nature*, No. 781, Vol. 30, p. 602, "The Prime Meridian Conference"; *Science*, Vol. IV, 1884. No. 89, pp. 376-378; No. 90, p. 406; No. 91, p. 421, "The Meridian Conference"; Paul S. Reinsch, *Public International Unions*, p. 69.

EDITORIAL COMMENT

SIR THOMAS ERSKINE HOLLAND

It is the custom of the American Society of International Law to honor itself by inviting to membership outstanding publicists who deserve well of the international world, and whose connection with the Society would not only show its appreciation of foreign internationalists but encourage its own members to renewed and continuous efforts for justice between and among the nations. The first publicist to be elected an honorary member of the Society was Sir Thomas Erskine Holland. He was born on July 17, 1835, and died on the 24th of May, 1926, full of honors at home and abroad and dean of our profession. The Society was founded January 12, 1906, in the rooms of the Bar Association of the City of New York. At its first annual session, held in Washington in April, 1907, under the presidency of the Honorable Elihu Root, then Secretary of State of the United States, Sir Erskine Holland, then Chichele Professor of International Law at the University of Oxford, was elected an honorary member.

The Constitution of the Society provides for two classes of members: ordinary members and life members, on the one hand, and honorary members on the other, the first class to be elected upon their request, the second chosen by the Society upon its own initiative. The Constitution of the Society says of the second class: "A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause which this Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation of the Executive Council." The Society in electing Sir Erskine Holland its first honorary member, sought to express in this way its judgment of the services which he had rendered to international law, and Sir Erskine appreciated his membership in the Society, always giving it an honored place among the foreign bodies to which he had been chosen.

Sir Erskine Holland was an Oxford man by education and by occupation. He was a Balliol man, entering that college in 1854. A year later he migrated to Magdalen, and died in Oxford, at Poynings House. He was a lawyer by profession and practiced at the Bar, and his conception of law was that of the lawyer who looked for the statute making a principle law, the court in which it was discussed and applied, and the sanction by which it was to be enforced. He was, however, a broad lawyer in the sense that he considered not merely the law of his country but also the law of other countries, private international law, which he always insisted was in fact and should therefore be called conflict of laws, and international public law, which it would seem should be, in his conception, more properly called the law of nations, as only

binding the nation which had adopted and given it the force of law within its jurisdiction. He was deeply interested in Roman law, which widened his outlook when young and was of infinite service to him later in the law international. As far back as 1873 he published an edition of *The Institutes of Justinian* as a recension of the *Institutes of Gaius*, and that little volume was largely, if not wholly, responsible for his election in 1874 as the second holder of the Chichele chair of international law created at Oxford in 1852, of which Montague Bernard was the first incumbent, as against the candidacy of another young man, likewise of Scotch ancestry, William Edward Hall, who had just made his first venture in international law by his essay on, *The Rights and Duties of Neutrals*. Either candidate was vastly fitted for the chair, to which Professor Holland added distinction as Mr. Hall, beyond the chair, added what is considered by many, if not by most publicists, as the greatest single-volume treatise on the law of nations.

In the field of jurisprudence, or rather in the matter of the origin, nature and extent of law in general, Professor Holland made a name for himself by *The Elements of Jurisprudence*, which, published for the first time in 1880, reached a thirteenth edition forty-four years later. In diplomacy, as distinct from international law as such, he added to his growing reputation by the publication in 1885 of *The European Concert in the Eastern Question*, an historical development of that important subject, with material portions of the treatise and correspondence required for its understanding. In international law as contradistinguished from jurisprudence and diplomacy, Professor Holland has many titles to remember. On taking possession of the chair of international law at Oxford, he performed an act of justice to the memory of Alberico Gentili, Regius Professor of Civil Law in Oxford in the days before the appearance of Grotius' treatise on the *Law of War and of Peace* had made of international law a branch of jurisprudence. Gentili, better known in the learned world as Gentilis, was an international lawyer as well as a civilian, and on two separate occasions he discoursed before the University upon certain phases of international law, first, on embassies, in 1585, and on the law of war, 1588-89. In expanded form the disquisition on embassies forms the first general treatise on the subject; in revised form the disquisitions on war form the three books of war, and the two taken together make of Gentilis a founder of the law of nations. The splendor of Grotius' treatise had obscured the value of Gentilis' performances, but since Professor Holland's inaugural discourse of 1874, the place of Gentilis is secure, the only difference of opinion among the learned being whether he is to be regarded as the founder of international law instead of Grotius, or to be assigned the lesser but honorable post of one who prepared the way for the master.

On this question, as indeed in every department of international law, Professor Holland thought for himself and expressed those views to which he had come as the result of study and reflection on his part without fear or favor, as in the case of the *Studies in International Law* (1898).

In the eighties the British Government availed itself of his demonstrated competence by commissioning him to prepare the Admiralty *Manual of Naval Prize Law*, which appeared in 1888, and which was not only of service then but was found to be of great service to the Joint Naval and Neutrality Board of the United States in the days of their neutrality. The War Department of Great Britain later availed itself of Professor Holland's attainments by having him prepare the War Office *Handbook of the Laws and Customs of War on Land*, published in 1904. The next year he delivered an address before the British Academy, of which he was a member, on *Neutral Duties in a Maritime War*. Professor Holland had made the subject of prize law peculiarly his own during a long course of years. He had specialized to an equal degree in the law of land warfare, and his country availed itself of his knowledge by appointing him delegate plenipotentiary to the Geneva Conference of 1906. The year following the Second Hague Peace Conference of 1907, he issued in his own behalf and in the form of a code, *The Laws of War on Land*. In 1911, after the London Naval Conference of the year previous to agree upon the law to be applied by the proposed International Court of Prize, Professor Holland expressed his views, unfavorable to the Declaration of London, in *Proposed Changes in Naval Prize Law*, a paper before the British Academy.

Professor Holland has shown his interest in international law in other ways than in the performance of his professional duties as such, or upon the request of his government on various occasions. The inaugural address on Gentilis led to an edition of the Latin text of that author's three books on the law of war, published in 1877, to which Professor Holland appropriately prefixed an introduction in Latin, a worthy monument to one deserving well at the hands of Oxford. Many years later he edited in the series of the Classics of International Law, then in course of publication by the Carnegie Institution for the Advancement of Science, *Iuris et Iudicii Feialis, sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio*, a work published in 1650 by Richard Zouche, a distinguished successor of Gentilis in the chair of civil law at Oxford, and like his three books on war, a milestone in the development of the positive law of nations. A few years later Professor Holland returned to Italy, and as he had edited the work on war by Gentilis, an Italian by birth although an English subject by naturalization, he edited the *De Bello, De Repraesaliis et De Duello* of one Legnano, an early predecessor of Gentilis in the law of war, and therefore a still earlier one of Professor Holland himself in the same field. The treatise of Legnano was edited by Professor Holland from a manuscript of circa 1390, and the translation, as in the case of Zouche, was made by Mr. J. L. Brierly, now Chichele Professor of International Law at Oxford.

Professor Holland's interest in international affairs was not merely historical, professorial, or indeed governmental. He felt that he owed a duty to the larger public to keep its members abreast of international events. There-

fore he had constant recourse to the *Times*, whose columns were frequently enriched by letters upon war and neutrality during a period of forty years, from 1881 to 1920, "with," as he himself says, "some commentary."

In addition to these many and varied activities, Professor Holland was an active member of the Institute of International Law, an associate in 1875, member in 1878, and President of that distinguished body at its Oxford meeting of 1913. In its labors he actively participated. For many years he was a regular attendant at its gatherings, and at its last session held in The Hague in 1925, in commemoration of the third centenary of the publication of Grotius' War and Peace, Professor Holland was appropriately elected an honorary member of the Institute.

Fortunately, students of international law are not obliged to rely upon inadequate statements of the services which Professor Holland rendered in his chosen science. He has himself dealt with a large, and the most important, part of his professional activity during the period from 1874 to 1910, in which he held the Chichele professorship at the University of Oxford, in a valedictory retrospect and lecture delivered at All Souls College on June 7, 1910, renouncing the chair he had held with advantage to the science and with great personal distinction during the long and not uneventful period of thirty-six years.

"The recently formed 'American Society of International Law,'" the retiring Professor said in his farewell address, after speaking in high terms of the Institute of International Law, "by its *personnel* and its objects, stands apart from most of these" societies of one kind or another in other countries, "and may well take rank next to the Institute."

JAMES BROWN SCOTT.

MEXICAN LAND LAWS

The turbulent state of affairs existing in Mexico from the overthrow of President Porfirio Diaz in May, 1911, until the accession of President Obregon in May, 1920, has been painfully reflected in the diplomatic relations between Mexico and the United States. Among various incidents vitally affecting these relations will be recalled the refusal of the United States to recognize the government of General Huerta in 1912; the landing of American troops at Vera Cruz in 1914; the punitive expedition under General Pershing in 1916; and the repeated use of embargoes on munitions of war by the United States as a means of affecting the fortunes of revolutionary leaders. The novel, and as it subsequently appeared, the untenable policy enunciated by President Wilson that no governments founded on violence would be recognized by the United States will also be recalled. The course pursued by the American Government during this period can hardly be said to have exerted a steady influence on the internal affairs of Mexico.

Some of the points of international law involved in the relations between

the two countries have been commented on in this JOURNAL at various times. The Department of State has recently published further diplomatic correspondence with Mexico concerning certain differences arising over the property rights of Americans adversely affected by acts of the Mexican Government and by legislation relating to ownership of land and of petroleum concessions. This legislation comprised the Land Law promulgated on January 21, 1926, the Petroleum Law promulgated on December 31, 1925, together with the Regulations applying the Land Law promulgated on March 29, 1926, and the Regulations of the Petroleum Law promulgated April 8, 1926. These Laws and Regulations were intended to carry out the purpose of Article 27 of the Mexican Constitution promulgated on May 1, 1917, which article had occasioned much uncertainty and apprehension on the part of Americans having vested interests in Mexico, and had given rise to strained relations with the United States, involving a long and irritating delay in the formal recognition of the government of President Obregon.

The pertinent paragraphs of Article 27 as translated, read as follows:

In the nation is vested *Dominio Directo* of all minerals or substances which are in veins . . . solid minerals, fuels, petroleum and all hydrocarbons. . . .

In the nation is likewise vested the *Dominio* of the waters of the territorial seas. . . .

Only Mexicans by birth or naturalization, and Mexican companies, have the right to acquire *Dominio* in lands, waters and their appurtenances or to obtain concessions to develop mines, waters or mineral fuels in the Republic of Mexico. The nation may grant the same right to foreigners provided they agree before the Department of Foreign Affairs to be considered Mexicans in respect to such property and accordingly not to invoke the protection of their Governments in respect of the same. . . .

Within the zone of 100 kilometers from frontiers and 50 kilometers from the seacoast, no foreigner shall, under any condition, acquire *Dominio Directo* of lands and waters.

Notwithstanding the repeated assurances of President Obregon, and the decisions of the Supreme Court of Mexico, dated January 17, 1920, and January 8, 1921, under injunction proceedings (*amparo*) brought by oil companies, the American Government felt constrained to make frequent and vigorous protests against the alleged retroactive application of Article 27, and against what seemed to amount to the actual confiscation of American property rights. Nor did the passage of the legislation concerning ownership of land and of concessions above cited serve to remove the grounds for these protests. On the contrary, certain features of this legislation appeared to confirm a policy of retroactive proceedings and of the virtual confiscation of vested American interests. The provisions of these laws causing the most apprehension are the following:

Article 1. No alien shall acquire direct ownership in lands and waters in a strip of one hundred kilometers along frontiers and of fifty on coasts

nor be a shareholder in Mexican companies which may acquire such ownership in the same strip.

Article 2. In order that an alien may form part of a Mexican company which may have or may acquire ownership of lands, waters and their accessories, or concessions for the exploitation of mines, waters or combustible minerals in the territory of the Republic he shall satisfy the requirement set out in the same fraction 1 of Article 27 of the Constitution, to wit: That of agreeing before the Department of Foreign Relations to consider himself a national in respect of the part of the property which pertains to him in the company, and not to invoke, in respect thereof, the protection of his Government with reference thereto under pain, in case of failing in the agreement, of losing for the benefit of the nation the property which he may have acquired or which he may acquire as a shareholder in the company in question.

Article 3. In the case of Mexican companies owning rural property for agricultural purposes the permit spoken of in the foregoing article shall not be granted when, through the acquisition to which the permit refers, there remains in the hands of aliens fifty per cent or more of the total interests of the company.

Article 4. Foreign persons who may represent since prior to the going into effect of this law fifty per cent or more of the total interest of any kind of companies owning rural property for agricultural purposes shall retain it until their death in the case of physical persons, or for ten years in the case of moral persons (corporations).

The provisions of this article shall not affect contracts of colonization concluded by the Federal Government prior to the going into effect of this law.

Article 5. The rights which are the object of the present law, not comprised in the foregoing article, and acquired legally by aliens prior to the going into effect thereof, shall be conserved by their present owners until their death.

Article 6. When an alien person should have to acquire by inheritance rights the acquisition of which might be prohibited to aliens by the law, the Department of Foreign Relations shall give a permit in order that there may be made the adjudication and that there may be registered the respective deed. In case any alien person should have to have adjudicated to himself by virtue of a preëxisting right acquired in good faith, a right to those which are prohibited to him by the law, the Department of Foreign Relations shall give the permit for such adjudication.

In both cases the permit shall be granted upon the condition of transferring the rights in question to a person with capacity under the law within a period of five years, counting from the date of the death of the author of the inheritance in the first case, or from the adjudication in the second.

Article 7. Aliens who may have any right of those which are the subject matter of this law, acquired before the going into effect of the same, shall make a declaration before the Department of Foreign Relations within the year following the date of the promulgation of the present law, upon the understanding that if this is not done it will be considered that the acquisition was made subsequent to the promulgation of this law.

Article 8. Executed acts and contracts made against the prohibition contained in this law shall be void with full right. Failure to comply with Articles 4 and 6 shall give rise to the auction of the property indicated therein.

The apprehensions of Americans interested in oil concessions centered mainly on the interpretation and the application of Article 14 of the Petroleum Law above referred to:

Article 14. The following rights will be confirmed without any cost whatever and by means of concessions granted in conformity with this Law:

I. Those arising from (*que se deriven*) lands in which works of petroleum exploitation were begun prior to May 1, 1917.

II. Those arising (*que se deriven*) from contracts made before May 1, 1917 by the surface owner or his successors in title for express purposes of exploitation of petroleum. The confirmation of these rights may not be granted for more than 50 years computed in the case of fraction I, from the time the exploitation works began, and in the case of fraction II, from the date upon which the contracts were made.

III. To owners of pipe lines and refiners who are at present operating by virtue of a concession or authorization issued by the Department of Industry, Commerce and Labor, and as to what has reference to said concessions or authorizations.

The principal difficulty arising from this article is the interpretation of those acts which may properly be considered to constitute "*exploitation*" of lands acquired prior to May 1, 1917, in order to confer rights in the subsoil on the part of property owners.

It is impossible to enumerate here in detail the various protests of the American Government, or to present in a satisfactory manner the arguments adduced by the Mexican Government in reply to these protests. Nor does it seem opportune to review the diplomatic procedure followed by the Department of State in these tortuous negotiations, notably in its futile attempt to constrain the government of President Obregon to sign a treaty of amity and commerce containing specific safeguards of American property rights as a preliminary condition for the recognition of that government by the United States. It would not seem desirable also to comment upon the statement issued by Secretary Kellogg in June, 1925, protesting in vigorous terms against alleged violations of American rights and adding that "... it is now the policy of this Government (American) to use its influence and its support in behalf of stability and orderly constitutional procedure, but it should be made clear that this Government will continue to support the Government in Mexico only so long as it protects American lives and American rights and complies with its international engagements and obligations."

With regard to the main issue, in this controversy, of the retroactive interpretation of Article 27 of the Mexican Constitution and of the legislation and accompanying regulations flowing from that article, the American Government took its stand upon the formal assurances of the Mexican com-

missioners of the joint commission appointed in 1923 to adjust the outstanding differences of the two countries. Charles Beecher Warren and John Barton Payne were the American members of this commission, and Ramón Ross and Fernando González Roa the Mexican members. The protocol of the formal meeting of the commission on August 2, 1923, contained the following important declaration on the part of the Mexican Commissioners:

The MEXICAN COMMISSIONERS stated that the following are natural consequences of the political and administrative program which the Mexican Government has been carrying out, and that they state them in behalf of their Government in connection with the representations relating to the rights of the citizens of the United States of America in respect to the subsoil.

It is the duty of the federal executive power, under the constitution, to respect and enforce the decisions of the judicial power. In accordance with such a duty, the Executive has respected and enforced, and will continue to do so, the principles of the decisions of the Supreme Court of Justice in the "Texas Oil Company" case and the four other similar *amparo* cases, declaring that paragraph IV of Article 27 of the Constitution of 1917 is not retroactive in respect to all persons who have performed, prior to the promulgation of said Constitution, some positive act which would manifest the intention of the owner of the surface or of the persons entitled to exercise his rights to the oil under the surface to make use of or obtain the oil under the surface: such as drilling, leasing, entering into any contract relative to the subsoil, making investments of capital in lands for the purpose of obtaining the oil in the subsoil, carrying out works of exploitation and exploration of the subsoil and in cases where from the contract relative to the subsoil it appears that the grantors fixed and received a price higher than would have been paid for the surface of the land because it was purchased for the purpose of looking for oil and exploiting same if found; and, in general, performing or doing any other positive act, or manifesting an intention of a character similar to those heretofore described. According to these decisions of the Supreme Court, the same rights enjoyed by those owners of the surface who have performed a positive act or manifested an intention such as has been mentioned above, will be enjoyed also by their legal assignees or those persons entitled to the rights to the oil. The protection of the Supreme Court extends to all the land or subsoil concerning which any of the above intentions have been manifested, or upon which any of the above specified acts have been performed, except in cases where the documents relating to the ownership of the surface or the use of the surface or the oil in the subsoil establish some limitation.

The above statement has constituted and will constitute in the future the policy of the Mexican Government, in respect to lands and the subsoil upon which or in relation to which any of the above-specified acts have been performed, or in relation to which any of the above-specified intentions have been manifested; and the Mexican Government will grant to the owners, assignees or other persons entitled to the rights to the oil, drilling permits on such lands, subject only to police regulations, sanitary regulations and measures for public order and the right of the Mexican Government to levy general taxes.

The protocol of this session also included the following joint declaration of the American and of the Mexican Commissioners:

The AMERICAN COMMISSIONERS have stated in behalf of their Government that the Government of the United States now reserves, and reserves should diplomatic relations between the two countries be resumed, all the rights of the citizens of the United States in respect to the subsoil under the surface of lands in Mexico owned by citizens of the United States, or in which they have an interest in whatever form owned or held, under the laws and Constitution of Mexico in force prior to the promulgation of the new Constitution, May 1, 1917, and under the principles of international law and equity. The MEXICAN COMMISSIONERS, while sustaining the principles hereinbefore set forth in this statement but reserving the rights of the Mexican Government under its laws as to lands in connection with which no positive act of the character specified in this statement has been performed or in relation to which no intention of the character specified in this statement has been manifested, and its rights with reference thereto under the principles of international law, state in behalf of their Government that they recognize the right of the United States Government to make any reservation of or in behalf of the rights of its citizens.

The above recognition of the right of the United States Government to make any reservation of the rights of its citizens had the effect of nullifying the purport of the clause in Article 2 of the Land Law cited above whereby an alien holding property in Mexico was compelled to renounce the right of invoking the protection of his government. This was expressly confirmed in the note of the Mexican Minister for Foreign Affairs addressed to Secretary Kellogg on March 27, 1926: "I consider that even though an individual should renounce applying for the diplomatic protection of his government, the government does not forfeit the right to extend it in case of a denial of justice. . . ." This declaration would seem to conform strictly with accepted international rules and practice. Borchard, in his authoritative work entitled *The Diplomatic Protection of Citizens Abroad*, states in this connection:

The weight of authority supports the view that the mere stipulation to submit disputes to local courts is confirmatory of the general rule of international law and will be so construed by the national government of concessionaries. If, however, the renunciation goes so far as to preclude recourse to diplomatic protection, even in cases of denial of justice, the renunciation of protection will not be considered as binding on the claimant's government. (Sec. 378.)

With reference to the decisions of the Mexican Supreme Court cited above in the declaration of the Mexican Commissioners, it is interesting to note the definition of retroactive effect of law as laid down by that tribunal: "In order that there may be a retroactive feature in law two circumstances are required: that it apply to the past and alter the past; and that it injure rights acquired under the protection of former laws, because of this new law being

in opposition to the former ones." (Quoted in note of Senor Pani to Mr. Summerlin under date of March 31, 1923.) It is also of interest to contrast this definition with that given by Justice Story in the case of *The Society for the Propagation of the Gospel, & v. Wheeler et al.*:

Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities. (2 Gallison 139.)

It should be observed that this doctrine, as a matter of fact, arose out of the exigencies of American constitutional law rather than from general juristic principles. The question of the retroactive effect of the Mexican land legislation, in any event, would seem subordinate to the question of the right of a nation to take over private property interests if adequate compensation be made to the owners. On this point, Secretary Hughes in his instructions of July 28, 1922, to Mr. Summerlin, the American Chargé d'Affaires in Mexico City, stated:

I have noted Mr. Pani's discussion of the Mexican agrarian problem and I fully appreciate the difficulties which that problem involves. I am also deeply sensible of the important public policy that is sought to be prosecuted in securing equitable distribution of lands and adequate opportunities for those who have been impoverished. But I know of no reason, or right, for the prosecution of this policy in a manner which deprives American citizens of valid titles without the payment of just compensation. . . . It would seem to be clear that it is not within the province of lawful expropriation either to value properties upon an inadequate basis or to tender compensation in state or federal bonds without assured market value. Compensation cannot be anything short of actual, fair and full compensation.

It will thus be seen that the whole controversy virtually is narrowed down to a question of what constitutes "actual, fair, and full compensation." On this score, the American interests adversely affected would seem to have had legitimate grounds for protest, inasmuch as the bonds created by law to indemnify the expropriation of private property amounted in most cases to little more than a promise to pay in an indefinite period of time. In due justice to the Mexican Government, however, it should be recalled that, owing to the decade of turbulence and disorganization prevailing in Mexico, the finances of that unhappy country could not readily meet the exactions of either internal or external obligations, or pay the claims of foreigners suffering damage to their interests in the course of civil warfare. The Mexican Government would appear to be solicitous to meet all of these obligations and afford adequate compensation to those adversely affected in the application of its land laws. Nor should it be forgotten that much of the revolutionary unrest in Mexico was due to the extraordinary agrarian situation prevailing for hundreds of years, whereby enormous estates were built up

and exploited to the detriment of the bulk of the rural population. The urgency of reform in order to quiet the people, and the precipitate, as well as arbitrary manner in which this reform was put into effect, according to the official admissions of the Mexican Government in its correspondence with the Department of State, would explain in large measure the legitimate grounds for the protests of the United States. The situation would seem to have called for a good deal of justification and forbearance on both sides of this lamentable diplomatic controversy. The attitude of the Mexican Government, fortunately, indicates that the relations of the two countries are in process of friendly amelioration.

PHILIP MARSHALL BROWN.

ALIEN PROPERTY AND AMERICAN CLAIMS

The Administration's plan to pay the American claims against Germany, awarded by the Mixed Claims Commission, to compensate the German owners of merchant ships, patents and radio stations taken over and used by the United States Government and to return to its owners the sequestered property held by the Alien Property Custodian, has experienced unexpected vicissitudes since it was first announced by Secretary Mellon last December.

The original announcement, published last December (this JOURNAL, Vol. 20, p. 154), provided for the distribution of the cash fund of 150 million dollars plus 32 millions of accrued interest, held by the Alien Property Custodian, into three parts. The American claimants were to receive 50 plus 32 millions, the German ship and patent owners were to receive 50 millions, and the German owners of the money were to receive 50 millions. For the balance due to the three groups in question, 5 per cent bonds of a trustee, amounting altogether to about 250 million dollars, payable at the option of the United States in dollars or marks, were to be issued, to be guaranteed by the United States. To the trustee the United States was to turn over for the service of the bonds all the funds payable to it under the Dawes Plan, whether on the Rhine Army costs account or on the claims account. (See this JOURNAL, Vol. 19, p. 359.) The plan received the assent of practically all members of the three interested groups.

At the end of March, 1926, Representative Mills introduced what is known as the Administration bill, and in support of it the Treasury published a detailed statement. The original plan was therein changed by the elimination of the trustee's alternative mark or dollar bonds guaranteed by the United States, and of the provision for distributing as above outlined the cash funds of the Alien Property Custodian, with the exception of the interest accrued prior to March 4, 1923. This interest fund was to go to the American claimants, on the theory that it could not physically be allocated to the owners of the principal funds from which it was derived, that it did not, as a matter of law, belong to those owners, because the government is not liable

for interest, and because the German owners assented to its payment to the American claimants in connection with the general settlement of the problem. Interest due on funds belonging to American owners from whom the principal had been improperly taken, was excepted; this was to be returned to the American owners. Instead of the guaranteed bond issue, the American claimants were to be paid in cash from the Treasury, it having been found apparently that the mark bond might disturb the Transfer Committee's freedom under the Dawes Plan. The Treasury was to raise the money from a bond issue, which could at this time be floated at $3\frac{3}{4}$ per cent interest. The Treasury was to be reimbursed from the proceeds of the Dawes Plan, which from September, 1926, on, is scheduled to produce for the United States thirteen million dollars annually on Rhine Army costs account and, after 1928, eleven millions on claims account. This was believed sufficient to amortize the bonds in eight years, the government deferring its claims for damages until the private claimants had been paid.

The Administration bill was severely attacked by certain Democrats on the Ways and Means Committee on the ground that it provided for the appropriation of cash from the Treasury for the benefit of the American claimants, some of whom, like the large marine insurance companies, it was said, had made considerable profits out of the insurance of such risks as they were now to be compensated for. This is reminiscent of the first Alabama claims commission. Other arguments against certain of the American claims were also advanced, with the result that it became necessary to modify the bill.

Such modification was undertaken by Representative Newton, in an effort to meet the objections that had been raised to the Mills bill. The Newton bill has been introduced in the Senate by Senator Borah and been referred to the Foreign Relations Committee. It also has had Treasury support. The principal amendments consist in the fact that no money is to be appropriated from the Treasury and no bonds are to be issued. The cash in the Alien Property unallocated interest fund, except that accruing to American citizens, plus some eight millions of dollars in the hands of the Agent General for Reparations in Berlin, a total of about thirty-six millions, is to be used to pay all death and personal injury claims, all claims under \$25,000, and the same amount on the larger claims, the balance to be distributed among the larger claimants. These latter claimants, in order to facilitate the acceptance of the proposal, have agreed to forego the continued running of interest at 5 per cent on their claims and agree to accept participation certificates in the funds coming to the United States under the Dawes Plan. The risks of the Dawes Plan are thus transferred from the government to the larger American claimants. A deduction of $\frac{1}{2}$ per cent is to be made from all claims to pay the expenses of the United States before the Mixed Claims Commission. It is anticipated that the certificates would be paid off in eight years, and for this period the Newton bill provides that interest on the Rhine Army costs shall be deducted and paid into the Treasury. Apparently the only remain-

those countries, or if found therein, will be subject to seizure, by some appropriate judicial process in each country, for the benefit of the legitimate owners thereof. It is anticipated that the nations participating would be of sufficient commercial importance to insure in effect the closing of the markets of the world to the confiscated properties and their products. The courts of these nations should be empowered to determine whether or not properties have been confiscated.

The law is already well settled, under decisions both of American and British courts, that unrecognized governments, such as that of Soviet Russia, cannot give good title to property confiscated from nationals of a government which has refused recognition, and property so confiscated if found within the jurisdiction of the governments of such nationals can be recovered through judicial procedure by the legitimate owners. The interests of peace and justice would be promoted by the application of the same rule even if recognition has been given to a government, so that it would not be necessary to go to the extreme of withdrawing recognition in order to secure the application of this rule.

An admirable precedent for such an arrangement as that proposed, among a few nations to protect their interests outside of their own jurisdiction against foreign interference, is furnished by the Fur Seal Treaty of 1911 between the United States, Great Britain, Japan, and Russia, by which the ports of each of those nations are closed to all vessels, whatever their nationality, which have been engaged, or are preparing to engage, in sealing on the high seas, and no seal skins taken by pelagic sealing are permitted to be imported into any of those countries.

CHANDLER P. ANDERSON.

THE RUSSO-GERMAN TREATY

The conclusion in April of the so-called neutrality treaty between Germany and the Union of Soviet Socialist Republics has been the subject of widespread discussion and speculation throughout Europe, particularly in respect to its possible effect upon Germany's obligations as a party to the Locarno Agreements and as a member of the League of Nations when she shall have become a member.¹ The treaty as published consists of four articles and an appendix consisting of a letter of the German Foreign Minister, Herr Stresemann, to M. Krestinski, the Russian Ambassador at Berlin, and the latter's reply thereto. These communications are declared categorically to have equal force with the treaty proper. Article I affirms that the basis of the relations between Germany and the Soviet Union remains the Treaty of Rapallo, concluded four years ago, and that Germany and Russia will continue in "friendly contact with one another in order to insure

¹ The text of the treaty was given out for publication on April 26. It may be found in the *New York Times* for April 27, p. 5, and in the Supplement to this JOURNAL.

mutual understanding on all questions of a political and economic nature" affecting the two countries. Article II affirms that should one of the parties, despite its peaceful demeanor, be attacked by a third Power or Powers, the other party shall remain neutral throughout the conflict. Article III declares that in case a "coalition" among other Powers in connection with a conflict such as is foreshadowed by Article II, or at a time when neither of the contracting parties is engaged in war-like activities, should be formed for the purpose of enforcing an economic boycott against either of the contracting parties, the other party will refrain from participating in such boycott. Article IV limits the duration of the treaty to five years and declares that the two parties will "reach an understanding over the further status of their political relations before the termination of this period."

The publication of the treaty is said to have caused serious apprehension in Poland, where it was construed as threatening Poland's safety and which, therefore, must be met by a strengthening of her military armaments rather than a reduction of them. It was also reported that this feeling was an important factor in bringing Marshal Pilsudski to the head of the recent revolt, which ended in the overthrow of the existing government of Poland. In some other countries, particularly France, the treaty was construed as an attempt of Tchitcherin, who regards the League and the Locarno Agreement as a hostile coalition against Russia, if not to wean Germany away from joining the League, at least to impair certain of the obligations which as a member she will be under when she is admitted to membership. Some of the French newspapers professed to see in the conclusion of the treaty a manifestation of Germany's resentfulness over the failure to admit her to the League in March last; evidence that Germany is turning her back upon Western Europe and with Russia intends to pursue a concerted policy against the states of the West; that as a member of the League she will not coöperate with the other members in a boycott against Russia, when the situation requires it, unless Russia's act consists of offensive warfare against a member of the League; that as a member of the Council she will by her vote prevent a decision pronouncing Russia an aggressor, even though she may be such in fact; that the effect of the treaty, therefore, is to give Russia a free hand to attack Poland; that Article 3 of the treaty is in contradiction with Article 17 of the Covenant relating to the situation caused by the refusal of a non-member of the League to accept the obligations of membership for the purposes of a particular dispute; that the faculty reserved by Germany as a member of the Council to judge for herself whether in a given case Russia is an aggressor or not is irreconcilable with Article 20 of the Covenant, which makes it the duty of a state which has incurred obligations before becoming a member, when such obligations are inconsistent with the terms of the Covenant, to take immediate steps to procure its release from such obligations; etc.

It will be recalled that the conclusion of the Treaty of Rapallo between

Congress in 1889, is making a general appeal to the public for coöperation in the raising of an adequate endowment. It was incorporated for the promotion of "American history, and of history in America." This it has

Germany and Russia four years ago was the object of somewhat similar attacks. The fact is any treaty which Germany may conclude with Russia is likely to arouse suspicion in some parts of Europe and to be construed as directed against certain states which were formerly her enemies.

endeavored to carry on by publication of the *American Historical Review*, a quarterly, and by other publications, by regular meetings of those interested in American history, by attention to the care of public records, and by other efforts in which coöperative and organized endeavor would be helpful.

Of particular interest to those concerned in international relations is the statement that "Though the Association has felt peculiarly responsible for 'American history, it has never forgotten the wider claims of history in America.' Indeed, it is impossible to understand American history if it is completely detached from that of the old world. Several publications deal with international topics—the correspondence of the early French Ministers, to the United States, the Texan Diplomatic Correspondence, and the papers of James A. Bayard, illustrating the peace negotiations at Ghent in 1814. Since the World War, the Association has been active in promoting scientific coöperation with scholars abroad, a field in which Americans now have new opportunities for service and leadership. It may be noted in this connection that the prizes administered by the Association are given for studies in European, as well as American, history." There is also the statement that "Now that the United States has become the most influential of the World powers, there is urgent need for more thorough and dispassionate studies of the history of American international relations (including contacts with Europe, Latin-America, and the Far East). The appeal to history is often made by partisans, but nearly always such appeals involve more or less distortion of the facts. There are few subjects more in need of disinterested research."

To carry out plans for enlarged usefulness, the American Historical Association under a representative committee is endeavoring to increase its endowment from \$50,000 to \$1,000,000.

The work already done and that projected by the Historical Association is closely allied to that of the American Society of International Law. The number of officers and members of this Society on the list of the committee for raising the fund of the American Historical Association indicates the cordial attitude of the Society toward the movement.

GEORGE GRAFTON WILSON.

AMERICAN-NORWEGIAN POSTAL ARBITRATION

On December 28, 1925, the Swiss Postal Administration communicated to the American Post Office Department the arbitral award¹ rendered by the Postal Administration of Hungary and the Postal Administration of Switzerland, in the dispute between Norway and the United States concerning the interpretation of Article 4 of the Universal Postal Convention, signed at Rome, May 26, 1906. This is a notable instance of compulsory arbitration,

¹ Published in *L'Union Postale*, Vol. 51, No. 3, March 1, 1926.

and a fresh indication of the successful functioning of a league of nations which in a brief half-century has become all but universal.

The Rome Convention (Article 23) provides that "in case of disagreement between two or more members of the Union, as to the interpretation of the present convention or as to the responsibility devolving on an administration from the application of said Convention, the question in dispute is decided by arbitration. To that end, each of the administrations concerned chooses another member of the Union not directly interested in the matter."² Since June, 1914, the American and Norwegian administrations had taken different views as to the amount of sea-transit charges due to Norway from the United States, for the conveyance of certain postal matter from Newcastle to Bergen, on the regular route, New York-Plymouth-Newcastle-Bergen. The difference was due to varying interpretations of Article 4, §3 of the Rome Convention.³ This article fixes the transit charges on the maritime conveyance of articles exchanged in closed mails. The Norwegian Administration claimed to be entitled to payment at the rate of 4 francs per kilogram of letters and post-cards, and 50 centimes per kilogram of other articles, according to Art. 4, §3, section 1, number 2, letter b of the convention, for the sea route from Newcastle to Bergen. The United States claimed, however, that according to Art. 4, §3, section 1, number 2, letter c, the total transit charge for the entire sea route from New York to Bergen, via Plymouth and Newcastle, should be 8 francs per kilogram of letters and post-cards and 1 franc per kilogram of other articles, and that this total should be shared, according to the second paragraph of Art. 3, by the American and Norwegian administrations, being pro-rated according to the distances traversed. As the distance from New York to Plymouth is 3,000 nautical miles, and that from Newcastle to Bergen only 404 nautical miles, the latter calculation would be much more favorable to the United States.

The International Bureau of the Postal Union was first asked for an interpretation of the article in question, but on account of the general interest involved, the Bureau sought the interpretations of the Administrations of Germany, France and Great Britain. On October 1, 1915, the British Administration expressed the opinion that the matter should be submitted to the next Postal Congress. Unsuccessful negotiations continued for several years, and on November 30, 1921, and on June 12, 1922, the Norwegian office proposed that it be settled by arbitration. This proposal was declined by the United States on August 18, 1922, and about the same time the United States declined to arbitrate a similar dispute with Sweden. A fresh proposal of arbitration was made by the Norwegian office on May 7, 1923, and accepted by the United States on April 24, 1924. Norway chose the Swiss Administration to act as arbiter, and the United States chose the Hungarian

² 35 Stat. 1661. An equivalent provision is to be found in Article 25 of the Madrid Convention of November 30, 1920. 42 Stat. 1997.

³ 35 Stat. 1642.

Administration to act in that capacity. On October 22, 1924, the United States informed the Hungarian office that it would apply the award in a similar dispute between the United States on the one hand and Sweden and Denmark on the other hand.

It was agreed that the arbitrators should deal only with the interpretation of Article 4, §3, and not with the actual amounts due to Norway. They reached the conclusion that the conveyance from Newcastle to Bergen was clearly a conveyance between "the ports of two States served by the same line of steamers," within the meaning of that language in Article 4, §3, section 1, number 2, letter b of the convention. The Norwegian Administration is clearly entitled to an indemnity, and the arbitrators found that the convention plainly justified the Norwegian contention as to the rate, which was pronounced to be "irrefutable."

The arbitral sentence was that the Postal Administration of the United States pay the Postal Administration of Norway for the conveyance of closed mails from Newcastle to Bergen during the years 1914-1919, at the rate of 4 gold francs per kilogram of letters and post cards and 50 gold centimes per kilogram of other articles. The arbitrators also directed, in accordance with Article XXXVII of the regulations for the execution of the Rome convention, that the United States should pay interest on the sums due at the rate of 5 per cent, per annum.

The award tends to give an impression that the case of Norway was so clear that the dispute ought not to have been allowed to go so far, and the reluctance of the United States to agree to the arbitration hardly comports with what is generally supposed to be the American attitude toward such settlement of international differences.

MANLEY O. HUDSON.

DECISIONS OF THE CLAIMS COMMISSIONS, UNITED STATES AND MEXICO*

The General Claims Commission, United States and Mexico, established in pursuance of the treaty of September 8, 1923, has handed down its first opinions. Some of them warrant comment.

In the case of the Illinois Central Railroad Company against Mexico, Docket No. 432, the claim arose out of an alleged breach of contract by Mexico in failing to pay a balance due for locomotives delivered to the National Railways of Mexico. The Mexican Agent moved to dismiss, alleging that the Commission had no jurisdiction over "contract claims," inasmuch as the rule of decision of Article I, "in accordance with the principles of international law, justice and equity," excluded claims arising out of contract, for which, it was argued, a government is not responsible in international law.

The contention of Mexico required an examination of the jurisdictional

* The texts of these decisions will be printed in the JOURNAL, beginning with the next issue.—ED.

clauses of Article I, to determine whether any limitation against contract claims was to be found in them. Article I provides that the Commission shall have jurisdiction over "All claims against one Government by nationals of the other for losses or damages suffered by such nationals or by their properties," the word "properties," not a precise legal term, appearing for the first time, it is believed, in an American claims convention; and over "all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice," the latter a term of broadest description. The Mexican Agent argued that claims against a government in its public capacity, and in its civil capacity, as in contract, are distinguishable, and that as the latter must be decided in accordance with the principles of municipal law, they are excluded from the jurisdiction of the Commission.

The Commission denied the validity of the Mexican contention. They found that the broad words "all claims" involved no limitation as to specific types of claims, and that the rule of decision "in accordance with the principles of international law," did not narrow the category of claims within their jurisdiction. They suggested that claims against a government in its public and in its civil capacity were both international claims, and that international law might well require claims originating in the government's civil capacity to be decided in accordance with municipal law.

The suggestion that Foreign Offices and notably the Department of State had usually treated contract claims as a special group, not espoused until after an exhaustion of local remedies had disclosed a denial of justice, and that arbitral commissions had occasionally denied jurisdiction over such claims or had jurisdiction over them expressly conferred, was refuted by the the Commission by the statement that the diplomatic pressure of claims was to some extent a matter of policy on which Foreign Offices differ and with which the Commission had nothing to do; and that the history of arbitral commissions disclosed that governments, and especially the United States Government, as well as the Mexican Government, had with practical uniformity included contract claims in the jurisdiction of arbitral tribunals. In this conclusion the Commission is confirmed by the instructions of Secretary Pickering, October 22, 1799, to the American plenipotentiaries to France¹, by the convention with France, April 30, 1803, by the United States-Spanish Commission of February 22, 1819, the three Mexican Commissions of April 11, 1839, March 3, 1849 (domestic), and July 4, 1868, the United States-British Commissions of February 8, 1853, and August 18, 1910, the United States-French Commission of January 15, 1880, the United States-Peruvian Commission of January 12, 1863, the United States-Venezuelan Commission of 1903 sitting at Caracas, and numerous other arbitral commissions sitting under protocols conferring jurisdiction over "all claims" or even over "claims," merely.

¹ Amer. St. Pap., For. Rel., V. 2, pp. 242, 301, 303; see also Moore's Digest, VI, 707-8.

The Commission further found that the waiver in Article V of the requirement that local remedies be exhausted, did not make necessary "some resort" to the local courts, as contended by the Mexican Agent. There was no limitation in the word "exhausted"; the waiver apparently dispensed with any resort to the local courts. Nor was the cause of the breach of contract, whether necessity or choice, and the nature of the breach, material to the Commission's jurisdiction. The decision seems hardly open to question.

A far more difficult issue was raised by the case of the North American Dredging Company of Texas against Mexico, also arising out of an alleged breach of contract for dredging a Mexican port. The contract contained the so-called Calvo clause, according to which the claimant company agreed that it was to "be considered as Mexican" in all matters concerning the execution and performance of the contract, that it would resort to Mexican law and remedies for the determination and enforcement of its rights, and that it was consequently "deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."

The important question was, to what extent did this contract stipulation deprive the claimant or the United States on its behalf of the privilege of appearing as a claimant before the Commission, and to what extent did the stipulation affect the waiver of exhaustion of local remedies under Article V of the claims convention.

The Calvo clause has had an unusual history before claims commissions. In eight cases the validity of the clause, thus barring an international claim, has been upheld; in eleven cases, its efficacy to bar the jurisdiction of a claims commission has been denied, the tribunal dealing with the clause much as the common law courts did with a contractual stipulation for private arbitration, into which they read an unlawful effort to oust the courts of jurisdiction.² The present United States-Mexican Commission makes no reference to the precedents on the subject, but examines the question *de novo*. The Commission sought to find the correct line of compromise between the two mutually exclusive claims of the local state to insure its complete judicial and administrative control over aliens who come to the territory to reside or do business, and of the alien's own state to extend him protection in all circumstances. The question was whether these conflicting claims could be reconciled and whether the alien's contract stipulation to be assimilated to a national, resort to local remedies and forego his privilege of invoking diplomatic interposition could be given practical effect without impinging upon international law. The Commission found that it could, and in this respect has gone into the question more exhaustively than previous commissions. Whether the extent of local control thereby achieved is very great, and whether its interpretation

² For convenience, I refer to the analysis of the cases on the Calvo clause in Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 800-810.

of the stipulation seriously impairs the privilege of diplomatic interposition will be discussed presently.

After calling attention to growing limitations on national sovereignty, to the increasing privilege of the individual to expatriate himself, to the supremacy of international law over municipal law, to the fact that there is nothing illegal about the clause in so far as the individual's personal stipulation is concerned, that no limitations upon individual freedom of action or waiver can be found in such vague notions as the "natural rights" or "inalienable rights" of nations, the Commission concluded that by the stipulation the claimant company agreed to resort to the Mexican courts in all matters affecting the execution, fulfillment and interpretation of the contract, and in these respects to forego the alien's alleged privilege of invoking diplomatic interposition. The claimant does not, however, waive other rights,—his privilege to protest internationally against a "denial of justice" or against any other violation of international law growing out of the contract; nor can he waive the right and privilege of his government to interpose in his behalf and protect him on account of any breach of international law by the defendant country. The decision was limited to contractual stipulations signed by the claimant; the validity of the Calvo clause in constitutions or municipal statutes, as a bar to a claimant's privilege of invoking diplomatic protection, was denied. The only justification for such conclusion, under the limited scope accorded the doctrine, seems to be the provision of Article V waiving the necessity for exhausting local remedies.

Whether this decision on the Calvo clause does anything more than state a commonly acknowledged rule of international law seems doubtful. Even if there is no stipulation to resort to the local courts, no alien's country should, under the rules of international law, extend its protection before he has exhausted his local remedies and established a denial of justice. The difficulty lies in the application of the rule, for the term "denial of justice" is given varying interpretations, and claimant countries often undertake to act on their unilateral view. The profession of occasional officials of Foreign Offices that this is justified because weak countries often trade on their weakness, can be met by the argument that a strong country is not always the best judge of the propriety of interposition and of the necessity for self-restraint.

The Commission's interpretation of the Calvo clause will thus, as a general proposition, neither add to the extent of local jurisdiction over aliens nor limit the privilege of diplomatic protection. In its application to the particular case before it, the Commission found that the claimant company had not endeavored to resort to the local courts at all. This failure barred the claim, under the construction given the treaty, because the claimant was not in a position to present his claim diplomatically, no denial of justice having been established. As such proper presentation was, under the treaty, deemed a condition precedent to governmental espousal, the Commission denied its jurisdiction. The important and vital question was, however, raised, whether

the waiver in Article V of the defense that local remedies had not been exhausted did not make it impossible to raise this defense against the claimant company. The Commission held no, because the claimant could not, under its contract, rightfully present the claim to its government and the claim was thus not cognizable by the Commission in any event. This conclusion is not altogether convincing to the writer, though as a matter of expediency and justice it may be sustainable. What is really decided is that local remedies, under Article V, need not be exhausted, unless there has been a contractual stipulation to the effect that they would be, and provided the claim is thus within the jurisdiction of the Commission under Article I. Whether Article V is susceptible of this interpretation is not altogether clear.

In the claim of William A. Parker against Mexico, Docket No. 127, the contention was advanced by the United States that inasmuch as the private claim is by espousal merged in the governmental claim, that therefore the allegations of fact in the claimant government's memorial establishing the claimant's citizenship, constitute *prima facie* evidence of nationality, rebuttable only by affirmative evidence to the contrary adduced by the defendant government. This contention was unequivocally rejected, and properly so. This is not the first time in arbitral commissions that claimant governments have sought to give exceptional evidential value to their assertion of facts, especially in the matter of claimant's citizenship. It was a violently controversial issue before the several umpires of the claims commission under the Spanish-American convention of 1871.

The present Commission held that it was not bound by the technical rules of evidence sanctioned by municipal law, but that wide latitude was allowed in the introduction of evidence. Nor was it bound by technical rules as to the burden of proof, both governments being under the duty of adducing all the evidence in their possession establishing or denying allegations of fact; and the Commission was empowered to give to the various pieces of evidence introduced their appropriate weight and to determine their admissibility. This is sound and just. The ordinary rules of evidence in Anglo-American law were largely developed in connection with the jury system. They have become so technical that the assertion is not without justification that they are often calculated to suppress, not establish, the truth. International arbitration should disregard technicalities, partly because it is an inter-governmental procedure and partly because every channel establishing facts should be open to the Commission.

The suggestion that the private is merged in the governmental claim is only partly valid. While the government's control over the claim, after espousal, is exclusive, it is not true that the private interest is lost or destroyed. The federal Act of February 27, 1896, relating to the distribution of awards denominates the relationship of the government as that of a trustee.³

³ 29 Stat. L. 32. See explanatory statement of Representative Hitt in the Congressional Record, 54th Cong. 1st sess., V. 28, part 2, p. 1058.

The claim of *George W. Hopkins v. Mexico*, Docket No. 39, for refund of certain postal money orders purchased from the Mexican Government during the Huerta régime and not paid out, gave the Commission occasion to pass upon the binding nature of the acts of the Huerta administration on Mexico. The Commission reviews the record of Huerta's accession and characterizes it as "illegal" and "abhorrent." Not all students of the subject have agreed with the Commission in its interpretation of Mexican constitutional law, and in these days of dictators, a certain interest is aroused by Huerta's evident desire to preserve constitutional forms. The Commission, after practically regarding Huerta as a usurper, determines that the binding character of the acts of his régime depends upon their nature, that is, that there is a distinction between those normal acts which any government must perform, like the sale of postage stamps, registration of births, collection of taxes, etc., and those exceptional acts, like the issuance of bonds, which may or may not bind the country, according to the purpose involved. The Commission distinguishes between the *government* of a country and the administration in power, a distinction not heretofore commonly made. They distinguish between the so-called acts of the Huerta administration in its personal character and the acts of the government itself in its impersonal character. Such a distinction is not easy to follow, and the Commission itself qualifies the value of the distinction by adding that the binding force of the so-called "personal" acts will depend "upon [Huerta's] real control and paramountcy at the time of the act over a major portion of the territory and a majority of the people of Mexico." Thus, its alleged illegal origin would not invalidate its acts if it were a general *de facto* government, though the Commission appears consciously to avoid the discussion of the time-honored and useful distinction between general and local *de facto* governments. It seems to the writer that this would have been helpful; for can it be that "while still in possession of the capital and therefore dominating the foreign office, the treasury, and Mexico's representatives abroad, its acts of a personal nature could not ordinarily bind the nation from the moment [the Huerta régime] apparently was no longer the real master of the nation"? Can such a criterion be applied, even if it presents a workable theory? The writer doubts. Huerta was, by all the tests, at least the *de facto* government of Mexico. For most of the time, he was the general *de facto* government, and practically all his acts should be deemed binding on Mexico. In so far as he was, after his withdrawal from the capital, in the position of a local *de facto* government, other tests apply⁴. His non-recognition by the United States is entirely immaterial; nor did this close to the United States "the avenue of diplomatic interposition and intervention with the Huerta administration," nor did it temporarily render this remedy "unavailable to an American citizen," as the Commission seems to assume. On the contrary, diplomatic representations to Huerta were constant during that period, and a very considerable degree of satisfaction was obtained by the

⁴ "International pecuniary claims against Mexico," (1917) 26 Yale Law Journal, 339.

Department. The Commission's effort to distinguish between the recognition of a *government* and of an *administration* is novel. The Carranza decrees purporting to nullify the legal effect of Huerta's acts are regarded as ineffective, on the theory that the claimant's right against Mexico had become a "vested right." The Commission reiterates the well-known fact that foreigners frequently enjoy, by virtue of diplomatic protection, a privileged position over natives.

Other cases decided by the Commission are not, with minor qualifications, of exceptional interest. In the claim of Fabian Rios, Docket No. 306, the distinction was emphasized between damages arising out of ordinary military operations in the capture of Vera Cruz by the United States, for which there was no legal liability on the part of the United States, and damages arising out of maladministration or unlawful administrative acts, after beginning of the military occupation. In the enforcement of the law, nonobservance of the Mexican law by the occupying authorities was used as the test of liability. (*El Emporio del Cafe v. U. S.*, Docket No. 281.)

The disallowance by the Umpire of the Special Claims Commission of the Santa Ysabel claims, arising out of the murder of some fifteen American citizens at that place by alleged Mexican insurrectionists or bandits, evidently rests upon the conclusion of the Umpire that the forces that perpetrated that crime were not governmental or revolutionary forces, within the first four paragraphs of Article III of the Special Claims Convention, but came under category (5) of "Mutinies or mobs or insurrectionary forces . . . or bandits," in which Mexican liability was predicated upon proof "that the appropriate authorities omitted to take reasonable measures to suppress insurrectionists, mobs or bandits, or treated them with levity or were in fault in other particulars." The character of the perpetrators and the issue of governmental negligence become questions of fact. The criticism of the Mexican Agent for using every defense available to his government and of the Umpire for deciding against the United States is unfortunate.

The opinions of the General Claims Commission, the only ones before us, seem to be carefully drafted and evidence much learning. We approve the use of the simple word "Commissioner" to designate the Commissioners nominated by the United States and Mexico, respectively, for as judges they should be deemed properly to cast aside any national bias, implicit in the old characterization of "American" or "Mexican" Commissioner. International arbitration is aided and encouraged by impartial decisions which, while the professed goal, are often hampered by the subconscious bias of a so-called national commissioner. The change should promote impartiality and objectivity.

EDWIN M. BORCHARD.

THE NON-RECOGNITION OF THE CHAMORRO GOVERNMENT IN NICARAGUA

On January 25, 1926, the Secretary of State of the United States in a formal note declined to recognize the Government in Nicaragua headed by General Emiliano Chamorro. It appears that on October 25, 1925, General Chamorro, who had formerly been President of Nicaragua when the Conservative party was in power, seized the Loma fortress without apparent opposition. It is reported that he stated that the purpose of this move was to drive the Liberals from the Cabinet and to restore the Conservative party to the power it enjoyed before the "fraudulent elections" which brought in Solorzano, the Liberal leader, as President. It is said that he wished Solorzano to remain as President and himself to be appointed Minister of War with complete control of the military establishment. The Liberals, however, were not disposed to retire from the government under General Chamorro's threats of use of force, but the pressure of circumstances forced President Solorzano to resign, and General Chamorro took over the executive power on January 17, 1926. In Secretary Kellogg's note of January 25th, mentioned above, he refers to the General Treaty of Peace and Amity signed on February 7, 1923, at the Washington Conference of the Central American Republics, and states:

The object of the Central American countries with which the United States was heartily in accord, was to promote constitutional government and orderly procedure in Central America and those governments agreed upon a joint course of action with regard to the non-recognition of governments coming into office through *coup d'etat* or revolution. The United States has adopted the principles of that treaty as its policy in the future recognition of Central American Governments as it feels that by so doing it can best show its friendly disposition towards and its desire to be helpful to, the Republics of Central America.

It is therefore with regret that I have to inform you that the Government of the United States has not recognized and will not recognize as the Government of Nicaragua the régime now headed by General Chamorro, as the latter was duly advised on several occasions by the American Minister after General Chamorro had taken charge of the citadel at Managua on October 25th last. This action is, I am happy to learn, in accord with that taken by all the governments that signed with Nicaragua the treaty of 1923.

There apparently had been little or no armed opposition to General Chamorro's authority until the Liberals under the leadership of Vice-President Sacasa took the field and captured Bluefields in the first days of May, 1926, and subsequently gained control of a large part of the eastern coast of Nicaragua. General Chamorro proceeded to put down this armed opposition to his authority and by the end of the month had gained control of the eastern coast and had practically driven the Liberal forces out of the country.

That General Chamorro is not the *de jure* or lawful ruler of Nicaragua is not questioned, but that he is in possession and control of the power of the nation without at the present time serious opposition thereto; in short, that

he is the government *de facto* of that country, may possibly be conceded. The declaration of Secretary Kellogg against the recognition of the Chamorro government leads to a consideration of the principles underlying the recognition of new governments which have been created by *extra*-legal methods.

The practice of the United States in regard to the recognition of new governments began as early as 1792 during the French Revolution. Having in mind the struggle for independence through which the thirteen States had recently passed, the young American Government was not backward in recognizing revolutionary governments in other countries. At the beginning, the only condition to recognition was, as declared by Jefferson, that the new government should represent the "will of the nation substantially declared." From that time the United States entered upon the practice of recognizing *de facto* governments without regard to the kind of government or the means by which it was established, so long as it controlled the machinery of government and had the express or implied approval of the people. This presupposed that the government was maintaining itself and that its supremacy was not seriously contested by other factions. The United States did not go behind the existing government to inquire into the question of its legitimacy. This was regarded as a domestic question. So far as the United States was concerned, as Secretary Van Buren said, "that which is the government *de facto* is equally so *de jure*," and the United States recognized, as Secretary Buchanan said, "the right of all nations to create and reform their political institutions according to their own will and pleasure."

The outbreak of the rebellion in the Southern States and the establishment of the Confederate Government, which exercised *de facto* control over a large portion of the United States, was not without its effect on the prior viewpoint of the United States Government. Naturally this condition of affairs would tend to cause the Federal Government to scrutinize the *de facto* character and the popular approval of a new government. As a result, Secretary Seward was inclined to favor a dilatory policy when there was a change of government by force of arms and not by constitutional methods, and to insist that the popular approval of the new government should be shown by the formal sanction of the people.

Whether or not the fall of the Confederacy and its inability to carry out its international obligations influenced the United States Government, it was President Hayes, in 1877, who first emphasized the necessity that new governments should comply with the rules of international comity and the obligations of treaties. Later Secretary Evarts observed that "Good faith in the observance of international obligations is the first essential towards the maintenance of such relations." If any generalization can be made from the practice of the United States from this time forward, it may perhaps be stated in the formula that the United States deferred recognition of a new government until it was in full control of the machinery of government with

the acquiescence of the people and without substantial resistance, and until it was in a position to fulfill its international obligations and responsibilities.

This formula may be said to have been followed more or less closely up to the time of President Wilson, who endeavored to discourage revolutionary movements in Latin American countries, by refusing to recognize new governments established by force and to postpone recognition until a government had been set up under a régime of law. Thereby he advocated, possibly without knowing it, the doctrine advanced in 1907 by Dr. Tobar, Minister of Foreign Affairs of Ecuador, and known as the Tobar Doctrine. Tobar proposed an agreement between Latin American countries not to recognize governments which arose from a revolution or a *coup d'état*.¹ The notable cases in which President Wilson applied the Tobar Doctrine were the overthrow of the Madero government in Mexico by General Huerta and the *coup d'état* by General Tinoco in Costa Rica.

The Tobar Doctrine has been adopted by the Republics of Central America in an international convention signed by them in 1907, and confirmed in a subsequent convention of 1923, at the Central American Conferences held in Washington under the auspices of the United States. The treaty of 1923 is the one referred to by Secretary Kellogg in his declaration against the recognition of the Chamorro government. At this point it may be recalled that Secretary Hughes on June 30, 1923, took the occasion of an impending revolution in Honduras, to notify the Central American Republics of the attitude of the United States toward this treaty as follows:

The attitude of the Government of the United States with respect to the recognition of new governments in the five Central American Republics whose representatives signed at Washington on February 7, 1923, a general Treaty of Peace and Amity, to which the United States was not a party, but with the provisions of which it is in most hearty accord, will be consonant with the provisions of Article II thereof. . . .

In view of the origin of these treaties and the connection of the United States with them, it is obviously difficult for the United States not to accept the policy laid down in them as to the recognition of a revolutionary government in one of the signatory countries; and it may be said that the signatories have by implication waived the right to object that this policy, when applied to them, amounts to intervention in their domestic affairs. However, this doctrine is not binding on non-signatory Powers and cannot be regarded as a postulate of international law.²

On principle, the recognition of new governments is essentially a question of the recognition of the agency which exercises the sovereignty of a nation. Sovereignty must, from its nature, be exercised by the sovereign or the agent of the sovereign, and, in modern times, governments are the common agen-

¹ Luis Anderson, "De Facto Government," *Inter-America*, Vol. 8, p. 520.

² *Great Britain v. Costa Rica*, 1923, Wm. H. Taft, Arbitrator, this JOURNAL, Vol. 18, p. 147.

cies created for the exercise of sovereignty. A government which has supreme control, without opposition, within the territory of the nation, exercises the sovereignty of the nation and represents that nation. It speaks and acts for the nation and, therefore, it has the power in most respects to bind the nation internationally.

The National Assembly of France, which concluded the Treaty of Frankfurt at the end of the Franco-Prussian War, was a *de facto* government, and the Government of Germany which signed the Treaty of Versailles at the conclusion of the World War was a revolutionary government. Nevertheless, in the exercise of the sovereignty "they spoke in the name of their respective countries and obligated them with those memorable treaties."³ Similarly the revolutionary government of the American Colonies signed treaties of alliance and of amity and commerce with France in 1778, which remained in force for twenty years. These illustrations show the binding character of the acts of a *de facto* government.

The recognition of a new government is simply an acknowledgment that it exercises the sovereignty of the nation and speaks and acts for it with authority. If this is the primary meaning of recognition, the origin, form and character of the new government are of secondary importance. Indeed an independent state has the power and right to choose and establish whatever kind of government it pleases, by whatever means it may elect, and with such individuals as it may nominate. These are internal matters for determination by the nation itself, and with which foreign nations, strictly speaking, have no concern except as their international rights may be affected thereby. There are certain facts which, if established, are indicative of the sovereign character of the new government, namely, the popular sanction of the new government's authority, and the physical power of the new government to impose its will and to maintain peace and order within the national boundaries. These facts once established, it may be presumed that the new government represents the sovereign power of the nation regardless of the legitimacy of its origin or the means by which it came into possession of the sovereignty.⁴

As foreign nations desire to ascertain the *de facto* authority of the new government with which they are to deal, so they also are concerned to know whether it will conduct the affairs of the nation so as not to invade their international rights, that is, whether the new government will respect the law and practice of nations, or, as it is generally stated, whether it will carry out its international obligations. While this may be presumed from the fact that the new government represents the sovereignty of a member of the family of nations, yet there may be circumstances which negative this presumption or which raise a doubt as to the purpose of the new government in

³ Luis Anderson, *op. cit.*, p. 511.

⁴ See Robert Lansing, "Recognition of the Mexican Government by the United States," *La Prensa*, Aug. 10, 1924.

this regard. Obviously a government which, although in supreme control and exercising sovereignty at home, avowedly declares its hostile intentions toward other nations or their governments, would not be regarded as entertaining the purpose of respecting their sovereign rights. But aside from such extreme cases, nations have a right to a reasonable assurance that their relations with the new agent of sovereignty will be conducted on the basis of established law and usage.

In conclusion, a word may be said as to the attitude of judicial tribunals toward the acts of new governments which have arisen out of a revolutionary movement or a *coup d'état*. The Supreme Court of the United States has had occasion to consider this question in connection with cases arising out of the acts of the Confederate Government during the Civil War. In *Williams v. Bruffy*, 1877 (96 U. S. 176), this court distinguished between a *de facto* government, such as the Confederate Government, in a portion of a country which has seceded, and a *de facto* government which has succeeded to supreme control over the whole country. The latter kind of *de facto* government, the court states,

is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. Such was the government of England under the Commonwealth established upon the execution of the king and the overthrow of the loyalists. As far as other nations are concerned, such a government is treated as in most respects possessing rightful authority; its contracts and treaties are usually enforced; its acquisitions are retained; its legislation is in general recognized; and the rights acquired under it are, with few exceptions, respected after the restoration of the authorities which were expelled.⁵

The United States-Venezuelan Claims Commission of 1889 declared in the Day case that "it may also be said with great confidence that a government *de facto*, when once invested with the powers which are necessary to give it that character, can bind the state to the same extent and with the same legal effect as what is styled a government *de jure*."

The Franco-Chilean Arbitral Tribunal of 1901, in the case of Dreyfuss Freres Cie, had under consideration the binding character of the acts of the Dictator Pierola of Peru. The tribunal held that the government of Pierola

⁵ In *Mauran v. Insurance Company*, 1867 (6 Wallace, 1), the United States Supreme Court said: "Another illustration will be found in a capture by a *de facto* government, which government is defined to be one in possession of the supreme or sovereign power, but without right—a government by usurpation, founded perhaps in crime, and in the violation of every principle of international or municipal law, and of right and justice; yet, while it is thus organized, and in the exercise and control of the sovereign authority, there can be no question between the insurer and the insured as to the lawfulness of the government under whose commission the capture has been made."

represented Peru in its international relations and by its acts bound the nation. The tribunal said:

Whereas, according to a principle of international law, denied at first theoretically in the dynastic interest by the diplomacy of European monarchies, applied, however, in fact in a series of cases to-day universally admitted, the capacity of a government to represent the state in its international relations does not depend in any degree upon the legitimacy of its origin, so that foreign states no longer refuse recognition of a government *de facto*, and that the usurper who holds power with the consent express or tacit of the nation, acts and concludes validly in the name of the state treaties that the restored legitimate government is obliged to respect.

The Franco-Peruvian Arbitral Tribunal of 1921 also considered the status of the Pierola government and confirmed the opinion of the Franco-Chilean Tribunal of 1901 and held that "this government represented and bound the nation," notwithstanding that a later government had declared Pierola's acts null and void.

In the arbitration between Great Britain and Costa Rica in 1923, involving, among other things, a concession granted by the Tinoco government which a later government declared null and void, William H. Taft (Chief Justice of the United States), sole arbitrator, declared that the Tinoco government was an actual sovereign government regardless of the recognition or non-recognition of this status by Great Britain or other Powers and that, therefore, the acts of this government, pursuant to the laws in existence at the time, were binding on Costa Rica and the subsequent governments of that country, notwithstanding a decree of a later government declaring them null and void, and notwithstanding that they were contrary to a prior constitution superseded by Tinoco but restored to force by the succeeding government. As to the policy of President Wilson in not recognizing the Tinoco government, Mr. Taft made the following comment:

The merits of the policy of the United States in this non-recognition it is not for the arbitrator to discuss, for the reason that in his consideration of this case, he is necessarily controlled by principles of international law, and however justified as a national policy non-recognition on such a ground may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law.

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government

under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.⁶

L. H. WOOLSEY.

⁶ This JOURNAL, Vol. 18, pp. 153-154.

CURRENT NOTES

THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The Twentieth Annual Meeting of the American Society of International Law was held in Washington, April 22-24, in accordance with the program previously announced.

In his opening address on Thursday evening, the Honorable Charles Evans Hughes, President of the Society, made some very important observations on recent international events, particularly the Locarno Treaties and the consent of the United States Senate to the adherence of the United States to the Permanent Court of International Justice. He was followed by Mr. Clement L. Bouvé, of the District of Columbia Bar, who read an interesting paper on "The Confiscation of Alien Property," with especial reference to the sequestration of enemy property in the United States during the World War. Mr. Bouvé concluded that the United States has not repudiated its traditional policy and practice of regarding such property as exempt from confiscation in time of war.

The sessions of Friday morning and afternoon, April 23rd, were designated as round table conferences and the discussions were of an informal character. "The Function and Scope of Codification in International Law" was the subject of discussion in the morning, and was opened by Professor James W. Garner of the University of Illinois, and Professor Joseph W. Bingham of Stanford University. The afternoon conference discussed "The Codification of International Law in Respect to Nationality." Mr. Richard W. Flournoy, Jr., of the Department of State, opened the discussion in respect to nationality by birth, and Mr. Henry B. Hazard, of the Bureau of Naturalization in respect of nationality by naturalization and the nationality of married women. The discussion of these subjects was concluded at the Saturday morning session. The debates at the round table conferences were lively and full of interest, and members in attendance considered them a most successful and desirable innovation.

Dr. Antonio S. de Bustamante made a special trip from Havana to attend the meeting of the Society. He opened the Friday evening session with a comprehensive address, which he delivered in English, upon "The Progress of Codification of International Law under the Auspices of the Pan American Union." Dr. de Bustamante, who is a member of the Executive Committee of the American Institute of International Law, explained and commented upon the projects prepared by the Institute upon the request of the Pan American Union. The Society also had upon its program a member of the Committee of Experts of the League of Nations for the Progressive Codification of International Law, the Honorable

George W. Wickersham, who followed with an address explaining the work of that committee, which he said was directed toward a conference of all civilized nations which recognize the obligations of international law. Mr. Wickersham urged the coöperation on the part of the foreign offices of all such governments in the preliminary work of the Committee of Experts.

At the business meeting on Saturday morning, the Society reelected the Honorary President, the President, the Honorary Vice-Presidents, and Vice-Presidents, filling the vacancy caused by the death of the Honorable George Gray on August 7, 1925, by electing the Honorable Frank B. Kellogg, Secretary of State, an Honorary Vice-President. The following members were elected to the new class of the Executive Council to serve until 1929: Edwin M. Borchard, Charles G. Fenwick, Richard W. Flournoy, Jr., James W. Garner, Arthur K. Kuhn, Frederick D. McKenney, Jesse S. Reeves and Ellery C. Stowell.

The Executive Council met immediately upon the adjournment of the Society on Saturday morning, and elected Judge Edwin B. Parker Chairman of the Council, vice Rear Admiral W. L. Rodgers, whose term expired; and for the same reason replaced Professor William I. Hull and Judge Kathryn Sellers on the Executive Committee by Mr. Frederick D. McKenney and Professor Ellery C. Stowell. The Recording and Corresponding Secretaries, Treasurer, and Editorial Board of the *AMERICAN JOURNAL OF INTERNATIONAL LAW* were reelected, with the addition of Professor Jesse S. Reeves as a member of the Board. The following committees were also appointed:

Committee on Selection of Honorary Members: George Grafton Wilson, Chairman; James W. Garner, Manley O. Hudson, Charles Cheney Hyde, Harry Pratt Judson.

Committee on Increase of Membership: Hollis R. Bailey, Chairman; Cephas D. Allin, Frank E. Hinckley, Pitman B. Potter.

Committee on Annual Meeting: Ellery C. Stowell, Chairman; Cephas D. Allin, William C. Dennis, Manley O. Hudson, Charles Warren, W. W. Willoughby, Lester H. Woolsey.

Committee for the Extension of International Law: Charles Cheney Hyde, Chairman; Manley O. Hudson, John H. Latané, Fred K. Nielsen, Edwin B. Parker, Pitman B. Potter, Henry W. Temple.

Special Committee on Collaboration with League of Nations Committee for the Progressive Codification of International Law: Jesse S. Reeves, Chairman; Edwin M. Borchard, Philip Marshall Brown, C. K. Burdick, Edwin D. Dickinson, Charles G. Fenwick, James W. Garner, Manley O. Hudson, Philip C. Jessup, Arthur K. Kuhn, Pitman B. Potter, James Brown Scott, George Grafton Wilson, Quincy Wright.

The Council received and approved a report from the Special Committee on Collaboration with the League of Nations Committee for the Progressive

Codification of International Law, which recommended the transmission of five additional topics to the Committee of Experts at Geneva as suitable for consideration scientifically looking toward an authoritative statement of the law. The topics were: (1) State succession; (2) Criteria of *de facto* recognition of new states and new governments; (3) Canons of interpretation of treaties; (4) International servitudes; (5) The civil and commercial status of aliens, transient and resident.

The report also contained a recommendation, which was likewise approved by the Council, that the questionnaires and reports issued by the Committee of Experts at Geneva, and the projects of codification drafted by the American Institute of International Law, be printed as special supplements to the AMERICAN JOURNAL OF INTERNATIONAL LAW. The questionnaires and reports of the Committee of Experts are printed as a special supplement to this number of the JOURNAL. The projects of the American Institute will be printed as a special supplement to the next number.

On Friday afternoon, the members of the Society were received by the President of the United States and Mrs. Coolidge at the White House.

The meeting closed with the usual dinner on Saturday evening, which was attended by over 200 guests and members. Mr. Hughes presided as toastmaster, and the speakers were the Vice-President of the United States, the German Ambassador, the Minister from Uruguay, and Professor Archibald C. Coolidge of Harvard University.

The printed volume of the complete proceedings of the Society and the Executive Council, including the after-dinner speeches, has been published and is ready for distribution to subscribers. (Price \$1.50.)

ADHERENCE OF THE UNITED STATES TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE

The resolution of the United States Senate, adopted on January 27, 1926, giving advice and consent to the adherence on the part of the United States to the Permanent Court of International Justice¹ was communicated by the Secretary of State on March 2, 1926, to each of the governments signatories of the Protocol, with an inquiry as to whether they would accept the conditions, reservations and understandings contained in the resolution as a part and condition of the adherence of the United States to the Protocol and Statute. A copy of the resolution was transmitted at the same time to the Secretary General of the League of Nations, who had on August 15, 1921, sent the Department of State a certified copy of the Protocol of Signature. In his letter of March 2, 1926, to the Secretary General of the League of Nations, Secretary Kellogg stated that "the signature of the United States will not be affixed to the said Protocol until the Governments of the Powers

¹ Printed in Supplement to the JOURNAL, Vol. 20, p. 73, April, 1926.

signatory thereto shall have signified in writing to the Government of the United States their acceptance of the foregoing conditions, reservations and understandings."²

The Secretary General communicated Secretary Kellogg's letter to the governments of the members of the League of Nations on March 17, 1926, and on the following day, at the Thirty-ninth Session of the Council of the League then in session at Geneva, Sir Austen Chamberlain reminded the Council of this letter, and read the following statement:

The Senate resolution of January 27th, 1926, stipulates that the signature of the United States to the Protocol of December 16th, 1920, shall not be affixed until the Powers signatory to that Protocol shall have indicated by an exchange of notes their acceptance of the first five paragraphs of that resolution. The Protocol of 1920 is a multilateral instrument to which all the signatories are parties, and the special conditions on which the United States desire to accede to it should also be embodied in a multilateral instrument. They cannot appropriately be embodied in a series of separate exchanges of notes.

The terms of some of the first five paragraphs of the Senate resolution affect in certain respects the rights of the States which have ratified the Protocol of December 16th, 1920, and it is not usual that rights established by an instrument which has been ratified should be varied by a mere exchange of notes.

The terms of the fifth paragraph of the Senate resolution necessitate further examination before they could safely be accepted by the States which are parties to the Protocol of 1920. This paragraph is capable of bearing an interpretation which would hamper the work of the Council and prejudice the rights of members of the League, but it is not clear that it was intended to bear any such meaning. The correct interpretation of this paragraph of the resolution should be the subject of discussion and agreement with the United States Government.

It should not be difficult to frame a new agreement giving satisfaction to the wishes of the United States Government, if an opportunity could be obtained for discussing with a representative of that government the various questions raised by the terms of the Senate resolution. To any such new agreement, the states which have signed the Protocol of December 16th, 1920, and the United States Government would be parties.

I suggest that the most convenient course would be to propose to all the governments which have received from the United States Government a copy of the Senate resolution that a reply should be made indicating the difficulty of proceeding by way of a mere exchange of notes and the need of a general agreement. An invitation might also be addressed by the Council to all these governments and to the Government of the United States to appoint a delegation to participate in the discussions as proposed above and in the framing of a new agreement at a meeting to be held here on September 1st of the current year.³

² For the text of this letter, see *League of Nations Official Journal*, April, 1926, pp. 628-629.

³ *League of Nations Official Journal*, April, 1926, p. 536.

The Council adopted the proposals of the British representative, and on March 29, 1926, the Secretary General of the League communicated to the signatories of the Protocol of the Statute of the Permanent Court the text of the foregoing extract from the minutes of the Council, and informed them that

The Council has decided, in the first place, to propose to all the Governments which have received from the United States a copy of the Senate's resolution, among which the Government of . . . being a state signatory of the Protocol in question, is no doubt included, "that a reply should be made indicating the difficulty of proceeding by way of a mere exchange of notes and the need of a general agreement."

The Council, in the second place, decided to invite all the governments signatories of the Protocol and the Government of the United States of America to appoint delegations to participate in the discussion contemplated by the above-mentioned recommendation and in the framing of a new agreement at a meeting to be held in Geneva on September 1st of the current year.⁴

An invitation was thereupon extended* to each of the signatories of the Protocol to participate in the meeting convened at Geneva by the Council on September 1, 1926. In transmitting on the same date the foregoing text and invitation to the United States Government, the Secretary General said:

You will observe from this extract that the Council, desirous of facilitating common action by the signatories of the Protocol in question with regard to the adhesion of the United States to that instrument, and after consideration of the technical aspects of the subject, has taken a decision that invitations shall be issued to the governments of the states actually signatories of the Protocol and to the Government of the United States to appoint delegations to meet in Geneva on September 1st of the current year for the purpose of discussing any questions which it may be proper for them to discuss in this connection, and for the purpose of framing any new agreement which may be found necessary to give effect to the special conditions on which the United States are prepared to adhere to the Protocol.⁵

The invitation was declined by the Secretary of State of the United States in a note made public at Washington on April 9, 1926, the material portion of which reads as follows:

While acknowledging the courtesy of the invitation of the League of Nations to attend such a meeting, I do not feel that any useful purpose could be served by the designation of a delegate by my government to attend a conference for this purpose. The Senate gave its consent to the adherence of the United States to the Statute of the Permanent Court with certain specific conditions and reservations set forth in the resolution, which I forwarded to you as the depository of the Protocol. These reservations are plain and unequivocal and, according to their terms, they must be accepted by the exchange of

⁴ League of Nations Official Journal, May, 1926, p. 721.

⁵ League of Nations Official Journal, May, 1926, p. 722.

notes between the United States and each one of the forty-eight states signatory to the Statute of the Permanent Court before the United States can become a party and sign the Protocol. The resolution specifically provided this mode of procedure.

I have no authority to vary this mode of procedure or to modify the conditions and reservations or to interpret them and I see no difficulty in the way of securing the assent of each signatory by direct exchange of notes as provided for by the Senate. It would seem to me to be a matter of regret if the Council of the League should do anything to create the impression that there are substantial difficulties in the way of such direct communication. This government does not consider that any new agreement is necessary to give effect to the conditions and reservations on which the United States is prepared to adhere to the Permanent Court. The acceptance of the reservations by all the nations signatory to the Statute of the Permanent Court constitute such an agreement. If any machinery is necessary to give the United States an opportunity to participate through representatives for the election of judges, this should naturally be considered after the reservations have been adopted and the United States has become a party to the Statute of the Permanent Court of International Justice. If the states signatory to the Statute of the Permanent Court desire to confer among themselves, the United States would have no objection whatever to such a procedure, but, under the circumstances it does not seem appropriate that the United States should send a delegate to such a conference.⁶

The Department of State announced on March 22nd and April 19th that the Governments of Cuba and Greece had each respectively accepted the conditions, reservations and understandings contained in the resolution of the Senate of January 27, 1926, as a part and condition of the adherence of the United States to the Protocol and Statute of the Permanent Court of International Justice.

PRELIMINARY CONFERENCE ON OIL POLLUTION OF NAVIGABLE WATERS

Pursuant to the Joint Resolution of Congress, approved July 1, 1922, the Government of the United States in April last issued invitations to Belgium, Denmark, France, Germany, Great Britain, Greece, Italy, Japan, The Netherlands, Norway, Spain and Sweden to a preliminary conference of experts to consider the problem of oil pollution of navigable waters. The issuance of the invitations followed the presentation to the Secretary of State on March 13, 1926, of a comprehensive report by an interdepartmental committee, which was formed for the purpose of studying the problem. The committee found that practically all agencies engaged in the production, transportation, handling, or use of oil, must be regarded as actual or potential sources of oil pollution of coastal and territorial waters. The increasing use of oil as fuel by vessels, and the resulting discharge of oily mixtures near the coasts of maritime nations, have caused widespread pollution with

⁶ State Dept. press notice.

resulting damage to bathing beaches, harbors, and shore property, increased fire hazard, and injury to the fishing industry and to wild life. Most maritime nations have adopted laws and regulations on the subject, but experiments indicated that concentrated masses of fuel oil agitated in sea water form emulsions which may float for indefinite periods and under the action of winds and currents may be carried from non-territorial waters into territorial waters. The interdepartmental committee therefore considered measures with a view to the elimination of oil pollution originating on the high seas, and recommended that the conference of experts be called to facilitate dealing with the problem through international agreement.

The conference convened in Washington on June 8, 1926, all of the countries invited being represented by delegates, except Greece. Portugal sent an observer. The conference adjourned on June 16, 1926, after agreeing upon a final act which was signed on that date by the delegates of the United States, Belgium, the British Empire, Canada, Denmark, France, Germany, Italy, Japan, The Netherlands, Norway, Spain and Sweden. The conclusions of the conference may be summarized as follows:

It was agreed that, while there has been some diminution of oil pollution, due both to the action of governments and the voluntary coöperation of the interests concerned, the evil remains serious in some waters and can only be satisfactorily dealt with by international action.

The principal causes of oil pollution are vessels and land installations and terminals. The conference, however, only dealt with pollution caused by vessels. The only vessels viewed as important sources of oil pollution were considered to be seagoing vessels carrying crude, fuel or diesel oil in bulk as cargo or as fuel for boilers or engines.

While harmful oily mixtures cannot be distinguished by hard and fast lines from those practically innocuous, the conference concluded that a mixture containing more than .05 of one per cent of the above mentioned oils should be regarded as constituting a nuisance. Such mixtures can generally be recognized by the film visible to the naked eye in daylight in clear weather produced on the surface of the sea.

The conference, after careful consideration, recommended the establishment of a system of areas adjacent to the coasts of maritime nations, within which discharge of oil or oily mixtures constituting a nuisance should be prohibited. Each country would establish the areas off its own coasts, in consultation with neighboring governments if deemed necessary. The conference recommended that, in the case of governments bordering the open sea, such areas should not extend more than 50 nautical miles from the coast, except that, if such extent is in particular instances found insufficient because of peculiar configuration of the coast line or other special conditions (such as prevailing winds, currents and the extent of fishing grounds), such areas may be extended to a width not exceeding 150 nautical miles. Full information as to the extent of all areas should be circulated

to all governments concerned by means of a central agency which it is proposed to set up.

The conference recommended that each government require vessels flying its flag, when within any area prescribed by that or other governments as before stated, to refrain from discharging oil or oily mixtures constituting a nuisance.

Already a number of vessels have been equipped with apparatus for the separating of oil from oily mixtures, and it is contemplated that the number of such vessels will increase. In order that the installation of suitable apparatus will not be hindered, the conference recommended that no penalty or disability in the matter of tonnage measurement or payment of dues be incurred by vessels fitting such apparatus, and that dues based on tonnage should not be charged in respect of space rendered unavailable for cargo by the installation of such apparatus.

The above mentioned points are contained in a series of recommendations embodied in the Final Act, as well as in a draft of convention annexed thereto to be submitted to the aforementioned governments.

UNITED STATES TREATY SERIES

In response to many requests, the Government Printing Office, through the Superintendent of Documents, has arranged to place the Treaty Series on sale beginning August 1, 1926.

In the absence of any provisions for the purchase of this series, the Department of State has hitherto been supplying it free on request. In the interests of economy and in order that there may be in the office of the Superintendent of Documents a demand sufficient to justify keeping a stock, the Department of State will, after July 31, 1926, limit its distribution of the Treaty Series exclusively to official requests, and refer all others to the Superintendent of Documents.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16, 1926-MAY 15, 1926

(With references to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *G. B. Treaty Series*, Great Britain, Treaty series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *Nation* (N. Y.); *N. Y. Times*, New York Times; *P. A. U.*, Pan American Union Bulletin; *Press notice*, U. S. State Dept. press notice; *Rev. int. de la Croix-Rouge*, Revue internationale de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

September, 1925

- 21 GREECE—SWITZERLAND. Signed treaty of conciliation and arbitration. *L. N. M. S.*, Mar., 1926, p. 52.

November, 1925

- 20-27 INTERNATIONAL CONFERENCE ON MEASUREMENT OF VESSELS IN INLAND NAVIGATION. Held at Paris. Convention, protocol of signature and final act, approved by the Conference. Texts: *L. N. O. J.*, Mar., 1926, p. 399.

December 1925

- 14 to January 29, 1926 GREAT BRITAIN—ITALY. Exchanged notes respecting deportation of British Somali subjects. *G. B. Treaty Series*, no. 4 (1926), *Cmd.* 2617.
- 15 GERMANY—ITALY. Exchanged ratifications of treaty of commerce and navigation signed at Rome Oct. 31, 1925. *Rivista di dir. int.*, 1926, fasc. 1, p. 138.

January, 1926

- 12 FRANCE—SIAM. Exchanged ratifications of treaty of amity, trade and navigation signed at Paris Feb. 14, 1925. *Commerce Reports*, Mar. 29, 1926, p. 802.
- 13 GREAT BRITAIN—IRAQ. Treaty with King Faisal relating to Mosul signed at Baghdad. *Times*, Jan. 15, 1926, p. 12. *Cmd.* 2587.
- 19 BELGIUM—PARAGUAY. Most-favored-nation commercial treaty of Feb. 15, 1894, denounced by Paraguay. *Commerce Reports*, Mar. 29, 1926, p. 801.

February, 1926

- 1 CZECHOSLOVAKIA—GREAT BRITAIN. Special tariff agreement arranged by exchange of notes, granting reduction of duty on certain advertising matter for British products. *G. B. Treaty Series*, no. 5 (1926), *Cmd.* 2625.
- 1 GERMANY—MEXICO. Announced that Mexico had abrogated treaty of friendship, trade and shipping, signed Dec. 5, 1882. *Commerce Reports*, Feb. 1, 1926, p. 292.
- 2-26 PERMANENT COURT OF INTERNATIONAL JUSTICE. Tenth session opened on Feb. 2 for hearings on certain German interests in Polish Upper Silesia. *L. N. M. S.*, Feb.-March, 1926, pp. 37, 52.

- 5 INTERNATIONAL MIGRATION CONFERENCE. Convened at Luxemburg by the International Federation of Trade Unions. *Int. Trade Union Review*, April-June, 1926, p. 94.
- 6 ALBANIA—GREAT BRITAIN. Exchanged notes recording renunciation by British Government of extraterritorial judicial rights in Albania. *G. B. Treaty Series*, no. 3 (1926), *Cmd.* 2616.
- 8 AUSTRIA—CZECHOSLOVAKIA. Exchanged ratifications of supplementary commercial agreement signed July 27, 1925. *Commerce Reports*, Mar. 29, 1926, p. 801.
- 8 BELGIUM—BULGARIA. Most-favored-nation commercial agreement arranged by exchange of notes. *Commerce Reports*, Mar. 29, 1926, p. 801.
- 9 ALBANIA—CZECHOSLOVAKIA. Temporary most-favored-nation trade agreement, signed Jan. 19, 1926, went into effect by decree of Czechoslovakian Government. *Commerce Reports*, April 26, 1926, p. 243.
- 11 GERMANY—SOVIET UNION. Exchanged ratifications of three conventions signed on Oct. 12, 1925: (1) Commercial treaty. (2) Consular treaty. (3) Judicial aid in civil matters. *Commerce Reports*, April 5, 1926, p. 51.
- 12 LEAGUE OF NATIONS COUNCIL. Held 38th session (extraordinary meeting) to discuss procedure for convening special session of Assembly following Germany's request for admission to the League. *L. N. O. J.*, April, 1926, p. 498.
- 15 NETHERLANDS—TURKEY. Most-favored-nation commercial treaty arranged by exchange of notes, to remain in force for six months. *Commerce Reports*, Mar. 29, 1926, p. 802.
- 16 to March 18 LEAGUE OF NATIONS PERMANENT MANDATES COMMISSION. Met in extraordinary session in Rome to consider report on Syria made by France. *Cur. Hist.*, Mar., 1926, 23:88. *L. N. M. S.*, Mar., 1926, p. 64.
- 17 NORWAY—TURKEY. Exchanged ratifications of treaty of friendship signed May 2, 1925. *Commerce Reports*, Mar. 29, 1926, p. 802.
- 18 FRANCE—TURKEY. Convention regarding Syria and five protocols signed at Constantinople, dealing with neutrality, military and commercial transport, exchange of criminals, prevention of smuggling, and rectification of the frontier. *Times*, Feb. 20, 1926, p. 11. *N. Y. Times*, Feb. 22 and 26, 1926, pp. 4, 2.
- 19 PARAGUAY—SPAIN. Clause 3 of the treaty of peace signed with Spain on Sept. 10, 1880, cancelled by Paraguay. *Commerce Reports*, June 7, 1926, p. 624.
- 21 FRANCE—HUNGARY. Commercial treaty signed at Budapest on Oct. 13, 1925, came into force in France pending ratification. Text: *J. O.*, Feb. 14, 1926, p. 2020.
- 22 SALVADOR—UNITED STATES. Treaty of friendship, commerce and consular rights signed at San Salvador. *Press notice*, Feb. 24, 1926. *Commerce Reports*, Mar. 8, 1926, p. 612.
- 24 GREAT BRITAIN—UNITED STATES. Correspondence of April 2, 1924, to Nov. 24, 1925, made public, regarding diversion of water from Lake Michigan by the Sanitary District of Chicago. *Press notice*, Feb. 24, 1926.
- 24 TURKEY—UNITED STATES. Temporary commercial agreement on basis of most-favored-nation treatment, arranged by exchange of notes. *Commerce Reports*, Mar. 8, 1926, p. 613.
- 25 FRANCE—GERMANY. Exchanged ratifications of temporary commercial agreement of Feb. 12, 1926. Treaty expanded by decree, effective from April 16. *Commerce Reports*, April 26, 1926, p. 243. Text: *J. O.*, April 13, 1926, p. 4428.
- 25 to April 17 TACNA ARICA. On Feb. 25, President Coolidge affirmed decision of Plebiscitary Commission on all points involved in pending appeals. Text: *Press*

- notice, Feb. 25, 1926. On March 17, the Plebiscite Law, effective March 27, was announced by the State Department. Text: *U. S. Daily*, March 17, 1926, p. 7. On March 27, correspondence exchanged between Chile and the United States regarding offer of good offices by the United States, was published. Text: *U. S. Daily*, March 29, 1926, p. 1. On April 6, at the invitation of Secretary Kellogg, the Peruvian and Chilean Ambassadors began a series of conferences, in order to find a common basis of adjustment. A plan, submitted by Secretary Kellogg, was made public on April 17. Press notice, April 6 and 17, 1926.
- 26 GERMANY—PARAGUAY. Notice of termination of most-favored-nation treaty of July 21, 1887, given by Paraguay. *Commerce Reports*, May 10, 1926, p. 369.
- 26 RUMANIA—UNITED STATES. Agreement effected by exchange of notes according mutual unconditional most-favored-nation treatment in customs matters. *U. S. Treaty Series*, no. 733.
- 27 CZECHOSLOVAKIA—FRANCE. Exchanged ratifications of convention relative to protection and legal assistance signed at Paris Oct. 7, 1922. Text: *J. O.*, Mar. 31, 1926, p. 3924.
- 27 HUNGARY—NETHERLANDS. Most-favored-nation commercial treaty signed Dec. 9, 1924, came into force. *Commerce Reports*, Mar. 22, 1926, p. 736.
- 27 MIXED COURTS OF EGYPT. Fiftieth anniversary of the founding of the mixed tribunals celebrated at Alexandria. *Clunst*, 1926, p. 536.
- March, 1926
- 1 FRANCE—POLAND. Exchanged ratifications of treaty relative to transmission of legal acts and of rogatory commissions in civil and commercial matters, signed at Paris Dec. 30, 1925. Text: *J. O.*, Mar. 31, 1926, p. 3923.
- 2 AUSTRIA—SWITZERLAND. Commercial treaty signed Jan. 6, 1926, came into force. *Commerce Reports*, April 12, 1926, p. 117.
- 4 CUBA—UNITED STATES. Treaty to prevent smuggling signed at Havana. Press notice, Mar. 4, 1926. *U. S. Daily*, Mar. 5, 1926, p. 18.
- 4 GERMANY—HONDURAS. Treaty of commerce signed at Guatamala City. *U. S. Daily*, May 19, 1926, p. 7. *Commerce Reports*, May 24, 1926, p. 498.
- 5 AUSTRIA—CZECHOSLOVAKIA. Treaty of conciliation and arbitration signed at Vienna. *N. Y. Times*, Mar. 7, 1926, p. 27. *Cur. Hist.*, May, 1926, 24: 298.
- 8 ALBANIA—UNITED STATES. State Department announced reciprocal agreement for waiver of fees for non-immigrant visas, signed at Tirana. Press notice, May 8, 1926.
- 8-17 LEAGUE OF NATIONS ASSEMBLY. Special session held to consider the admission of Germany. Owing to difficulties arising in the Council, and reservations made by Brazil, the decision relating to Germany was postponed till the next meeting of the Assembly. *L. N. M. S.*, March, 1926. *Cur. Hist.*, May, 1926, 24: 266.
- 8-18 LEAGUE OF NATIONS COUNCIL. Held 39th session at Geneva to consider admission of Germany and other matters; appointed committee of 15 members to consider question of composition of the Council and number and mode of election of its members; dealt with question of frontiers between Turkey and Iraq and Greece and Turkey, reservations of the United States to the Protocol of the Permanent Court of International Justice, and convocation of preparatory commissions for conferences on disarmament and economic questions, etc. *L. N. M. S.*, March, 1926. *L. N. O. J.*, April, 1926.
- 10 CHINA. Protocol Powers addressed note to Chinese Minister of Foreign Affairs relative to closing of port of Tientsin to the sea. Press notice, Mar. 11, 1926. *Times*, Mar. 11, 1926, p. 16. Ultimatum of the Powers: *Times*, Mar. 17, 1926, p.

13. On March 18, American Minister to China reported that satisfactory assurances had been given from authorities at Tientsin and no further representations by the naval authorities were requested on the subject. *Press notice*, March 19, 1926. *Times*, March 19, 1926, p. 13.
- 11 CUBA—UNITED STATES. General anti-smuggling treaty, known as a convention of "mutual assistance," signed at Havana, covering smuggling operations in a broader way than the treaty signed March 4, 1926. *U. S. Daily*, Mar. 12, 1926, p. 2. *Press notice*, Mar. 11, 1926.
- 17 PERMANENT COURT OF INTERNATIONAL JUSTICE. Request for advisory opinion on competence of International Labour Organization to propose legislation on certain subjects, referred to the Court by Council of the League. *L. N. M. S.*, March, 1926, p. 57.
- 18-22 DISARMAMENT CONFERENCE, PREPARATORY. League Council decided upon May 18 as date of opening of preparatory conference. Russian Foreign Office declined invitation to participate. *L. N. O. J.*, April, 1926, pp. 535 and 635.
- 18 MEXICO—UNITED STATES. Exchanged ratifications of treaty signed Dec. 23, 1925, to prevent smuggling of merchandise, narcotics, etc. *Press notice*, Mar. 18, 1926. *U. S. Treaty Series*, no. 732.
- 20 DAWES ARBITRATION TRIBUNAL. Oral pleadings closed on March 20 and decisions were rendered on March 25. *C. S. Monitor*, Mar. 20 and 25, 1926, pp. 1, 3. Text: this JOURNAL, pp. 566-574.
- 20 GERMANY—PORTUGAL. Commercial agreement signed at Lisbon. *Commerce Reports*, May 17, 1926, p. 434.
- 20 GERMANY—SPAIN. Exchanged ratifications of temporary commercial agreement signed Nov. 18, 1925. *Commerce Reports*, May 10, 1926, p. 369.
- 23 BELGIUM—FRANCE. Exchanged ratifications of arrangement of Jan. 27, 1926, for simplification of immigrant travel through the two countries. Text: *J. O.*, April 21, 1926, p. 4675.
- 24 LITHUANIA—UNITED STATES. Most-favored-nation treaty of Dec. 23, 1925, came into force, upon ratification by Lithuania. *Press notice*, Mar. 26, 1926. *U. S. Daily*, March 29, 1926, p. 11.
- 26 POLAND—RUMANIA. Signed treaty to replace the defensive alliance of March 3, 1921, which expired on March 2, 1926. *Commerce Reports*, April 12, 1926, p. 117. Summary: *N. Y. Times*, April 21, 1926, p. 7.
- 29 CZECHOSLOVAKIA—GREAT BRITAIN. Exchanged ratifications of convention relative to legal proceedings in civil and commercial matters signed in London Nov. 11, 1924. *G. B. Treaty Series*, no. 6 (1926), *Cmd.* 2637.
- 29 CZECHOSLOVAKIA—UNITED STATES. Exchanged ratifications of extradition treaty signed at Prague July 2, 1925. Text: *U. S. Treaty Series*, no. 734.
- 30 GREAT BRITAIN—IRAQ. Exchanged ratifications of treaty signed Jan. 13, 1926, regarding duration of the treaty between the United Kingdom and Iraq of Oct. 10, 1922. Text: *G. B. Treaty Series*, no. 10, 1926. *Cmd.* 2662.
- 30 GREAT BRITAIN—SIAM. Exchanged ratifications of treaty for revision of treaty arrangements concerning jurisdiction of British subjects in Siam, signed July 14, 1925. *G. B. Treaty Series*, no. 7 (1926), *Cmd.* 2642.
- 30 GREAT BRITAIN—SIAM. Exchanged ratifications of treaty of commerce and navigation signed at London, July 14, 1925. *G. B. Treaty Series*, no. 8 (1926), *Cmd.* 2643.

- 31 NETHERLANDS—UNITED STATES. Exchanged notes in connection with arbitral proceedings to decide ownership of Palmas Island in the Philippine Archipelago. *Wash. Post*, April 1, 1926, p. 5.
- April, 1926*
- 6-9 MARITIME LAW CONGRESS. Sixth session of International Conference on the Unification of Maritime Law opened in Brussels with 17 nations represented. Four conventions under consideration: (1) Immunity of state-owned ships and cargo. (2) Limitation of ship-owners' liability. (3) Maritime mortgages and liens. (4) Carriage of goods by sea. Immunity treaty signed by 17 nations, and ship-owners' liability treaty signed by nearly all nations present. *Times*, April 7 and 16, 1926, pp. 11, 15.
 - 8 HUNGARY—SPAIN. Exchanged ratifications of commercial treaty signed June 17, 1925. *Commerce Reports*, June 7, 1926, p. 624.
 - 9 GUATEMALA—NETHERLANDS. Most-favored-nation commercial agreement signed at Guatemala. *U. S. Daily*, May 19, 1926, p. 7. *Commerce Reports*, May 24, 1926, p. 499.
 - 10 to May 8 MEXICO—UNITED STATES. Correspondence exchanged between the two governments from Oct. 29, 1925, to March 27, 1926, regarding the two laws regulating section I of Article 27 of the Mexican Constitution (Land and Petroleum Laws) was made public on April 10. Texts: *Press notice*, April 10, 1926. *Senate Doc. 96, 69th Cong. 1st sess.* *U. S. Daily*, April 12-15, 1926. On May 8, correspondence exchanged from May 27, 1921, to March 31, 1923, relating to a treaty of amity and commerce, which led to restoration of friendly relations, was made public. Texts: *Press notice*, May 8, 1926. *U. S. Daily*, May 15-20, 1926.
 - 14-16 INTERNATIONAL SHIPPING CONFERENCE. Held in London to consider questions of double taxation, reciprocal arrangements, maritime law, etc. Resolutions: *Times*, April 16-17, 1926, pp. 11, 9.
 - 16 PORTUGAL—UNITED STATES. Exchanged ratifications of arbitration agreement, extending duration of the convention of April 6, 1908, signed Sept. 5, 1923. *U. S. Treaty Series*, no. 735.
 - 17 LEAGUE OF NATIONS—UNITED STATES. State Department replied to League invitation of March 29, 1926, declining to participate in conference on adhesion of United States to the Protocol of the Permanent Court, to be held Sept. 1, 1926. Text: *N. Y. Times*, April 20, 1926, p. 1. *Press notice*, April 19, 1926.
 - 19-26 BOLIVIA—UNITED STATES. Exchanged notes relative to Bolivian request for inclusion in direct negotiations now in progress concerning Tacna Arica. Text: *U. S. Daily*, April 29, 1926, p. 2. *Press notice*, April 26, 1926.
 - 19 DENMARK—TURKEY. Announced that temporary tariff agreement had been arranged by exchange of notes. *U. S. Daily*, April 20, 1926, p. 3.
 - 19 MEXICO. Apostolic letter from Pope Pius, dated Feb. 2, 1926, to the Archbishop of Mexico City, protesting against treatment of Catholic clergy, etc., by the Mexican Government, and outlining course to be followed by Catholics in Mexico, was made public. Text: *N. Y. Times*, April 20, 1926, p. 4.
 - 22 CITIZENSHIP OF MARRIED WOMEN. State Department issued new ruling reducing entrance restrictions on wives of naturalized citizens. *U. S. Daily*, May 4, 1926, p. 1.
 - 22 CUBA—UNITED STATES. Consular treaty signed in Havana. *N. Y. Times*, April 23, 1926, p. 3.
 - 23 PERSIA—UNITED STATES. Agreement announced, effective May 15, 1926, according to which each country waives requirement of visaed passports of the non-immigrant class. *Press notice*, April 23, 1926.

- 24 GERMANY—SOVIET UNION. Treaty of amity and neutrality signed in Berlin, and notes exchanged on same date by German and Russian plenipotentiaries. Texts: *Times*, April 27, 1926, pp. 16 and 18. *Russian R.*, June, 1926, p. 145. Supplement to this JOURNAL.
- 26 ECONOMIC CONFERENCE. Preparatory commission met at Geneva, selected economic groups, and adjourned until October. *N. Y. Times*, April 27 and 29, 1926, pp. 2, 4. *L. N. M. S.*, April, 1926, p. 94.
- 26 GREAT BRITAIN—UNITED STATES. Secretary Kellogg replied to British *aide-memoire*, dated Mar. 27, 1926, with reference to administrative assistance of British Government to prevent liquor smuggling into the United States. *Press notice*, May 4, 1926.
- 29 FRANCE—UNITED STATES. Agreement on French debt signed and approved by President Coolidge. Text: *U. S. Daily*, May 1, 1926, p. 4.
- 30 PASSPORT CONFERENCE. League of Nations invitation of Jan. 21, 1926, to Passport Conference on May 12, and reply of United States Government of Feb. 25, 1926, made public. *U. S. Daily*, May 1, 1926, p. 2. *Press notice*, April 30, 1926.
- May, 1926*
- 1 SERBIA—UNITED STATES. Serbian debt funding agreement signed. *U. S. Daily*, May 3, 1926, p. 5.
- 7 NICARAGUA. United States marines landed at Bluefields, which was declared a neutral zone. *Press notice*, May 10, 1926.
- 9 ITALY—SIAM. Signed treaty of friendship, replacing that of Oct., 1868. *C. S. Monitor*, May 10, 1926, p. 1.
- 10-14 BRIARCLIFF CONFERENCE ON INTERNATIONAL RELATIONS. Held at Briarcliff Manor, New York, under joint auspices of the Carnegie Endowment for International Peace and the Academy of Political Science of New York. *N. Y. Times*, May 11-15, 1926.
- 12 INTERNATIONAL PASSPORT CONFERENCE. Opened at Geneva. *C. S. Monitor*, May 13, 1926, p. 2.
- 14 GERMANY—SWEDEN. Commercial treaty signed at Berlin. *Commerce Reports*, June 7, 1926, p. 624.
- 22 ESTHONIA—UNITED STATES. Exchanged ratifications of treaty of friendship, commerce and consular rights signed Dec. 23, 1925. *Press notice*, May 22, 1926. *U. S. Daily*, May 24 and 29, pp. 2, 7.

INTERNATIONAL CONVENTIONS

ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.

Signature: New Zealand. Mar. 11, 1926. *L. N. O. J.*, May, 1926, p. 648.

Adhesions (March 12, 1926)

British Guiana	Kenya
British Honduras	Zanzibar
Jamaica	Northern Rhodesia
Leeward Islands	Ceylon
Grenada	Mauritius
Saint Lucia	Gibraltar
Saint Vincent	Malta
Gambia	Falkland Islands
Gold Coast	Iraq and Palestine

L. N. O. J., May, 1926, p. 648.

ARMS TRAFFIC. Protocol on Chemical Warfare. Geneva, June 17, 1925.

Signature: Sweden. Dec. 7, 1925. *L. N. O. J.*, March, 1926, p. 371.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.

Ratifications:

China. Feb. 23, 1926.

Hungary. Feb. 23, 1926.

Rumania. Dec. 23, 1925.

Sweden. Feb. 12, 1926. *L. N. O. J.*, March, 1926, p. 371.

EMPLOYMENT (FINDING) FOR SEAMEN. Genoa, July 10, 1920.

Ratification: Greece. Dec. 16, 1925. *L. N. O. J.*, March, 1926, p. 373.

EMPLOYMENT OF CHILDREN AT SEA. Genoa, July 9, 1920.

Ratification: Greece. Dec. 16, 1925. *L. N. O. J.*, March, 1926, p. 373.

EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.

Ratification: Great Britain. Mar. 1, 1926. *I. L. O. B.*, Mar. 15, 1926.

LEAGUE OF NATIONS. Covenant. Protocols of Amendments. Oct. 3-5, 1921.

Ratification: Netherlands (Art. 16). *L. N. O. J.*, March, 1926, p. 372.

Signatures (Art. 16):

Japan. Dec. 15, 1925.

Salvador. Jan. 23, 1926. *L. N. O. J.*, March, 1926, p. 372.

MEASUREMENT OF VESSELS. Paris, Nov. 27, 1925.

Signature: Czechoslovakia. Jan. 26, 1926. *L. N. O. J.*, March, 1926, p. 371.

MEASUREMENT OF VESSELS. Protocol and Final Act. Paris, Nov. 20-27, 1925.

Text and signatures: *L. N. O. J.*, March, 1926, p. 401.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.

Ratification: Great Britain. March 1, 1926. *I. L. O. B.*, March 15, 1926.

MERCHANDISE CLASSIFICATION. Santiago, May 3, 1923.

Ratification: Dominican Republic. Nov. 20, 1925. *P. A. U.*, April, 1926, p. 421.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.

Adhesions:

Danzig. Mar. 31, 1926. *L. N. O. J.*, May, 1926, p. 647.

Newfoundland. Dec. 31, 1925.

Rhodesia. Dec. 31, 1925. *L. N. O. J.*, March, 1926, p. 371.

Ratifications:

Great Britain, Union of South Africa, India, Northern Ireland, New Zealand. Dec. 11, 1925.

China. Feb. 24, 1926.

Switzerland. Jan. 20, 1926. *L. N. O. J.*, March, 1926, p. 371.

OPIUM AGREEMENT. Geneva, Feb. 11, 1925.

Ratification: Great Britain. Feb. 17, 1926. *L. N. O. J.*, March, 1926, p. 372.

OPIUM CONVENTION. Geneva, Feb. 19, 1925.

Adhesions:

Egypt. Mar. 16, 1926.

Rumania. Mar. 26, 1926.

Salvador. Mar. 11, 1926.

Sarawka. Mar. 11, 1926. *L. N. O. J.*, May, 1926, p. 647.

Ratifications:

Great Britain, Union of South Africa, Australia, India, New Zealand. Feb. 17, 1926.

Sudan. Feb. 20, 1926. *L. N. O. J.*, March, 1926, p. 372.

PAN AMERICAN SANITARY CODE. Havana, Nov. 14, 1924.

Ratifications:

United States. March 28, 1925.

Peru. July 9, 1925.

Chile. Oct. 13, 1925.

- Nicaragua. Dec. 18, 1925. *P. A. U.*, April, 1926, p. 421.
- PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.
Adhesion (renewed): Sweden. March 8, 1926. *L. N. O. J.*, May, 1926, p. 648.
Ratification: Belgium. March 10, 1926. *L. N. M. S.*, March, 1926, p. 52.
Signature: Denmark. Dec. 11, 1925. *L. N. O. J.*, March, 1926, p. 373.
- PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol. Geneva, Dec. 16, 1920.
Ratification: Hungary. Nov. 20, 1925. *L. N. O. J.*, March, 1926, p. 373.
- PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol. Reservations of United States.
Ratifications:
 Cuba. March 17, 1926. *Press notice*, March 22, 1926.
 Greece. April 15, 1926. *Press notice*, April 15, 1926.
- RAILWAYS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Ratifications:
 Norway. Feb. 24, 1926.
 Rumania. Dec. 23, 1925. *L. N. O. J.*, March, 1926, p. 371.
- SANITARY CONVENTION. Paris, Jan. 17, 1912.
Ratification deposited: Czechoslovakia. April 8, 1926. *J. O.*, April 16, 1926, p. 4546.
- SUBMARINE CABLES. Paris, Mar. 14, 1884. Declaration, Dec. 1, 1887. Protocol, July 7, 1887.
Adhesion: Danzig. Mar. 31, 1926. *J. O.*, April 28, 1926, p. 4858.
- TRADE MARKS. Santiago, April 28, 1923.
Ratification: Dominican Republic. Nov. 20, 1925. *P. A. U.*, April, 1926, p. 421.
- UNEMPLOYMENT INDEMNITY IN CASE OF LOSS OF SHIP. Genoa, July 9, 1920.
Ratification: Greece. Dec. 16, 1925. *L. N. O. J.*, March, 1926, p. 373.
- WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision. Sèvres, Oct. 6, 1921.
Ratification deposited: Uruguay. Dec. 2, 1925. *J. O.*, Dec. 7-8, 1925, p. 11690.
- WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.
Ratifications:
 France. Feb. 19, 1926.
 Rumania. Dec. 4, 1925. *L. N. O. J.*, March, 1926, p. 373.
- WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.
Adhesion: France. Jan. 16, 1926.
Ratifications:
 China. Feb. 24, 1926.
 Japan. Dec. 15, 1925.
 Switzerland. Jan. 20, 1926. *L. N. O. J.*, March, 1926, p. 372.
 France. Mar. 1, 1926. *L. N. O. J.*, May, 1926, p. 647.
- WHITE SLAVE TRADE. Paris, May 4, 1910.
Adhesion: Switzerland. Jan. 30, 1926. *J. O.*, Feb. 25, 1926, p. 2570.
- WORKMEN'S COMPENSATION FOR ACCIDENTS. Geneva, June 5, 1925.
Ratification: Union of South Africa. Mar. 30, 1926. *L. N. O. J.*, May, 1926, p. 649.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

ARBITRAL TRIBUNAL OF INTERPRETATION CREATED UNDER THE PROVISIONS
OF ANNEX II TO THE LONDON AGREEMENT OF AUGUST 9, 1924, BETWEEN
THE REPARATION COMMISSION AND THE GERMAN GOVERNMENT

Award delivered at The Hague on March 24, 1926

The Committee of Experts (Dawes Committee) was invited by the Reparation Commission on November 30, 1923, conformably to Article 234 of the Treaty of Versailles, to consider the means of balancing the budget and the measures to be taken to stabilize the currency of Germany. On April 9, 1924, the committee presented its report to the Reparation Commission. Several of the Allied and Associated Governments accepted the report as a basis of negotiations, which took place in London in July and August, 1924. The result of these negotiations was, *inter alia*, an arrangement between the Reparation Commission and the German Government for the putting into operation of the Experts' Plan; this arrangement was signed in London on August 9, 1924. It contains provisions with a view to the execution of the plan, and obliges the contracting parties to execute also the supplemental agreements made with the same object in the course of the London Conference. These supplemental agreements are annexed to the above-mentioned arrangement.

Annex II A, signed on August 30, 1924, lays down in its first clause the method to be followed in order to arrive at a settlement of disputes which might arise between the Reparation Commission and Germany with regard to the interpretation either of the arrangement, the Experts' Plan or the German legislation enacted in execution of this plan. It was decided in the said annex as subsequently modified, that such disputes would be submitted for decision to five arbitrators, appointed for five years, one by the Reparation Commission, another by the German Government, and three by agreement between the Reparation Commission and the German Government, one of whom should be an American citizen and should be President of the Tribunal.

The Tribunal was constituted as follows: Mr. Walter P. Cooke, of Buffalo, U. S. A.; Mr. Marc. Wallenberg, of Stockholm; Mr. A. G. Kröller, of The Hague; Mr. Rist, of Paris; Mr. Mendelssohn-Bartholdy, of Hamburg. The seat of the Arbitral Tribunal is for the present at The Hague.

By special agreements between the Reparation Commission and the German Government dated August 28 and November 18, 1925, eight questions inquiring whether the Dawes Plan Annuities comprise certain payments to be made by Germany under the peace treaties and agreements, were referred to the Tribunal for decision.

A settlement was arrived at subsequently between the parties with regard to Questions II and VI, so that the Tribunal did not express an opinion upon them.

Arguments took place on March 11, 1926, and following days. The following jurists represented the parties: *For the Reparation Commission*: Mr. Lyon, Mr. Marx, Mr. Pilotti, Sir John Fischer Williams, K.C.; *For the German Government*: Professor Kaufmann (accompanied by experts). In view of its interest in Questions III and V, the Polish Government was represented before the Tribunal.

WHEREAS by Terms of Submission dated at Paris, the 28th August, 1925, the Reparation Commission and the German Government have agreed to submit for decision to the Tribunal the questions whether or not as between the Reparation Commission representing the Allied Governments signatory to the Final Protocol of the London Conference, of August 1924, on the one hand, and Germany on the other, the annuities prescribed by the Plan for the discharge of the reparation obligations and other pecuniary liabilities of Germany under the Treaty of Versailles, accepted by the said London Conference (which Plan is hereinafter referred to as the Experts' Plan) as payable

to the Agent General for Reparation Payments, comprise the respective payments or transfers following, that is to say:

I. The transfers to be made by Germany to France in pursuance of Article 77 of the Treaty of Versailles, following a decision of the Council of the League of Nations dated the 21st June, 1921, in respect of social insurance funds relating to Alsace-Lorraine;

II. The transfers to be made by Germany to Belgium in pursuance of Article 312 of the Treaty of Versailles and the agreement of the 9th July, 1920, between Germany and Belgium in respect of social insurance funds relating to territories ceded by Germany to Belgium;

III. The transfers to be made by Germany to Poland in pursuance of Article 312 of the Treaty of Versailles in respect of social insurance funds relating to Upper Silesia, the amounts of which transfers (other than that of the miners' super-annuation fund which still remains to be settled) were determined by a decision of the Council of the League of Nations dated the 9th December, 1924;

IV. Payments under Article 62 of the Treaty of Versailles in respect of civil and military pensions earned in Alsace-Lorraine on the 11th November, 1918;

V. Payments under the agreement of the 9th January, 1920 made between the German and Polish Governments in pursuance of Article 92 of the Treaty of Versailles, in respect of civil and military pensions;

VI. Restitutions of Belgian railway rolling stock effected by Germany under the restitution agreement with Belgium dated the 6th September, 1924;

VII. Restitutions in specie under Article 238 of the Treaty of Versailles of objects of every nature or securities.

AND WHEREAS by a supplementary agreement dated at Paris, the 18th November, 1925, the Reparation Commission and the German Government have agreed to add to the payments or transfers heretofore enumerated the following, that is to say:

VIII. The sum of £.14.185.9.8 owing by Germany to Great Britain as payment for coal supplied in December, 1918, and January, 1919, to the steamship *Jerusalem*;

AND WHEREAS by a joint letter dated at Paris, the 3rd March, 1926, the Reparation Commission and the German Government informed the Tribunal that these parties had come to an agreement to the effect that the questions submitted to the Tribunal under Nos. II and VI of the Terms of Submission of the 28th August, 1925, concerning social insurance funds to be paid to Belgium by Germany, and concerning the restitution of Belgian railway material, should be withdrawn from the number of questions to be decided by the Tribunal, in consequence whereof the Tribunal was requested by the said parties to consider Questions II and VI as no longer requiring a decision to be taken by the Tribunal;

AND WHEREAS the Polish Government has availed itself in time of its right, under Article 14 of the abovesaid Terms of Submission, to accede

thereto for the purpose solely of obtaining a decision as between itself and the German Government of the questions whether the annuities payable under the Experts' Plan comprise the transfer of social insurance funds in Upper Silesia and the payment of civil and military pensions;

AND WHEREAS the Agents of the parties to the present arbitration have duly communicated to the Tribunal their cases, counter-cases, and documentary evidence within the periods fixed by agreement of the parties;

AND WHEREAS the oral debates have taken place and have been declared closed in accordance with the rules governing this arbitration by virtue of the Terms of Submission;

AND WHEREAS the Tribunal has jurisdiction to pronounce upon the questions submitted to it for decision, the said questions constituting disputes with regard to the interpretation of the Experts' Plan which by the terms agreed at the London Conference, confirmed in this respect by the correspondence exchanged between the Reparation Commission and the German Government on the 30th May and 4th June, 1925, are to be submitted to it for decision;

NOW THEREFORE the Tribunal, having carefully considered the written proceedings and oral debates and the documentary evidence submitted by the parties, after due deliberation pronounces as follows:

A. *As between the Reparation Commission representing the Allied Governments signatory to the Final Protocol of the London Conference, on the one hand, and Germany on the other, the annuities prescribed by the Experts' Plan comprise:*

1. The transfers to be made by Germany to France in pursuance of Article 77 of the Treaty of Versailles, following a decision of the Council of the League of Nations dated the 21st June, 1921, in respect of social insurance funds relating to Alsace-Lorraine;

2. The transfers to be made by Germany to Poland in pursuance of Article 312 of the Treaty of Versailles in respect of social insurance funds relating to Upper Silesia, the amounts of which transfers (other than that of the miners' superannuation fund which still remains to be settled) were determined by a decision of the Council of the League of Nations dated the 9th December, 1924;

3. Payments under Article 62 of the Treaty of Versailles in respect of civil and military pensions earned in Alsace-Lorraine on the 11th November, 1918.

B. *The decision stated under (2) above is also given as between the German Government and the Polish Government.*

C. *On the other hand, the said annuities do not comprise:*

1. Restitutions in specie under Article 238 of the Treaty of Versailles of objects of every nature or securities, and

2. The sum of £.14.185.9.8 owing by Germany to Great Britain as

payment for coal supplied in December, 1918, and January, 1919, to the steamship *Jerusalem*.

D. *The Tribunal is unable at present to give a decision on the questions whether or not, as between the Reparation Commission and the German Government, and as between the German and the Polish Governments, the said annuities comprise payments under the Agreement of the 9th January, 1920, made between the German and Polish Governments in pursuance of Article 92 of the Treaty of Versailles, in respect of civil and military pensions.*

REASONS

I. SOCIAL INSURANCE (ALSACE-LORRAINE)

1. The task of the Experts was "to consider the means of balancing the budget and the measures to be taken to stabilize the currency" of Germany, two conditions which they considered were necessary for the fulfilment of Germany's obligations towards the Allies under the Treaty of Versailles. At the beginning of their report (Part I, Section I, second paragraph, first and second sentences), the Experts state that they have been concerned with the practical means of recovering Germany's debt to the Allied and Associated Powers under the Treaty of Versailles. They say textually: "The dominating feature of the German Budget is Germany's obligation to the Allies under the Treaty of Versailles. We have been concerned with the practical means of recovering this debt. . . ." Nothing is said or implied in this passage, which is, so to speak, the starting-point of the Experts in the building up of their plan, which would justify the assumption that they only considered one or more component parts of the obligation contracted by Germany under the treaty, leaving other parts outside the purview of their deliberations.

2. The Experts then laid down a plan according to which Germany is to make, to the credit of the Allied and Associated Powers, certain fixed annual payments (Part I, Sections VIII and X of their report).

3. The Experts have repeatedly emphasized that an important principle of their plan through which they assumed its durable success would be ensured was, that Germany's liabilities to the Allies for any particular year should be limited to the annuities which were proposed in the plan and that as a general rule these annuities should comprise all possible charges.

4. After a careful consideration of the contents and spirit of the plan, it is evident to the Tribunal that the Experts, while not losing sight of the juridical character of Germany's liabilities, looked upon the matter largely from an economic and financial point of view. To them, it must have been of minor importance whether a liability was exclusively based on the treaty, or whether, although mentioned in the treaty, it originated in German legislation, or from other sources. It was chiefly to the question whether the payments they had in view might influence Germany's budget or her

currency, that they directed their attention. The Experts state in Section XI of Part I of their report: "The Committee have noted the important fact that Germany is not in a position to ascertain her liabilities out of the Peace Treaty as demands are made upon her from time to time during the year, which cannot be calculated beforehand. . . . The difficulty will be satisfactorily met if Germany's liabilities for any particular year are absolutely limited according to our plan."

5. The Experts have tried repeatedly and in varying terms, to lay stress upon the principle that the obligations of Germany for the purposes of their plan are one, and that the planned annuities represent on principle the total burden which they believed Germany could stand without jeopardizing their scheme.

6. The Tribunal has been confirmed in its interpretation by the fact that the Experts found it expedient to insert in their report, Section XI of Part I, which is obviously an attempt made by them to indicate to what extent the annuities to be paid by Germany are comprehensive. To that section, therefore, the Tribunal had to pay special attention.

7. It has been contended that a payment, in order to be included in the annuities, must have two characteristics: (1) that it should be imposed by the treaty, and (2) that it must represent a cost arising out of the war. Now it is true, that the plan refers chiefly to payments which, under the Treaty of Versailles, Germany is bound to make for reasons in a more or less direct connection with the war. The Experts were, of course, especially concerned with Germany's obligations under Part VIII of the Treaty of Versailles (Reparation), but, as shown in Section XI of Part I of their report, where the expression "for the costs arising out of the war" is used, they also thought of payments in a wider sense, and it may be well argued that this expression is broad enough to include the payment or transfer now under consideration. But even if it does not, the Tribunal cannot overlook the fact, and is much impressed by it, that the report in Section XI of Part I, says that "also special payments such as those due under Articles 58, 124 and 125 of the Treaty of Versailles" come under the annuities. The Tribunal does not think, especially in view of the words "such as," that it would be justified in ascribing to the term "special payments" in a narrow meaning; and when it is considered that the words just quoted, read in conjunction with the preceding sentence, are used as a new category of payments, to be added to the one which it has been contended has only a reference to war costs, the Tribunal considers this new category of payments as so comprehensive as to include the payment now under discussion. This statement should not, however, be construed as meaning that all payments, without exception, to be made by Germany to the Allies under the Treaty of Versailles or in connection wherewith are to come under the annuities.

8. The Tribunal finds that this decision is corroborated by the following considerations:

(a) It is difficult, considering what the task of the Experts was (a task which they earnestly and conscientiously sought to fulfil), to account for the fact that, if to their mind the payment here under consideration was to constitute an exception to their clear intention that as a general rule the annuities are to be very comprehensive, they nowhere made a statement to that effect. Whatever may be the true nature of the payment prescribed by the decision of the Council of the League of Nations of June 21, 1921, especially as compared with the transfer originally prescribed in Article 77 of the Treaty of Versailles, it is certain that the funds required to make the payment in question would involve a charge on the German budget. The Tribunal fails to discern in the Experts' Plan any statement which must have the effect of letting this payment constitute a charge on the German budget otherwise than as part of the annuities.

(b) As appears from the "Report of the Commission set up in virtue of Article 312 of the Treaty of Versailles to examine the conditions and procedure of the transfer by the German Government to the French Government of capital and reserves attributable to the carrying on of social insurance in Alsace-Lorraine" (Part I, Paras. 4 and 5), the amount finally determined by the Council of the League of Nations was in part the result of the offsetting of German claims against French claims, taking the form of a lump sum payment, and thus constituting a pecuniary obligation of Germany to be discharged in pursuance of the Treaty of Versailles, and being of a public character. It was not a transaction under which Germany had merely to hand over certain funds she had in her possession or under her control by virtue of some fiduciary arrangement of a private nature.

(c) The Tribunal took into consideration that, by including the payment here contemplated in the annuities, the liability for making it is by no means cancelled, and that the Experts' Plan, as stated in Section XI of Part I is "not to be read as prejudicing questions of distribution or questions of priority between the various categories of charges." The decision of the Tribunal need not, therefore, have the effect of depriving any persons of anything which they may have a moral or legal right to receive.

2. SOCIAL INSURANCE (UPPER SILESIA)

(a) *As between the Reparation Commission and Germany*

The reasons given above under I (Social Insurance—Alsace-Lorraine) in paragraphs 1-7 (inclusive), and, *mutatis mutandis*, paragraph 8 (a) and (c), also apply to the transfer or payment here under consideration.

(b) *As between the German Government and the Polish Government*

1. The Polish Government has submitted to the Tribunal that it is in a special position for two reasons (1) that it is not a party to the various agreements made at the London Conference of August, 1924, the Experts' Plan therefore being, so far as the Polish Government is concerned, *res inter alios acta*, (2) that the decision of the Council of the League of Nations dated the

9th December, 1924, with regard to the transfer or payment now under discussion has not made any reference to the Experts' Plan, in spite of the fact that the plan had been known for some considerable time before the decision was given. The Polish Government therefore asked the Tribunal to decide that the transfer or payment here contemplated does not fall within the annuities prescribed by the Experts.

2. The Tribunal, having in this case for its sole task the interpretation of the Experts' Plan, is of opinion that, as between the German Government and the Polish Government, just as between the Reparation Commission and Germany, this transfer or payment is to be treated exactly in the same manner as the similar case referred to under (1) with regard to social insurance (Alsace-Lorraine). The reasons are the following:

(a) It does not appear to the Tribunal that the fact that Poland has not accepted the Experts' Report should modify the interpretation to be given to the report itself. The Plan of the Experts is mainly concerned with the economic and financial situation of Germany; its purpose is to organize machinery capable of obtaining from Germany maximum annual payments. In fixing such maximum payments, the Experts evidently sought out of them to satisfy all Allied and Associated creditors without exception. Their report expressly quotes in various places the debt Germany owes to the Allied and Associated Powers, without discriminating between them in any sense.

(b) The fact that the decision of the Council of the League of Nations dated the 9th December, 1924, does not make any reference to the Experts' Plan, cannot, in the opinion of the Tribunal, modify its conclusion. As a matter of fact, what the Council was asked to do was merely to fix the amount to be paid by Germany to Poland. The solution of this clearly defined problem could not be affected by the possibility that the sum fixed would have to be paid out of the annuities.

(c) In addition, the reasons given above under I (Social Insurance—Alsace-Lorraine) in paragraphs 1-7 (inclusive) and paragraph 8 (a) and (c) are applicable here.

3. CIVIL AND MILITARY PENSIONS (ALSACE-LORRAINE)

The reasons given above under I (Social Insurance—Alsace-Lorraine) in paragraphs 1-7 (inclusive), and, *mutatis mutandis*, paragraph 8 (a) and (c), also apply to the payments here under consideration.

The Tribunal considered the provision of Article 7 of the Baden Agreement of March 3, 1920, for the execution of Article 62 of the Treaty of Versailles, and has had some question as to whether its decision in respect of pensions (Alsace-Lorraine) should not be limited to pensions dealt with and referred to in the first paragraph of the said Article 7. But as the question which the Tribunal is asked to answer refers generally to all such pensions, the Tribunal has not felt either obligated or permitted to change its form.

4. RESTITUTIONS IN SPECIE

1. In considering this question, the Tribunal is aware that the parties have agreed that the following fall within the annuities:

a. Sums which Germany is pledged to pay under the substitution-agreements referred to in Part C, Section 2 of the case of the German Government, and in Section 106 of the countercase of the Reparation Commission, and

b. Expenses such as those of transport or repair mentioned by the German Government in the above-quoted passage of its case, but not German administrative expenses.

2. This being so, the Tribunal noted that Article 238 of the Treaty of Versailles provides for restitutions; Article 243 provides that Germany shall not benefit by restitutions through credits to be given to her in respect of reparation obligations. The same principle is laid down in Article 250 of the treaty. These provisions are based, as stated in the countercase of the Reparation Commission (Section 103), "upon the principle that property taken away from Allied territory during the war was not to be regarded as properly German: not being properly German its restoration could not give rise to a pecuniary credit in favour of Germany."

3. It would be contrary to the spirit of the abovementioned articles of the Treaty of Versailles to make it incumbent on an Allied Government to give credit for the value of objects or securities as here under consideration in order to have them restored. This situation would be created if the Experts' Plan meant to include the restitutions here under discussion in the annuities. It is impossible to assume that the Experts, who addressed themselves largely to economic and financial matters, had in mind to do this. Moreover, the Experts' Plan deals with payments to be made, whereas the restitutions here contemplated are restitutions in specie.

5. PAYMENT FOR COAL SUPPLIED TO THE S. S. *JERUSALEM*

1. It may be assumed that no difference subsists between the parties with regard to the principal facts of the case. However that may be, it is certain that the coal in question supplied to the steamship *Jerusalem* was supplied prior to the coming into force of the Treaty of Versailles. It is also certain that there did not exist at any time an obligation arising out of a convention of an international public character which made it incumbent on the British authorities to supply the coal.

2. The Tribunal feels that the element which dominates the situation is the fact that the transactions which took place were of a private character. In selling coal to the steamship *Jerusalem* the British Government did not act as a government, but saw fit to supply coal to those responsible for the S. S. *Jerusalem* against a consideration. It did what might just as well have been done by any coal-merchant, or by a neutral government having coal at its disposal. The connection with the war of the obligation to pay for coal

supplied (as distinct from the transport of sick and wounded) is indirect or in any event too remote to let it come under the phraseology of the Experts' Plan as the Tribunal understands it.

6. CIVIL AND MILITARY PENSIONS (POLAND)

(a) *As between the Reparation Commission and the German Government*

The Tribunal is asked to decide whether payments under the agreement of January 9, 1920, made between the German and the Polish Governments in pursuance of Article 92 of the Treaty of Versailles, in respect of civil and military pensions should come within the annuities. The Tribunal notes that in that agreement no payments are prescribed; the possibility is only contemplated therein that at a future date payments, at present unknown as regards their terms and conditions, may have to be made. No agreement between the two governments of a later date, and dealing with this matter, has been brought to the knowledge of the Tribunal. In these circumstances, the Tribunal cannot give a decision on the question here under consideration, because at present it has no object.

(b) *As between the German Government and the Polish Government*

The reasons stated under (a) also apply as between the German Government and The Polish Government.

Done at The Hague on March 24, 1926.

WALTER P. COOKE, *President*.

E. N. VAN KLEFFENS, *Secretary*.

AMERICAN AND BRITISH CLAIMS ARBITRATION TRIBUNAL *

CAYUGA INDIAN CLAIMS

Award rendered at Washington, January 22, 1926

The Cayuga Nation had no international status. It existed as a legal entity only by New York law, and Great Britain cannot maintain a claim for it. When the tribe divided, as the result of the War of 1812 between Great Britain and the United States, its status was such only as Great Britain chose to recognize as to the Cayugas who moved to Canada, and what New York recognized as to the Cayugas who remained in New York. Legally, the Indians could do nothing except under the guardianship of some sovereign. Great Britain dealt with the Canadian Cayugas as individuals, and is entitled to maintain their claims as such.

The hard situation of the tribe after its division, and the dependent position of the individual Cayugas in Canada presents a situation so anomalous that recourse must be had to

* Established in pursuance of the special agreement signed at Washington, August 18, 1910 (Supplement to this Journal, Vol. 5, pp. 257-267).

Arbitrators: Alfred Nerinx, Sir Charles Fitzpatrick, Roscoe Pound.

Agents and Senior Counsel: United States—Fred K. Nielsen; Great Britain—Sir Cecil J. B. Hurst.

Previous decisions of the Tribunal will be found printed in this JOURNAL, Vol. 7, pp. 875-890; Vol. 8, pp. 650-655; Vol. 15, pp. 292-304; Vol. 16, pp. 106-116, 301-333; Vol. 18, pp. 814-844; Vol. 19, pp. 193-219, 790-803; Vol. 20, pp. 377-399.

Headnote supplied by the Managing Editor.

general principles of justice and fair dealing in order to determine the rights of the individuals involved. Under the terms of the treaty of arbitration, which provides that decision shall be made in accordance with the principles of international law and equity, and after an examination of the provisions of arbitration treaties which shows a recognition that something more than strict law must be used in the grounds of decision of arbitral tribunals in certain cases, the tribunal concludes that, according to general and universally recognized principles of justice and the analogy of the way in which English and American courts, on proper occasions, look behind what in such cases they call "the corporate fiction," on the division of the Cayuga Nation the Cayuga Indians permanently settled in Canada became entitled to their proportionate share of the annuity covenanted to be paid to the Cayuga Nation by the State of New York in the treaty of 1795, and that such share ought to have been paid to them from 1810 to the present time.

The treaty of 1795 was a contract of the State of New York, and the United States is not liable merely on the basis of a failure of New York to perform a covenant to pay money. The liability of the United States is grounded upon Article IX of the Treaty of Ghent, in which the United States covenanted that the Indians should be restored to the position in which they were before the War of 1812. That liability did not accrue until the refusal of New York to recognize the claim had been brought to the attention of the authorities of the United States and that government did nothing to carry out the treaty provision. The earliest date at which the claim can be said to have accrued against the United States under international law is 1860, and for these reasons it is not barred by Article V of the Claims Convention of 1853.

There is no doubt that there has been laches on the part of Great Britain in presenting the claim to the United States; but on the general principles of justice on which it is held in the civil law that prescription does not run against those who are unable to act, on which in English-speaking countries persons under disability are excepted from the operation of statutes of limitation, and on which English and American courts of equity refuse to impute laches to persons under disability, the tribunal holds that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign.

The State of New York has paid the whole amount of the annuity each year in reliance upon its authority to decide who constituted the Cayuga Nation, and an equity runs in its favor as to payments made before the claim of the Canadian Cayugas was presented to the legislature of that State in 1849. Interest is therefore denied on the share of the Canadian Cayugas on past instalments, and the payments from 1811 to 1849 will stand as made. A lump sum of \$100,000 is awarded to provide an amount equal to a just share in the payments of the annuity from 1849, and a capital sum which, at five per cent interest, will yield half of the amount of the annuity for the future; the Government of the United States to be considered as having performed the covenant in Article IX of the Treaty of Ghent so far as specific performance may be achieved through a money award.

This is a claim of Great Britain, on behalf of the Cayuga Indians in Canada, against the United States by virtue of certain treaties between the State of New York and the Cayuga Nation in 1789, 1790, and 1795, and the treaty of 1814 between the United States and Great Britain, known as the Treaty of Ghent.

At the time of the American Revolution, the Cayugas, a tribe of the Six Nations or Iroquois, occupied that part of central New York lying about Cayuga Lake. During the Revolution, the Cayugas took the side of Great Britain and as a result their territory was invaded and laid waste by Continental troops. Thereupon the greater part of the tribe removed to Buffalo Creek, and after 1784 a considerable portion removed thence to the Grand River in Canada. By 1790 the majority of the tribe were probably in Canada. In 1789 the State of New York entered into a treaty with the Cayugas who remained at Cayuga Lake, recognized as the Cayuga Nation, whereby the latter ceded the lands formerly occupied by the tribe to New York and the latter covenanted to pay an annuity of \$500 to the nation. In this treaty a reservation at Cayuga Lake was provided for. As there was

much dissatisfaction with this treaty on the part of the Indians, who asserted that they were not properly represented, it was confirmed by a subsequent treaty in 1790 and finally by one in 1795, executed by the principal chiefs and warriors both from Buffalo Creek and from the Grand River. By the terms of the latter treaty, in which, as we hold, the covenants of the prior treaties were merged, the State covenanted, among other things, with the "Cayuga Nation" to pay to the said "Cayuga Nation" eighteen hundred dollars a year forever thereafter, at Canandaigua in Ontario County, the money to be paid to "the Agent of Indian Affairs under the United States for the time being, residing within this state" and, if there was no such agent, then to a person to be appointed by the Governor. Such agent or person appointed by the Governor was to pay the money to the "Cayuga Nation," taking the receipt of the nation and also a receipt on the counterpart of the treaty, left in the possession of the Indians, according to a prescribed form. By this treaty the reservation provided for in the treaty of 1789 was sold to the State.

There are receipts upon the counterpart of the treaty of 1795 down to and including 1809, and these receipts and the receipt for 1810, retained by New York, show that the only persons who can be identified among those to whom the money was paid, and the only persons who can be shown to have held prominent positions in the tribe, were then living in Canada. In 1811 an entire change appears. From that time a new set of names, of quite different character, appear on the receipts retained by New York. From that time there are no receipts upon the counterpart. Since that time, it is conceded, no part of the moneys paid under the treaty has come in any way to the Cayugas in Canada, but the whole has been paid to Cayugas in the United States, and since 1829 in accordance with treaties in which the Canadian Cayugas had no part or in accordance with legislation of New York. The claim is: (1) That the Cayugas in Canada, who assert that they have kept up their tribal organization and undoubtedly have included in their number the principal personages of the tribe according to its original organization, are the "Cayuga Nation," covenantees in the treaty of 1795, and that as such they, or Great Britain on their behalf, should receive the whole amount of the annuity from 1810 to the present. In this connection it is argued that the covenant could only be discharged by payment to those in possession of the counterpart of the treaty and indorsement of a receipt thereon, as in the treaty prescribed. (2) In the alternative, that the Canadian Cayugas, as a part of the posterity of the original nation, and numerically the greater part, have a proportion of the annuity for the future and a proportion of the payments since 1810, to be ascertained by reference to the relative numbers in the United States and in Canada for the time being.

As the occasion of the change that took place in and after 1811 was the division of the tribe at the time of the War of 1812, those in the United States and those in Canada taking the part of the United States and of Great

Britain respectively, Great Britain invokes Article IX of the Treaty of Ghent, by which the United States agreed to restore to the Indians with whom that government had been at war "all the possessions, rights, and privileges which they may have enjoyed or been entitled to" in 1811 before the war.

Great Britain can not maintain a claim as for the Cayuga Nation for the whole annuity since 1810 and for the future. In order to maintain such a claim, it would be necessary to establish the British nationality of the obligee at the date at which the claim arose. The settled doctrine on this point is well stated by Little, Commissioner, in *Abbiatti's Case*, 3 Moore, *International Arbitrations*, 2347-8. See also *Mexican Claims*, 2 *id.*, 1353; *Dimond's Case*, 3 *id.*, 2386-8. The obligee was the "Cayuga Nation," an Indian tribe. Such a tribe is not a legal unit of international law. The American Indians have never been so regarded. 1 Hyde, *International Law*, p. 10. From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the Power which by discovery or conquest or cession held the land which they occupied. Wheaton, *International Law*, 838; 3 Kent, *Commentaries*, 386; *Breaux v. Jones*, 4 La. Ann. 141. They have been said to be "domestic, dependent nations" (Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17), or "states in a certain domestic sense and for certain municipal purposes" (Clifford, J., in *Holden v. Joy*, 17 Wall, 211, 242). The Power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive. "No other power could interpose between them." (Marshall, C. J., in *Johnson v. McIntosh*, 8 Wheat. 543, 578.) So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it. Before the Revolution all the lands of the Six Nations in New York had been put under the Crown as "appendant to the Colony of New York," and that colony had dealt with those tribes exclusively as under its protection. (Baldwin, J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 34-35.) New York, not the United States, succeeded to the British Crown in this respect at the Revolution. Hence the "Cayuga Nation," with which the State of New York contracted in 1789, 1790, and 1795, so far as it was a legal unit, was a legal unit of New York law.

If the matter rested here, we should have to say that the Legislature of New York was competent to decide, as it did in the treaties of 1829 and 1831, what constituted the "Nation," for the purposes of the prior treaties made by the State with an entity in a domestic sense of its own law and existing only for its own municipal purposes.

It does not follow, however, that Great Britain may not maintain a claim on behalf of the Cayuga Indians in Canada. These Indians are British nationals. They have been settled in Canada, under the protection of

Great Britain, and, subsequently, of the Dominion of Canada, since the end of the eighteenth or early years of the nineteenth century. There was no definite political constitution of the Cayuga Nation and it is impossible to say with legal precision just what would constitute a migration of the nation as a legal and political entity. But as an entity of New York law, it could not migrate. "Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation." Parker, Umpire, in Administrative Decision No. 5, Mixed Claims Commission, United States and Germany, October 31, 1924, 19 *Am. Jour. Int. Law*, 612, 625. The Cayuga Nation, as it existed as a legal unit by New York law, could not change its national character, without any concurrence by New York, and become, while preserving its identity as the covenantee in the treaty, a legal unit of and by British law. The legal character and status of the New York entity with which New York contracted was a matter of New York law. Moreover the situation of the Cayuga Nation is very different from that of an ordinary corporation, which has no small margin of self-determination. Such a legal unit can not change its national character by its own act. See North and South American Construction Company's Case, 3 Moore, *International Arbitrations*, 2318, 2319. Even less is such a thing possible in the case of an Indian tribe, whose dependent condition is as well settled as its legal position is anomalous. Such tribes are "in a state of pupillage" (Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17). They have always been "subject to such restraints and qualified control in their national capacity as was considered by the whites to be indispensable to their own safety and requisite to the due discharge of the duty of protection" (3 Kent, *Commentaries*, 386). In the case of Indians on the public domain of the United States, they are "the wards of the Nation. They are communities dependent on the United States." (Miller, J., in *United States v. Kagama*, 118 U. S. 375, 383-4.) With respect to Indians, the government "is *in loco parentis*." (Nisbit, J., in *Howell v. Fountain*, 3 Ga. 176.)

When the Cayugas divided, some going to Canada and some remaining in New York, and when that cleavage became permanent in consequence of the War of 1812, Great Britain might, if it seemed desirable, treat the Canadian Cayugas as a unit of British law or might deal with them individually as British nationals. Those Indians were permanently established on British soil and under British jurisdiction. They were and are dependent upon Great Britain or later upon Canada, as the New York Cayugas were dependent on and wards of New York. If, therefore, the Canadian Cayugas have a just claim, according to "the principles of international law and of equity," Great Britain is entitled to maintain it.

That as a matter of justice the Canadian Cayugas have such a claim, has been the opinion of every one who has carefully and impartially investigated their case. In 1849, the Commissioners of the Land Office, to whom the Legislature of New York had referred a memorial of "the chiefs and warriors

of the Cayuga Indians residing in Canada West," reported in their favor and urged a "just distribution" of the annuity. This commission was composed of the then Lieutenant Governor, Secretary of State, Comptroller, Treasurer, and State Engineer and Surveyer of New York. N. Y. Assembly Doc. 1849, Vol. 3, No. 165. Afterwards the claim was considered in detail by the General Term of the Supreme Court of New York in *People v. Board of Commissioners of the Land Office*, 44 Hun. 588. That tribunal pointed out that we "ought not to permit words such as 'sovereign states,' 'treaties,' and the like to conceal the real facts." The substance of the matter was that New York agreed to pay the then Cayuga Indians and their posterity, and on the division of the tribe the annuity ought to have been apportioned, as, indeed, was done when the New York Cayugas afterward divided. It is true the judgment in this case was reversed by the Court of Appeals. But the reversal was upon jurisdictional grounds in no way affecting the views of the Supreme Court upon the merits of the claim. Nor can we examine the evidence and come to any other conclusion than that as a matter of right and justice such an apportionment should have been and ought to be made.

In the report of the committee of the New York Senate, in 1890, that committee was governed by two propositions of law, one that the Canadian Cayugas by their emigration "surrendered all claim or interest in the annuity funds and property of said Cayuga Nation of Indians," the other, that the claim was not within the purview of the Treaty of Ghent. N. Y. Senate Doc. No. 73, 1890. But the first can not be maintained in view of the circumstances that the United States guaranteed their lands to the Six Nations in 1789, after the removal to the Grand River in 1784, and that the principal signers of the treaty of 1795 and most of those who receipted for the annuities on behalf of the nation from 1795 to 1810 were Cayugas who had so emigrated. As to the second, we do not so construe the Treaty of Ghent. The committee relies on the form of payment to the nation as an entity. The word "enjoy" in the treaty, as we think, refers to the substantial participation in the division of the money. If New York did not follow the treaty as to production of and receipt on the counterpart, the State was bound to see that those who ought to have the money were those who got it. Both in this report and in the opinion of Judge O'Brien, then Attorney General of New York, in 1884 (Memorial, Vol. III, p. 777), the circumstance that the Canadian Cayugas had taken part with Great Britain in the War of 1812 is evidently regarded as a ground of excluding them from any share in the annuity. So also the letter of Commissioner Bissell (Memorial, Vol. III, p. 793) gives this reason. But it is obviously untenable and it was expressly stated on behalf of the United States at the hearing that no such defense is urged. It is evident that both the committee and the Attorney General go upon the form of the covenant and the legal authority of New York to determine what shall be recognized as the Cayuga

Nation. They do not deny the merit of the Claim. This is palpably true of the decision of the New York Court of Appeals in *Cayuga Nation v. State*, 99 N. Y. 235.

It cannot be doubted that until the Cayugas permanently divided, all the sachems and warriors, wherever they lived, whether at Cayuga Lake, Buffalo Creek, or the Grand River in Canada, were regarded as entitled to and did share in the money paid on the annuity. Indeed it is reasonably certain that the larger number and the more important of those who signed the treaty of 1795 were then or were soon thereafter permanently established in Canada. It is clear that the greater number and more important of those who signed the annuity receipts from the date of the treaty until 1810 were Canadian Cayugas. We find the person through whom, by the terms of the treaty, the money was to be paid, writing to the Governor of New York in 1797 that the Canadian Cayugas had not received their fair proportion in a previous payment and proposing to make the sum up to them at the next payment. Everything indicates that down to the division the money was regarded as payable to and was paid to and divided among the Cayugas as a people. The claim of the Canadian Cayugas, who are in fact the greater part of that people, is founded in the elementary principle of justice that requires us to look at the substance and not stick in the bark of the legal form.

But there are special circumstances making the equitable claim of the Canadian Cayugas especially strong.

In the first place, the Cayuga Nation had no international status. As has been said, it existed as a legal unit only by New York law. It was a *de facto* unit, but *de jure* was only what Great Britain chose to recognize as to the Cayugas who moved to Canada and what New York recognized as to the Cayugas in New York or in their relations with New York. As to the annuities, therefore, the Cayugas were a unit of New York law, so far as New York law chose to make them one. When the tribe divided, this anomalous and hard situation gave rise to obvious claims according to universally recognized principles of justice.

In the second place, we must bear in mind the dependent legal position of the individual Cayugas. Legally they could do nothing except under the guardianship of some sovereign. They could not determine what should be the nation, nor even whether there should be a nation legally. New York continued to deal with the New York Cayugas as a "nation." Great Britain dealt with the Canadian Cayugas as individuals. The very language of the treaty was in this sense imposed on them. What to them was a covenant with the people of the tribe and its posterity, had to be put into legal terms of a covenant with a legal unit that might and did come to be but a fraction of the whole. American courts have agreed from the beginning in pronouncing the position of the Indians an anomalous one. *Miller, J., in United States v. Kagama*, 118 U. S. 375, 381. When a situation

legally so anomalous is presented, recourse must be had to generally recognized principles of justice and fair dealing in order to determine the rights of the individuals involved. The same considerations of equity that have repeatedly been invoked by the courts where strict regard to the legal personality of a corporation would lead to inequitable results or to results contrary to legal policy, may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider the human individuals who were the real beneficiaries. Those considerations are even more cogent where we are dealing with Indians in a state of pupillage toward the sovereign with whom they were treating.

There is the more warrant for so doing under the terms of the treaty by virtue of which we are sitting. It provides that decision shall be made in accordance with principles of international law and of equity. Merignhac considers that an arbitral tribunal is justified in reaching a decision on universally recognized principles of justice where the terms of submission are silent as to the grounds of decision, and even where the grounds of decision are expressed to be the "principles of international law." He considers, however, that the appropriate formula is that "international law is to be applied with equity." *Traite theorique et pratique de l'arbitrage international*, p. 303. It is significant that the present treaty uses the phrase "principles of international law and equity." When used in a general arbitration treaty this can only mean to provide for the possibility of anomalous cases such as the present.

An examination of the provisions of arbitration treaties shows a recognition that something more than the strict law must be used in the grounds of decision of arbitral tribunals in certain cases; that there are cases in which—like the courts of the land—these tribunals must find the grounds of decision, must find the right and the law, in general considerations of justice, equity, and right-dealing guided by legal analogies and by the spirit and received principles of international law. Such an examination shows also that much discrimination has been used in including or not including "equity" among the grounds of decision provided for. In general it is used regularly in general claims arbitration treaties. As a general proposition, it is not used where special questions are referred for arbitration.

Three arbitration treaties between Great Britain and the United States contain provision for decision in accordance with "equity" or "justice!" The Claims Convention of 1853, Art. 1 (1 Malloy, *Treaties*, 664), using the words "According to justice and equity;" the Claims Conventions of 1896, Art. II (1 Malloy, 766), calling for "a just decision;" and the Agreement for Pecuniary Claims Arbitration, 1910, Art. VII (3 Malloy, 2619), prescribing decision "in accordance with treaty rights, and with the principles of international law and of equity." These are general claims arbitrations. They should be contrasted with the arbitration agreements between Great Britain and the United States in which there is no provision for equity as

one of the grounds of decision. Articles IV, V, and VI of the Treaty of Ghent provide for arbitration as to the islands on the Maine boundary, as to the northeastern boundary, and as to the river and lake boundary. The arbitrators are to decide "according to such evidence as shall be laid before them." Here the questions were of fact only. Hence in an arbitration of specific questions, all provision as to equity is omitted. So also in the Regulations for the Mixed Courts of Justice under the Treaty of April 7, 1862 (1 Malloy, 681), Art. I, the arbitrators are to "act in all their decisions in pursuance of the stipulations of the aforesaid treaty." This was a special tribunal under a treaty for abolition of the slave trade. The contrast with the provisions of the treaties for general claims arbitrations is noteworthy. So also in the Fur Seal Arbitrations Convention of 1892 (1 Malloy, 746), Arts. II, VI; the Alaskan Boundary Convention, 1903 (1 Malloy, 787), Arts. I, III, IV; and the Agreement for the North Atlantic Coast Fisheries Arbitration (1 Malloy, 835), Art. I. In each of these, certain specific questions were submitted. These agreements are either silent as to the grounds of decision, or provide simply for a fair and impartial consideration.

In some of the arbitration agreements between Great Britain and the United States, it has happened that clauses of both types have been included in one treaty. Thus, in the Jay Treaty of 1794, Art. V, has to do with arbitration of the Maine boundary. In that matter, the arbitrators are to decide "according to such evidence as shall . . . be laid before them." But Article VII, providing for arbitration of claims, requires a decision "according to the merits of the several cases, and to justice, equity, and the law of nations" (1 Moore, *International Arbitrations*, 5, 321). Again in the Treaty of Washington, 1871, Arts. XXXIV and following, providing for arbitration of the San Juan water boundary, call for decision "in accordance with the true interpretation of the Treaty of June 15, 1846." 1 Moore, *International Arbitrations*, 227. Also in the same treaty, Art. VI, submitting the Alabama Claims, provides three carefully formulated rules, agreed on expressly by the parties, and requires decision by those rules and "such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case." So also in Art. II, as to claims governed by rules agreed upon, the arbitrators are to examine and decide "impartially and carefully." On the other hand, in Art. XXIII, providing for the arbitration of fishing claims, the decision is to be "according to justice and equity" (1 Malloy, 710, 714). Here the careful discrimination, according to the subject matter dealt with, in the several articles of the same treaty, speaks for itself.

Arbitration treaties of and with Latin American countries before 1910 (the date of the treaty here in question) tell the same story. Of these, some provide for decision according to international law, equity (or justice) and treaty provisions. Such are (with slightly varying language): Arbitration Convention between the United States and Mexico, 1839, 1 Malloy,

1101, Art. IV (arbitration of claims); Ecuador-United States, 1862, 13 St. L. 631; Peru-United States, 1863, 13 St. L. 639, Art. III; United States-Venezuela, 1866, 13 St. L. 713, Art. I; Mexico-United States, 1868, 1 Malloy, 1128, Art. I; Guatemala-Mexico, 1888, 71 Br. & For. State Pap. 255, Art. IV; United States-Venezuela, 1892, 28 St. L. 1183, Art. III; Chile-United States, 1892, 27 St. L. 965, Art. IV; Guatemala-Honduras, 1895, 77 Br. & For. State Pap. 530, Art. IV; Mexico-Venezuela, 1903, Manning, *Arbitration Treaties among the American States*, 343, Art. I (arbitration of all pending claims); Brazil-Peru, 1904, U. S. Foreign Relations, 1904, p. 111, Art. III (general claims arbitration); Argentina-Brazil, 1905, 3 *Am. Journ. Int. Law*, Suppl. p. 1, Art. X (general arbitration); Brazil-Peru, 1909, Manning, 450, Art. IX (general arbitration). It will be noted that these words are used where no specific claims are in question, but there is a general arbitration of claims of all kinds. In other cases the treaty speaks only of justice and equity. Such are: Costa Rica-Nicaragua, 1854, Manning, 31, Art. III; New Granada-United States, 1857, 1 Malloy, 319, Art. I; Chile-United States, 1858, 12 St. L. 1083; Paraguay-United States, 1857, Manning, 145, Art. II; Costa Rica-United States, 1860, 12 St. L. 1135, Art. II; Peru-United States, 1868, 16 St. L. 751, Art. I; Chile-Peru, 1868, Manning, 78; United States-Venezuela, 1886, Manning, 150, Art. VI; Mexico-United States, 1902, 32 St. L. 1916; Brazil-United States, 1902, U. S. Treaty Series, No. 413, Art. I. Here it is significant that eight of the ten are arbitrations between the United States and Latin American States, in which, because of the difference in legal systems and technique of decision, it was expedient to give some latitude to the tribunal. In this connection the treaty between the United States and Venezuela in 1903, U. S. Treaty Series, No. 420, is especially significant. It requires decision "upon a basis of absolute equity, without regard to objections of a technical character or of the provisions of local legislation." (As to what this meant, see Ralston, *International Arbitral Law and Procedure*, 69-71). In other cases, the language shows that the arbitrator was to be no more than an *amiable compositeur*: Honduras-Salvador, 1880, Manning, 1115, Art. V ("just and expedient"); Honduras-Nicaragua, 1894, Manning, 211, Art. II (5); Honduras-Salvador, 1895, Manning, 216, Art. II; Chile-United States, 1909, U. S. Treaty Series, No. 535- $\frac{1}{2}$ ("as an *amiable compositeur*").

In the treaties cited, to which the United States has been a party, it will be noted how discriminatingly the language is chosen. How can it be said that the phrase "principles of equity" is of no significance when the different phrases are shown to have been so carefully chosen to fit different occasions?

This conclusion is borne out even more when we examine the arbitration treaties of and with the Latin American States in which no reference is made to equity. In some of these no reference is made to grounds of decision: Mexico-United States, 1897, 30 St. L. 1593 (a limited arbitration

of specific issues of law and fact raised by prior diplomatic correspondence). Peru-United States, 1898, U. S. Treaty Series, No. 286 (limited arbitrations of the amount of indemnity only—all other questions excluded); Haiti-United States, 1899, Manning, 282 (special agreement to submit one claim of a citizen of the United States to one of the Justices of the Supreme Court of the United States); Guatemala-United States, 1900, Manning, 288, Art. I (refers "questions of law and fact" as to one specific claim); Nicaragua-United States, 1900, 2 Malloy, 1290 (reference to specific claims, as to the amount of indemnity only—question of liability expressly excluded); Salvador-United States, 1901, U. S. Treaty Series, No. 400 (specific claims, the issues having already been defined by diplomatic correspondence); Dominican Republic-United States, 1902, Manning, 320 (special arbitration of one claim on defined points); Dominican Republic-United States, U. S. Treaty Series, No. 417 (special arbitration as to terms of payment of agreed indemnity). In each of these cases the United States was a party, and the nature of the arbitration shows why it is that reference to general grounds of decision was omitted.

In another type of case, provision is made for decision according to international law or "public law" and treaties. Such a case is: Colombia-United States, 1874, 1 Foreign Rel. U. S., 427, Art. II (but here these general grounds were supplemented by special stipulations). In another type, the grounds of decision are expressly restricted to "the rules of international law existing at the time of the transactions complained of": Haiti-United States, 1884, 23 St. L. 785, Art. IV (reference to two special claims of citizens of the United States to one of the Justices of the Supreme Court of the United States; naturally it was sought to restrict the scope of his choice of grounds of decision). In another group of treaties, the decision is to be "according to the principles of international law." Such are: Brazil-Chile, 1899, Manning, 259, Art. V; Argentina-Uruguay, 1899, 94 Br. & For. State Pap. 525, Art. X; Argentina-Paraguay, 1899, 92 *Id.*, 485, Art. X; Argentina-Bolivia, 1902, Manning 316, Art. X; Argentina-Chile, 1902, Manning, 328, Art. VIII; Costa Rica-Guatemala-Honduras-Nicaragua-Salvador, 1907, 100 Br. & For. State Pap. 836, Art. XXI (treaty establishing the Central American Court of Justice as a Permanent Court of Arbitration.) But these treaties (except the last) add that the terms of submission may otherwise provide, thus taking care of the possibility of anomalous situations. One treaty, Bolivia-Peru, 1901, 3 *Am. Journ. Int. Law*, Suppl. 378, Art. VIII, requires "strict obedience to the principles of international law." In another type of this species of treaty, there is minute specification of the exact grounds of decision. Such are Bolivia-Peru, 1902, Manning, 334; Costa Rica-Panama, 1910, 6 *Am. Journ. Int. Law*, Suppl. p. 1. Each is a boundary arbitration.

In these treaties of and with Latin American States, as in the case of treaties between Great Britain and the United States, it happens sometimes

that different provisions as to the grounds of decision are made in different articles of the same treaty. Thus: Colombia-Ecuador, 1884, Manning, 140 (Art. I, "impartiality and justice;" Art. II, "in accordance with the principles of international law and the legal principles established by analogous modern tribunals of high authority"); Ecuador-United States, 1893, 28 St. L. 1205, (Art. II, b, "under the law of nations;" Art. IV, such damages "as may be just and equitable"—an arbitration of one specified claim); United States-Venezuela, 1908, U. S. Treaty Series, No. 522½ (Art. I, "under the principles of international law;" Art. II, whether "manifest injustice" was done; Art. III, "on its merits in justice and equity;" Art. V, "in accordance with justice and equity"). This different language for different situations speaks for itself. It should be said also that the language of treaties with Continental Powers, both prior and subsequent to 1910, to which the United States is a party, entirely sustains the conclusions to which the examination of the treaties with Great Britain and with Latin American States must lead. See United States-Norway, 1921, 3 Malloy, 2749, Art. I; Allied Powers-Germany, 1920, 3 Malloy, 3469, Art. 299 (b); Allied Powers-Hungary, 1921, 3 Malloy, 3644, Art. 234 (b); United States-Great Britain-Portugal, 1891, 2 Malloy, 1460, Art. I; United States-Germany-Great Britain, 1899, 2 Malloy, 1589, Art. I.

Under the first and second Hague Conventions for the Pacific Settlement of International Disputes (32 St. L. 1779, Art. XLVIII; 36 St. L. 2199, Art. LXXIII) there is to be a special *compromis* in each arbitration which is to provide as to the basis of decision. But wide powers of determining the basis of decision are insured by Art. 48. Also Art. 38 of the Statute of the Permanent Court of International Justice (1920) provides specially that the court may decide *ex aequo et bono*, if the parties agree thereto. As Anzilotti points out, however, that much criticized provision is meant for cases such as we have seen above, which call, not for principles of equity, but for a degree of compromise. Anzilotti, *Corso di diritto internazionale*, 64 (1923). Such a power is not necessarily non-judicial, as Magyary asserts. *Die internationale Schiedsgerichtsbarkeit im Völkerbunde*, 151-2 (1922). But it is a different thing from what we invoke in the present case—namely, general and universally admitted principles of justice and right dealing, as against the harsh operation of strict doctrines of legal personality in an anomalous situation for which such doctrines were not devised, and the harsh operation of the legal terminology of a covenant which the covenantees had no part in framing and no capacity to understand. It is enough to cite the opinions of Merignhac (*Traite theorique et pratique de l'arbitrage international*, §§294-305), Bulmerincq (*Die Staatsstreitigkeiten und ihre Entscheidung ohne Krieg*, §11). Holtzendorff, (*Handbuch des Völkerrechts*, VI, 42), and Lammasch (*Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange*, II, 179-181, 185).

It remains to consider the United States-Norway Arbitration Award,

1922, 17 *Am. Journ. Int. Law*, 362 ff. By Art. I of the agreement under which that award was made, the decision was to be "in accordance with the principles of law and equity." The meaning of this phrase is discussed on pp. 383-385. Construing Art. LXXIII of the Hague Convention for the Settlement of International Disputes (1907) and Art. XXXVII of the Convention of 1908, the tribunal considers, rightly as we conceive, that the word *droit*, as used in those articles, has a broader meaning than that of "law" in English, in its restricted sense of an aggregate of rules of law. It quotes Lammash to the effect that the arbitrator should "decide in accordance with equity, *ex aequo et bono*, when positive rules of law are lacking." It then says of the words "law and equity" in the agreement under which it was sitting: "The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state" (p. 384). Not only is this the weight of opinion, but it is amply borne out by the language of arbitration treaties as adapted to the different sorts of arbitration and the types of questions which they present. The letter of Secretary Hughes to the Norwegian Minister, of date February 26, 1923 (17 *Am. Journ. Int. Law*, 287-289), in which he protests as to certain features of the award, challenges the rule of international law found by the tribunal and applied to the case. But it does not contest or refer to the tribunal's construction of the words "law and equity," as used in the agreement; nor do we think that construction is open to question.

Our conclusion on this branch of the cause is that, according to general and universally recognized principles of justice and the analogy of the way in which English and American courts, on proper occasions, look behind what in such cases they call "the corporate fiction" in the interests of justice or of the policy of the law (*Daimler Company, Ltd., v. Continental Tyre and Rubber Company, Ltd.* [1916] 2 A. C. 307, 315-316, 338 ff; 1 Cook, *Corporations*, 8 ed. §2) on the division of the Cayuga Nation the Cayuga Indians permanently settled in Canada became entitled to their proportionate share of the annuity and that such share ought to have been paid to them from 1810 to the present time.

But it is not necessary to rest the case upon this proposition. It may be rested upon the strict legal basis of Article IX of the Treaty of Ghent, and in our judgment is to be decided by the application of that covenant to the equitable claim of the Canadian Cayugas to their share in the annuity.

Article IX of the Treaty of Ghent, so far as material, reads as follows:

The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities.

The former portion of this covenant clearly refers to the Indian tribes on the public domain of the United States known then as the Western Indians, and was so construed by the United States, which proceeded to make special treaties of peace with those tribes. On its face, the remainder of the covenant seems to apply squarely to the Canadian Cayugas, who had been actually in the receipt and enjoyment of their share of the annuity from the treaty of 1795 down to the eve of the War of 1812. In the answer of the United States there is an elaborate and ingenious argument, based upon the history of the negotiations leading to Article IX, on the basis of which we are asked to hold that the article was only a "nominal" provision, not intended to have any definite application. We can not agree to such an interpretation. Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do. We think the covenant in Article IX of the Treaty of Ghent must be construed as a promise to restore the Cayugas in Canada, who claimed to be a tribe or nation and had been in the war as such, to the position in which they were prior to the division of the nation at the outbreak of the war. It was a promise to restore the situation in which they received their share of the money covenanted to be paid to the original undivided nation. There are but two alternatives, each quite inadmissible under every-day rules of interpretation. One is that the promise has no meaning but was, as it was urged in argument, a provision inserted to save the face of the negotiators. The other is that the tribe or nation must be taken to be the entity of New York law, not the Canadian Cayugas as British nationals. As to this interpretation, the remark of Chief Justice Fuller, in *Burthe v. Dennis*, 133 U. S. 514, 520-21, is pertinent. He says: "It would be a remarkable thing, and we think without precedent in the history of diplomacy, for the Government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers." It would be no less strange and unprecedented for the United States to covenant with another Power to restore the rights of its own nationals under its exclusive protection. In order to give this portion of the article any meaning, we must take it to promise that the Indians who had gone to Canada and had sided with Great Britain on the splitting up of the original nation, were to be put in the *status quo* as of 1811, even if legally the New York Cayuga organization was now the nation for the strict legal purposes of the covenant in the treaty of 1795.

In 1843, in a letter to the then Governor of New York, written on behalf of the New York Cayugas with reference to the division of the annuity between the Cayugas remaining in New York and those who had gone to the west, Peter Wilson, an educated Cayuga, and one of the sachems of the New York nation, said: "The emigrating party of the New York Cayugas have invited

the Canadian Indians to come over and accompany them to the Western country, and we are apprehensive they will represent these as composing a part of their party having claims to the moneys of the Cayuga Nation arising from the annuities of the State of New York, which claim we do not recognize." Further on he adds: "We wish your excellency distinctly to understand that the Cayugas residing in a foreign country, to-wit, Canada, have no just or legal claim to any part of the annuities arising from this State." Here, in its original form, the objection of the New York Cayugas to participation by the Canadian Cayugas rests on the proposition, obviously inadmissible, if for no other reason, in view of Art. IX of the Treaty of Ghent, that the Canadian Cayugas reside in a foreign country. Six years later (1849), when the Canadian Cayugas were pressing their claim to a share before the Legislature of New York, the objection was rested on the ground of an agreement at the time of the division of the nation, whereby, to use Wilson's own words, "it was mutually agreed that thereafter they should no longer participate in the annuities or emoluments flowing from the governments they were to oppose; but each division should take the whole from the government to which it is allied . . . that all property and interest on the British side should belong to the British Indians, while the property and interests on the American side must be the sole property of the American Iroquois." This is a plausible theory and, urged dramatically and with much detail of circumstance in Wilson's speech in 1849, it has undoubtedly played a controlling part in the subsequent denials of the claims of the Canadian Cayugas. But without adverting to the mystery that surrounds the speech itself, for it is not established that it was ever delivered, and conceding certain circumstances that appear to confirm it, we are of opinion that it has no foundation beyond the admitted division of the nation on the eve of the War of 1812 and the fact that during and after that war the Canadian Cayugas did not participate in the division of the payments. In reality the circumstances do not go beyond this. If there had been more, Wilson certainly would have said so in 1843. His letter of that date is too prolix to justify an assumption that he left out anything he knew that had a bearing on his case. Certainly he would not have left out the one conclusive argument in his armory. Moreover, it ought to have been possible to establish a point of such importance by something more than the assertion in Wilson's speech. The only other evidence is a statement in a report of the Committee on Indian Affairs to the Senate of New York, in 1849, that the Council in which "that agreement was made, if any," had been graphically described to the committee by an Onondaga Chief. It is clear enough from the whole report that the committee, at the least, was skeptical as to the alleged agreement. Certainly the whole conduct of the Canadian Cayugas from the conclusion of the War of 1812 was inconsistent with it. We are satisfied that they held the counterpart of the treaty of 1795 from a time soon after its execution to the present, when they produce it before us. There is clear evidence that after

1815 their chiefs made repeated visits to New York claiming a share and vouching their possession of the counterpart upon which, by the terms of the treaty, receipts for payment were to be indorsed. Almost immediately upon the close of the war they urged upon the British Colonial Office that they were no longer receiving their share of the annuity, as they had received it before the war. In 1819 they discussed their claim in a council and considered retaining counsel to present it. In 1849 they presented it by petition to the Legislature of New York, and continued to press it at intervals from that time. No one but Wilson testifies (if his speech may be called testimony) to the agreement of partition. His speech, in many of its details, is palpably erroneous. The circumstances and the conduct of the parties are at variance with it. It can not be that, if this solid and conclusive ground of excluding them from a share in the annuity would have been doubtful in 1849.

We have next to consider whether the claim of Great Britain, on behalf of the Canadian Cayugas, that the latter should share in the payments of the annuity covenanted to be paid to the original Cayuga Nation, is barred by Article V of the Claims Convention of 1853. That Article reads:

The high contracting parties engage to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, presented, or laid before the said commission, shall, from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

On behalf of Great Britain it is contended that Article V must be construed in connection with Articles I and II. The United States, on the other hand, contends that Article V is complete and unambiguous and hence calls for no interpretation, but must be applied according to its plain terms.

It will be noted that in order to be barred the claim must have (1) "arisen," and (2) arisen out of "transactions" prior to the ratification of the convention. No doubt the treaty of 1795, the division of the Cayuga nation, and the Treaty of Ghent are "transactions" prior to 1853. But if no claim against the United States had "arisen" in 1853, there was no claim to be barred by the terms of Article V, which does not purpose to apply and certainly ought not to be construed as applying to claims to arise in the future, even if in part out of past transactions. If, as the United States insists, we must apply the language of Article V as it stands, the word "arise" is quite as important as the word "transactions," and we must look to the transactions that are decisive for the "arising" of the claim, as one cognizable before an international tribunal, in order to determine whether the claim before us is barred.

What, then, are the grounds on which liability of the United States must

be based and what is the date of the "transactions" from which a claim "arises" in which that liability may be asserted?

First, we must ask whether the United States would be liable directly and immediately on the basis of the treaty of 1795. It has been urged upon us that the United States would be liable upon that treaty on three grounds: (1) That the treaty is legally a federal, not a New York treaty, made in the presence of a federal Indian agent; (2) that the treaty has to do with a matter of exclusively federal cognizance, under the Constitution of the United States; and so must be presumed to have been executed under competent federal authority, since the alternative would be that the treaty would be void; (3) that in any event the interest of the United States in the treaty, as one dealing with a matter of federal cognizance under the Constitution of the United States, is such as to make the United States directly and immediately liable upon the treaty, even if it is the contract of the State of New York.

We are unable to assent to any of these propositions. Neither in form nor in substance was the treaty of 1795 a federal treaty; it was a contract of New York with respect to a matter as to which New York was fully competent to contract. In form it is exclusively a New York contract. The negotiators derived their authority from the State Legislature and purported to represent the State only. The United States does not appear anywhere in the negotiations nor in the treaty. The United States Indian Agent, who was present, at the request of the Indians because they had confidence in him, appears as a witness in his personal, not his official, capacity. Nor was the subject matter one of federal cognizance. The title of the Cayuga Indians, one of occupation only, had been extinguished by the treaty of 1789, which ceded the lands of the Cayugas to New York, providing for a reservation, which, we think, must be taken to have been held of New York by the nation. It is argued that the language of the treaty is rather that of a common-law reservation, so that the reserved land was reserved out of the grant. As to this, we are satisfied with the observations of Gray, J., in *Jones v. Meehan*, 175 U. S. 1, 11; "The Indians . . . are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter . . . ; the treaty must therefore be construed, not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." We think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession. Such a construction is indicated by Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17.

That treaty (1789) was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown. Long before the Revolution, the country of the Six Nations had been treated as "appendent to the government of New York." Baldwin, J., in *Cherokee*

Nation v. Georgia, 5 Pet. 1, 35. It was for the Legislature of New York to say who could bind the Cayuga Nation as a New York entity. The subsequent treaties of 1790 and 1795 purported simply to confirm the original treaty and were made because of dissatisfaction of the Indians, not because of any legal invalidity. The cases cited to us with respect to Indians on the public domain of the United States or on lands relinquished by some or other of the original thirteen States are not in point. The distinction is made clear in Dana's note to Wheaton, *Elements of International Law*, p. 38 (8 ed. 60). He says: "It is important to notice the underlying fact that the title to all lands occupied by the Indian tribes *beyond the limits of the thirteen original states*, is in the United States. The Republic acquired it by the treaties of peace with Great Britain, by cessions from France and Spain, and by *relinquishments from the several states*." See also *Seneca Nation v. Appleby*, 127 App. Div. 770. The title of New York here was independent of and anterior to the Federal Constitution. At the time of the treaty of 1795, the Cayuga Indians held the reservation of New York and the dealings of New York with the Cayuga Nation as a New York entity and with respect to lands held of New York, were a matter for that State only. See Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 16-18; Nelson, J., in *Fellows v. Blacksmith*, 19 How. 366, 369; 3 Kent, *Commentaries*, 380-386; *Beecher v. Wetherbee*, 95 U.S. 517, 525, and State decisions there cited; *Seneca Nation v. Christie*, 126 N. Y. 122; *Jemison v. Bell Telephone Co.*, 186 N. Y. 493, 496.

We must hold that the treaty of 1795 was a contract of the State of New York and that it was not a contract on a matter of federal concern or in which the Federal Government had an interest. Indeed the fact that it has stood unchallenged as a New York contract for over a century and that New York has gone on for the whole of that time dealing with the provisions of the treaty and with the legal position of the Cayuga Nation as matters of New York law, speaks for itself. This tribunal can not know more as to what is a federal treaty and what a New York treaty than the United States and the State of New York.

If the treaty of 1795 is a contract of the State of New York, the United States would not be liable merely on the basis of a failure of New York to perform a covenant to pay money. This proposition is established by repeated decisions of international tribunals: Thornton, Umpire, in Nolan's Case, 4 Moore, *International Arbitrations*, 3484; Thompson's case, *Ibid.*; Rainbridge, Commissioner, in La Guaira Electric Light and Power Company's Case, Ralston, *Venezuela Arbitrations of 1903*, 178, 181-2; Thomson-Houston Electric Company's Case, *id.* 168-9; Schweitzer v. United States, 21 Ct. Cl. 303; Florida Bond Cases, 4 Moore, *International Arbitrations*, 3594, 3608-12. In the case last cited there is a full discussion by Bates, Umpire. See also Ralston, *International Arbitral Law and Procedure*, pp. 457-467, pp. 217-221; Borchard, *Diplomatic Protection of Citizens Abroad*,

200. Two *dicta*, cited to the contrary on the argument, are readily distinguishable. What is said in the *Montijo*, 2 Moore, *International Arbitrations*, 1421, 1439, had no reference to a contract of a state of a federal union, creating a debt of that state. There was a violation of a federal treaty. And the letter of Secretary Fish, 6 Moore, *Digest of International Law*, 815-816, had reference to injuries to persons and property by the state authorities, not to federal liability for debts incurred by the contract of a state.

In the cases in which a federal government has been held upon the contract of a state, there has been (1) an immediate connection of the federal government with the contract as a participant therein, or (2) an assumption thereof or of liability therefor, or (3) a connection therewith as beneficiary, whether in the inception or as beneficiary of the performance, in whole or in part, or (4) some direct federal interest therein. The United States is in no such relation to and had no such connection with or interest in the contract of New York with the Cayuga Nation.

Liability of the United States must, therefore, be grounded upon Article IX of the Treaty of Ghent, in which the United States covenanted that the Indians should be restored to the position in which they were before the War of 1812, and hence that they should share in the annuity, as they did before the war. That liability, in our opinion, did not accrue until, New York having definitely refused to recognize the claims of the Canadian Cayugas, the matter was brought to the attention of the authorities of the United States, and that government did nothing to carry out the treaty provision. That situation and the Treaty of Ghent are the transactions out of which the claim arises. The earliest date at which the claim can be said to have accrued, as a claim against the United States under international law, is 1860.

In municipal law, failure of a promisor to perform gives rise to a cause of action then and there, without more. But it is otherwise when one state steps in to assert a claim against another state because the latter is in default with respect to some performance promised to a nation of the former. "In the estimation of statesmen and jurists, international law is probably not regarded as denouncing the failure of a state to keep such a promise, until there has been a refusal either to adjudicate wholly the claim arising from the breach, or, following an adjudication, to heed the adverse decision of a domestic court. Upon the happening of either of those events, the denial of justice is regarded as first apparent. Then there is seen a failure to respect a duty of jurisdiction which is distinct from the breach of the contract and subsequent to it in point of time." 1 Hyde, *International Law*, 303, pp. 546-7. See to the same effect decisions cited in Ralston, *International Arbitral Law and Procedure*, 37, pp. 27-29; 6 Moore, *Digest of International Law*, 916, pp. 285-9; 1 Westlake, *International Law*, 331-334.

Even in 1860, the Government of the United States referred the Indians to New York. Certainly in 1853, when it was by no means clear that something

might not yet be done by the Legislature of New York, an international tribunal would have said that, while there might have been a breach of the covenant, there had not, as yet, been a denial of justice by the United States. For these reasons we hold that the claim is not barred by Article V of the Convention of 1853.

It is urged on behalf of the United States that the claim should be held to be barred by laches. There is no doubt that there has been laches on the part of Great Britain. The claim of the Canadian Cayugas to share in the annuity payments was brought to the attention of the British Colonial Office immediately after the War of 1812, and within a few years thereafter was repeatedly urged upon the Deputy Superintendent General of Indian Affairs in Canada. Yet it was not until 1899 that the British Minister at Washington presented the claim to the State Department of the United States. Also it must be conceded that the case is not as if New York had withheld the money entirely. That State had paid the whole amount of the annuity each year, in reliance upon its authority to decide who constituted the "Cayuga Nation." There is much to be said for an equity in favor of New York as to payments before the claim of the Canadian Cayugas was presented to the Legislature of that State, in 1849. But no laches can be imputed to the Canadian Cayugas, who in every way open to them, have pressed their claim to share in the annuities continuously and persistently since 1816. In view of their dependent position, their claim ought not to be defeated by the delay of the British Government in urging the matter on their behalf. Nor can New York be said to have been prejudiced by the delay after 1849, at which time the facts of the case had been brought to the notice of the Legislature and a public commission had recommended that justice be done. On the general principles of justice on which it is held in the civil law that prescription does not run against those who are unable to act, on which in English-speaking countries persons under disability are excepted from the operation of statutes of limitation, and on which English and American courts of equity refuse to impute laches to persons under disability, we must hold that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign, unless, at least there has been so complete and *bona fide* change of position in consequence of that laches as to require such a result in equity. In the present case by no possibility can there be said to have been a change of position without notice after 1849. Under all the circumstances, we think it will be enough to deny interest on the share of the Canadian Cayugas in past installments of the annuity and to let the payments from 1811 to 1849 stand as made.

By the third prayer of the Memorial, Great Britain seeks a declaration that the Canadian Cayugas are entitled to the annuity for the future. Great Britain, for reasons already stated, is not entitled to such a declaration. Nor

have we jurisdiction to make a declaration that the Canadian Cayugas are entitled to share in the annuity for the future. Our powers are limited to a money award, and we must consider how we may frame a money award so as to give effect by that means to the substantive rights of the parties and reach a just result. Accordingly we think the award should contain two elements: (1) an amount equal to a just share in the payments of the annuity from 1849; (2) a capital sum which at five per cent interest will yield half of the amount of the annuity for the future. If by means of an award the United States is held to pay these sums, we think that government will have been required to perform the covenant in Article IX of the Treaty of Ghent so far as specific performance may be achieved through a money award. The Canadian Cayugas are in a legal condition of pupillage. A sum in the hands of their *quasi* guardian sufficient to pay their share of the annuities for the future will fully protect them and give them what they are entitled to under the Treaty of Ghent.

In explanation of the way in which we have arrived at the amount of the award, we may say that as to the second element, we have taken a sum sufficient to yield an income equal to half of the annuity because the evidence is too uncertain and controversial and the relative numbers fluctuate too much to permit of an exact proportion. Hence in the absence of any clear mathematical basis of distribution, we proceed upon the maxim that equality is equity. In view of all the evidence we are satisfied that it is not New York nor the United States that will suffer by reason of any margin of error. As to the first element, as it is palpable that in any possible reckoning the Canadian Cayugas have always been numerically much more than half the tribe, we feel that we should be quite justified in awarding sixty per cent of the payments after 1849. But out of abundant caution and in view of the fact that New York actually paid out the whole amount each year under claim of right, we fix the whole amount, including both the elements above set forth, at one hundred thousand dollars.

We award one hundred thousand dollars.

Done at Washington, D. C., January 22, 1926.

The President of the Tribunal,
A. NERINCX.

MIXED CLAIMS COMMISSION—UNITED STATES AND GERMANY*

MACKENZIE v. GERMANY

(Docket No. 2482)

Decision, October 30, 1925

Citizenship is determined by rules prescribed by municipal law. The husband of decedent, a native born American citizen, during most of his minority, and for several years after attaining his majority, resided within the jurisdiction of Great Britain, to which his parents owed allegiance, and then returned and established a permanent residence in the United States, where he died, and where his widow and children continued to live.

Under the laws of Great Britain then in effect he also possessed British nationality by parentage, but the American law makes no provision for the election of nationality by an American national by birth possessing a dual nationality. There was therefore no statutory presumption of expatriation arising from residence within the jurisdiction of the land of alien parents. It follows that his widow was an American national when she met her death on the *Lusitania*.

The permanent loss of citizenship is not to be confused with a loss for the time being of diplomatic protection, as the right of protection does not necessarily follow the technical legal status of citizenship. The American State Department does not possess, and has never possessed, the power to strip of American citizenship one so born.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners¹ certifying their disagreement.

Mary A. Mackenzie, 58 years of age, widow of Robert A. G. Mackenzie, was lost with the *Lusitania*. This claim is put forward on behalf of the administrator of her estate, her son, William Mackenzie, her married daughter, Ethel A. Purrington, and the estate of her deceased son, James R. D. Mackenzie.

The German Agent challenges the American nationality of the claimants and of the claim here presented. A determination of this issue turns on the nationality of Robert A. G. Mackenzie, who, the Umpire finds, was born in the United States of British parents on June 4, 1858. While still a minor his parents with their children returned to England. There Robert married, on February 10, 1879, during his twenty-first year, and there his first child, James R. D. Mackenzie was born. Soon thereafter he found employment at Hamilton in the Province of Ontario, Canada, whither he went with his wife and baby, and there his other two children, William and Ethel Annie, were born. The record is barren of evidence of any election made by him to adopt the British nationality of his parents or to renounce his American nationality by birth, save as such election might be inferred from his continued residence in England and in Canada after attaining his majority.

* Established in pursuance of the agreement between the United States and Germany of August 10, 1922. Edwin B. Parker, Umpire; Chandler P. Anderson, American Commissioner; Wilhelm Kieselbach, German Commissioner; Robert W. Bonyng, American Agent; Karl von Lewinski, German Agent.

Headnotes and references in brackets inserted by the Editor of the JOURNAL. Lack of space prevents the publication of the disagreeing opinions of the two National Commissioners.

¹Dated April 17, 1925.

In 1894 he, his wife, and their three children took up permanent residence in New Bedford, Massachusetts, where they lived until his death in 1901. So far as disclosed by the record it appears that he and the members of his family, by express declarations and by their course of conduct, consistently regarded and proclaimed him an American national. He repeatedly registered and voted at New Bedford as an American citizen and seems to have possessed to an unusual degree the qualities of good citizenship. His son William, though born in Canada (and hence possessing dual nationality if born of American parents), on attaining his majority, while residing at New Bedford as an American citizen, took the oath requisite to qualifying him to vote and has repeatedly voted as an American citizen.

Citizenship is determined by rules prescribed by municipal law. The issue here presented must be determined by the law obtaining and enforced within the jurisdiction of the United States. Under that law Robert A. G. Mackenzie, who was born in the United States of British parents, was by birth an American national,² notwithstanding the Fourteenth Amendment to the Constitution had not then been adopted and the statutes in pursuance thereof had not then been passed. Under the laws of Great Britain then in effect he also possessed British nationality by parentage. This created a conflict in citizenship, frequently described as "dual nationality." The American law makes no provision for the election of nationality by an American national by birth possessing dual nationality. As Robert A. G. Mackenzie was by birth an American national, he could neither divest himself of the duties and obligations of an American citizen nor be divested of the rights of an American citizen, save through expatriation by becoming a naturalized citizen of a foreign state in conformity with its laws or possibly³ by taking an oath of allegiance to a foreign state. So far as disclosed by this record the right of expatriation was never exercised by him. He therefore remained an American citizen.

But the German Agent contends that the continued residence of Robert A. G. Mackenzie in England and Canada after attaining his majority amounted in law to an election by him to remain a British national and operated as a renunciation and a forfeiture of his American nationality. It is insisted that this is the American rule established by the executive branch of the Government of the United States and long recognized in its diplomatic correspondence. It may be that some of the instructions issued by the Department of State of the United States to its diplomatic and consular representatives are susceptible of the construction which the German Agent would place upon them,⁴ but it is believed that when carefully analyzed they

² *United States v. Wong Kim Ark* (1898), 169 U. S. 649.

³ Prior to the Act of March 2, 1907, there was no statute expressly providing that the taking of an oath of allegiance to a foreign state would work expatriation.

⁴ Acting Secretary of State Porter to Mr. Winchester, Minister to Switzerland, Foreign Relations of the United States (hereinafter cited as "Foreign Relations"), 1885, page 811;

should not be so construed.⁵ The error into which the German Agent has quite naturally fallen arises through the use of loose language confusing the permanent loss of citizenship with the loss for the time being of diplomatic protection. This confusion is due to a failure to bear in mind that the right to protection does not necessarily follow the technical legal status of citizenship.⁶ While the American Department of State may in the exercise of its sound discretion well decline to issue a passport to, or intervene on behalf of, or otherwise extend diplomatic protection to an American by birth of foreign parents so long as he resides in the country of the nationality of his parents, it is not believed that it has, by departmental rule or otherwise, asserted the power to strip of American citizenship one so born. At all events the Umpire holds that the American State Department does not possess and has never possessed such power, and that the Congress of the United States has not as yet seen fit through legislation to adopt the rule adopted by numerous other countries under which the anomalous status of dual nationality must be terminated through election by the party possessing it within a reasonable fixed time after becoming *sui juris*. Much might be said in favor of adoption by the United States and other nations of a multilateral treaty, supplemented by municipal legislation, looking to the abolition of dual nationality or its termination through enforced election under appropriate restrictions. But it is not competent for this international tribunal to consider what the municipal law of the United States with respect to its citizenship should be, but only to find and declare that law as it is, to the extent necessary to determine the jurisdiction of this Commission and the liability of Germany under the Treaty of Berlin.

The Umpire holds that as Robert A. G. Mackenzie was born an American citizen and never exercised his right of expatriation by the only methods prescribed by the law of the United States he remained an American citizen to the time of his death. But even if the American law had during the life

Secretary of State Bayard to Mr. Lee, Minister to Austria-Hungary, Foreign Relations, 1886, page 12; Secretary of State Bayard to Mr. Vignaud, Minister of France, Foreign Relations, 1886, page 303; Secretary of State Bayard to Count Sponneck, Minister of Denmark, Foreign Relations, 1888, page 489; Acting Secretary of State Seward, December 31, 1878, to the American Minister at Paris concerning Henry Tirel, 20 MS. Instructions to France, 7.

⁵ See particularly General Instruction No. 919 (Diplomatic Serial No. 225-A) issued to the diplomatic and consular officers of the United States on November 24, 1923, by Secretary of State Hughes. See also Secretary of State Evarts to Mr. Cramer, Minister to Denmark (1880), III Moore's Digest of International Law (hereinafter cited as "Moore's Digest"), page 544; Acting Secretary of State Porter to Mr. Winchester, Minister to Switzerland, Foreign Relations, 1885, page 811, and III Moore's Digest, pages 545-546; Secretary of State Olney to Mr. Uhl, Ambassador to Germany (1896), III Moore's Digest, at page 551; Secretary of State Olney to Mr. von Reichenau, Foreign Relations, 1897, at page 183; *Ex parte* Chin King (Circuit court, District of Oregon, 1888), 35 Federal Reporter 354.

⁶ Secretary of State Fish to Mr. Niles, October 30, 1871, 91 MS. Dom. Letters 211, III Moore's Digest, page 762.

of Robert A. G. Mackenzie recognized the doctrine of election as applicable to one born an American citizen and possessing dual nationality, still this would not change the Umpire's disposition of this case on the record presented. In each case cited by the German Agent the American State Department was dealing with a person, born in the United States of alien parents, who had gone to the country of which they were nationals and had continued to reside therein after attaining his majority, and held that such continuing residence constituted such strong *evidence* of his having elected to take the nationality of his parents as to justify the Department, in the exercise of its discretion and during the continuance of his residence in the country of the nationality of his parents, in declining to issue to him a passport or extend to him diplomatic protection. But the German Agent has confused evidence of an election with the fact of election. Continued residence in the country of which the parents were nationals is strong evidence from which may be inferred an election of the nationality of the parents by one born in the United States of aliens. But such inference is by no means conclusive, nor is such evidence of election exclusive, but it may be rebutted by other competent evidence. Such election is a fact and may be established as any other fact. In the event of conflict in the evidence with respect to the election, if any, actually made, the evidence must be weighed and the conflict decided as any other issue of fact.

The diligence of the German Agent has pointed the Umpire to no instance where an American national by birth has been denied diplomatic protection by the American Department of State where he was residing in and had a permanent residence in the United States, notwithstanding the fact that, after attaining his majority, he may have continued to reside for a term of years in the country of his alien parents. Such inferences as may be drawn from the instructions of the State Department tend toward a recognition not only of American citizenship but the right to diplomatic protection in such a case.⁷ This is the case here presented. The American Department of State, through the American Agent before this Commission, is contending that Robert A. G. Mackenzie never elected to become a British national but at all times elected to remain and did remain an American national. The Umpire finds as a fact that the record here presented sustains this contention.

It follows that Mary A. Mackenzie, widow of Robert A. G. Mackenzie, was an American national when she met her death on the *Lusitania*. It likewise follows that James R. D. and William Mackenzie, who were born abroad of American parents, and who on attaining their majority were residing in the United States and continued to reside therein, were American nationals at the time of their mother's death. The contention of the German Agent that the decedent and her two sons did not possess American nationality at the time of her death is therefore rejected. Ethel Annie Mackenzie

⁷ See particularly instruction by Secretary of State Hughes and other authorities cited in note 4, *supra*.

married Ralph Forbes Purrington, an American national, in 1908. Her American nationality is not challenged. James R. D. Mackenzie died on January 12, 1921, and was survived by his wife and daughter, Hattie May Warner Mackenzie and Margaret L. C. Mackenzie.

Mary A. Mackenzie was 58 years of age at the time of her death. She had no earning capacity. No one was dependent upon her and she made no contributions to anyone which are susceptible of measurement by pecuniary standards. Her children all maintained establishments of their own. She resided with her married daughter, and the inference from the record is that she was dependent upon her children for support.

The personal property, including cash, belonging to the decedent and lost with her was of the value of \$300.

Applying the rules announced in the *Lusitania* Opinion and in other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of William Mackenzie, Administrator of the Estate of Mary A. Mackenzie, Deceased, the sum of three hundred dollars (\$300.00) with interest thereon at the rate of five per cent per annum from May 7, 1915; and further decrees that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the other claimants herein.

Done at Washington October 30, 1925.

EDWIN B. PARKER,
Umpire.

RICHARDS v. GERMANY
(Docket No. 5590)

Decision, November 11, 1925

Decedent was lost on the *Lusitania* while in company with her father, a naturalized American citizen, who was returning with his family to England, his native land, and where he has since continued to reside without registering as an American citizen or applying for an American passport, as advised by the American Consul.

When the United States entered the war on April 6, 1917, claimant had not resided in his native land for the full period of two years and no statutory presumption of expatriation had, up to that moment, arisen under the Act of March 2, 1907, which prohibits expatriation while the United States is at war; but when, on July 2, 1921, the United States ceased to be at war, the statutory presumption of expatriation did obtain.

Held, that the claimants have failed to discharge the burden resting upon them to prove American nationality entitling the United States to put forward this claim.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners¹ certifying their disagreement.

Dora Millicent Richards, an infant 19 months of age, born in the United States, lost her life on the *Lusitania* while traveling with her father, mother,

¹Dated November 5, 1925.

and two older brothers, all claimants herein, from Butte, Montana, to England. The claim is put forward for pecuniary damages alleged to have been suffered resulting from the decedent's death. No claim is made for any personal injuries sustained or property lost.

The decedent's father, Thomas H. Richards, born a British subject, became an American citizen through naturalization in Montana in 1906. The very meager and unsatisfactory evidence submitted fails to disclose the purpose of Richards in returning with his entire family to his native land. Since May, 1915, he and his family have resided in England, apparently engaged in agriculture. Under date of May 5, 1925, ten years after the sinking of the *Lusitania*, he states that the lease which he had taken on the farm upon which he and his family are living still had six years to run and he declined to follow the advice of the American Consul at Plymouth that he make application for passport to the United States or for registration as an American citizen. He expressed the hope that he would "some day" return to the United States but is apparently unwilling to state with greater definiteness when, if at all, he will return, and, while admitting that he has failed to register as an American citizen, maintains that he still is an American citizen and has not registered otherwise or voted in England.

The German Agent challenges the American nationality of the claimants and of the claim. This presents a very different question than that in the case submitted on behalf of William Mackenzie and others,² where the citizenship of the decedent and of the claimants turned on the nationality of the husband of decedent, Robert A. G. Mackenzie, a native American citizen, who during most of his minority and for several years after attaining his majority resided within the jurisdiction of Great Britain, to which his parents owed allegiance, and then returned and established a permanent residence in the United States, where he died and where his widow and children continued to live. In that case there was no statutory presumption of expatriation arising from residence within the jurisdiction of the land of alien parents. In the instant case Section 2 of the Act of the Congress of the United States approved March 2, 1907, applies. That statute, still in effect, provides that:

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also*, That no American citizen shall be allowed to expatriate himself when this country is at war.

Under this statute the continued residence of Thomas H. Richards in his

² Docket No. 2482, decided by the Umpire on October 30, 1925.

native land did not *ipso facto* operate to deprive him of American citizenship, but it raised a rebuttable presumption of his expatriation. However, the rights of American citizenship carry with them correlative duties, and while the American rule clearly recognizes the general right of expatriation that right does not exist while the United States is at war. Since Richards had not resided in his native land—England—for the full period of two years when the United States on April 6, 1917, entered the war, no statutory presumption of his expatriation had up to that moment arisen.

Thereafter he was not *allowed*, under the statute, to expatriate himself while the United States was at war. But this statutory limitation on his right of expatriation did not toll the running of the statute against him, and when on July 2, 1921, the United States ceased to be at war the statutory presumption of expatriation arising from a residence in his native land of two years or more, including the war period, did obtain.³ It is not seriously contended by the American Agent that this presumption has been rebutted. The clear inference from the record is that it can not be rebutted. On the record as submitted the Umpire decides that the claimants have failed to discharge the burden resting upon them to prove American nationality entitling the United States to put forward this claim under the rule announced in Administrative Decision No. V.

Applying the rules announced in the *Lusitania* Opinion, in Administrative Decision No. V, and in other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay any amount to the claimants herein or any of them.

Done at Washington November 11, 1925.

(signed) EDWIN B. PARKER,
Umpire.

ARTHUR SEWALL & COMPANY *et al v.* GERMANY
(Docket No. 6070)

Decision, April 21, 1926

Claim for freight money on a cargo of British-owned wheat payable upon the completion of the voyage of the *William P. Frye*, an American vessel, which was sunk by a German cruiser after more than one half of the voyage had been completed. A stipulated award for the loss of the ship was entered on October 30, 1925, and the present claim comes up on a joint motion of the American and German Agents to reconsider that award.

Under the Treaty of Berlin, Germany's liability arising out of the destruction of ships and their cargoes is limited to physical or material damage to tangible things and does not extend to consequential damages growing out of the frustration of contract obligations resulting from such destruction. The so-called lien for freight under the claimant's contract of affreightment amounts to nothing more nor less than the right to hold the cargo until the freight *when earned* shall have been paid. Until so earned, the lien to secure its payment does not mature. Such lien attaches only while the cargo remains in the possession of the shipowner.

³ General Instruction No. 919 (Diplomatic Serial No. 225-A), issued by the Department of State of the United States on November 24, 1923, compilation of *Circulars Relating to Citizenship, Etc.*, 1925, at page 120.

The contract was frustrated by the destruction of the cargo. The freight was never earned, and the lien to secure its payment never matured.

Under the terms of the treaty, there is no room for the legal fiction that Germany accepted delivery of the cargo which she destroyed or that she assumed *cum onere* the contract which was frustrated by her act.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

The facts as disclosed by the record follow:

The claimants herein, all American nationals, were the owners of the *William P. Frye*, a steel, four-masted, square-rigged sailing ship duly licensed under the laws of the United States and registered at the port of Bath, Maine. On October 13, 1914, the owners of that ship entered into a contract of affreightment for the carriage of a cargo of wheat from Tacoma and/or Seattle, in the State of Washington, obligating them to proceed to Queenstown, Falmouth, or Plymouth "for orders . . . to discharge at a safe port in the United Kingdom . . . and there deliver the same and be paid freight, as herein provided." The charter party further stipulated for the payment of freight to the claimants "in cash without discount, on true and faithful delivery of cargo at port of discharge." The cargo was loaded in accordance with the charter party, the vessel cleared from Seattle November 4, 1914, and the voyage was more than one-half completed when, on January 27, 1915, the vessel with her cargo was captured and on the following morning sunk by the cruiser *Prinz Eitel Friedrich* of the German Navy in the South Atlantic Ocean. Claimants received indemnification from American insurers under five war-risk insurance policies on the hull in amounts aggregating \$58,550.00 and also received from a Canadian insurer \$10,000.00 under a war-risk insurance policy as indemnity for the loss of freight.

On September 11, 1925, the American and German Agents filed with the Commission an agreed statement of facts, in which it was recited that "The fair market value of the *William P. Frye*, at the date of loss, was the sum of \$150,000.00, and the claimants have therefore suffered a loss in the sum of \$91,450.00, being the agreed fair market value of the vessel lost less the \$58,550.00 which the war-risk insurers paid to claimants for the loss of the hull." On this agreed statement the National Commissioners on October 30, 1925, entered an award on behalf of the claimants in the sum of \$91,450.00 with interest thereon at the rate of five per cent per annum from the date of the loss to the date of payment.

Thereafter, on November 19, 1925, the American and German Agents joined in a motion requesting this Commission to reconsider that award

in order that the Commission may determine whether the Government of Germany is liable for the additional sum of \$39,759.54, for loss to the claimants of freight monies, the payment of which was controlled by the terms of an existing charter party.

This motion was accompanied by a corrected agreed statement of the two Agents reciting that —

There was loaded upon the ship *William P. Frye* a cargo of approximately 5,034 tons of wheat which, upon completion of the voyage, would have secured to the claimants, the payment of \$39,759.54 as freight monies.

The Agent of the United States and the Agent of Germany submit to the Commission for its determination, the claim for loss of freight in the sum of \$39,759.54.

From that sum the \$10,000 received from the Canadian insurer must be deducted.

In certifying to the Umpire for decision the question thus put by the two Agents, the National Commissioners stated that they have "been unable to agree on the question of the liability of Germany for this loss or any part of it under the Treaty of Berlin."

For the reasons fully set forth in Administrative Decision No. VII, this Commission has held that under the Treaty of Berlin Germany's liability arising out of the destruction of ships and their cargoes is limited to physical or material damage to tangible things and does not extend to consequential damages growing out of the frustration of contract obligations resulting from such destruction. In the case here presented the only tangible things destroyed by Germany's act were (a) the ship, its equipment and stores, all owned by claimants and for which an award equal to their fair market value as stipulated by the Agents has already been entered on claimants' behalf, and (b) the cargo of wheat, which was British-owned and for which no claim is here presented.

It is urged that the claimants were by Germany's act in destroying the ship deprived of their right to continue with the voyage and thus completely to earn the freight money due them only on the completion of the voyage and delivery of the cargo. The argument advanced and the authorities cited by the counsel for both parties are interesting and would be pertinent if Germany's liability had to be determined either by rules of municipal law obtaining in the jurisdiction of the cases cited or by rules of international law in the absence of a treaty fixing the basis of liability. But, as has been repeatedly pointed out, Germany's obligations are fixed by the treaty provisions without regard to the legality or illegality or the other qualities of the act resulting in the damage complained of. After very mature and painstaking consideration, this Commission has held that under the terms of the Treaty of Berlin, Germany's liability in a case of this nature is limited to the reasonable market value of the tangible property destroyed at the time and place of destruction with interest thereon.

But it is contended that the claimants (American nationals) had a lien on the cargo (which was impressed with the British nationality of its owners) for their freight money and that this claim was a property interest in the cargo

itself, for the destruction of which the claimants can recover under the rule announced in Administrative Decision No. VII.

While there is no doubt that as between claimants and the owner of the cargo the former had a right to retain possession of the cargo pending the completion of the voyage and the payment of the freight, this was the extent of the claimants' rights. Under the express terms of the contract the freight was not earned or payable *pro rata itineris*. There never was a time when the claimants could demand the payment of the freight or any part of it. The contract was an entire contract under the terms of which the freight was to be earned and paid only on delivery of the cargo at destination.

The so-called lien for freight amounts to nothing more nor less than a right to hold the cargo until the freight *when earned* shall have been paid. Until so earned the lien to secure its payment does not mature. Such lien attaches only while the cargo remains in the possession of the shipowner. When it passes out of the shipowner's possession the lien does not follow the cargo, or inhere in it, or remain a charge upon it.

While, therefore, at the time the cargo involved in this case was destroyed, the claimants under their contract of affreightment had a right to possess it for the purpose of performing their contract and to collect the freight due thereunder, if, and when, that performance should be completed, further than this their interest in the cargo did not extend. The contract was frustrated by the destruction of the cargo. The freight was never earned and the lien to secure its payment never matured.

It is further contended on behalf of the claimants that in destroying the ship and the cargo Germany in effect stepped into the shoes of the cargo owner and accepted full delivery of the cargo at the place of destruction, and hence became liable to the claimants for the full amount of the freight stipulated for in the contract. Here again the rules for determining Germany's liability laid down in the Treaty of Berlin are lost sight of in an effort to apply rules prescribed by municipal law. Under the terms of the treaty there is no room for the legal fiction that Germany accepted delivery of the cargo which she destroyed or that she assumed *cum onere* the contract which was frustrated by her act. Her liability is fixed by the terms of the treaty as applied to the actual facts, not to legal fictions, and the facts are that Germany destroyed the cargo upon which the claimants' lien never matured and frustrated the contract which was never performed. The sole question presented is, Was Germany's act in destroying the British-owned cargo, which resulted in frustrating the claimants' contract to carry and deliver it to destination, a damage for which Germany is liable under the Treaty of Berlin? For the reasons pointed out in Administrative Decision No. VII this question must be answered in the negative, as the American and German Agents have agreed that, measuring the damages suffered by claimants resulting from the act of Germany in sinking the *William P. Frye* on the basis of the fair market value of that vessel on the date of her destruction, the

claimants herein have suffered damages in the sum of \$91,450.00 and no more, and as the National Commissioners on October 30, 1925, entered an award herein on behalf of the claimants for that amount with interest thereon at the rate of five per cent per annum from the date of the loss to the date of payment, the Commission decrees that the said award be, and it is hereby, in all things confirmed; and the Commission further decrees that the Government of Germany is not obligated to pay to the Government of the United States any further or additional amount on behalf of the claimants herein because of any loss or damage alleged to have been sustained by them connected with or growing out of the destruction of the *William P. Frye*.

Done at Washington April 21, 1926.

EDWIN B. PARKER,
Umpire.

IN THE MATTER OF THE ARBITRATION BETWEEN THE REPUBLIC OF CHILE AND
THE REPUBLIC OF PERU, WITH RESPECT TO THE UNFULFILLED PROVISIONS
OF THE TREATY OF PEACE OF OCTOBER 20, 1883, UNDER THE PROTOCOL
AND SUPPLEMENTARY ACT SIGNED AT WASHINGTON JULY 20, 1922

*Order Allowing an Appeal from the Decision of the Plebiscitary Commission
made on the 9th day of December, 1925*

December 22, 1925

WHEREAS the Opinion and Award given in the foregoing matter on the 4th day of March, 1925, provided for the holding of a plebiscite as required by Article 3 of the Treaty of Ancon and to that end made provision for a Plebiscitary Commission which has since been duly constituted and is now engaged in the performance of its functions in the plebiscitary area; and

WHEREAS in and by said Opinion and Award the following provision was made for appeals to the Arbitrator from the decisions of the Plebiscitary Commission:

D. *Appeal to the Arbitrator.* 1. The Arbitrator reserves the power and right on his own motion to entertain an appeal from the Plebiscitary Commission on any question decided by it. The Arbitrator further reserves the power and right to entertain an appeal on the certificate of the Commission to the effect that the question decided involves the interpretation of the Award, the jurisdiction of the Commission, or some question of general importance in relation to the holding or result of the plebiscite and that one member of the Commission has filed a dissenting opinion in writing and requested that the question be certified to the Arbitrator.

In every case of appeal, the Arbitrator reserves the power and right to determine the time and manner in which, and the record upon which, the appeal shall be submitted to the Arbitrator;

AND WHEREAS at a meeting of the Plebiscitary Commission held on

November 21, 1925, the Chilean member of said Commission presented a resolution reading as follows:

MOTION TO FIX THE DATE OF THE PLEBISCITE

WHEREAS, the Arbitral Award provides that the primary duty of the Plebiscitary Commission shall be to proceed at once to formulate the regulations governing the plebiscite and to fix the date thereof; and

WHEREAS, nearly four months have elapsed since the Plebiscitary Commission began to function, a term which corresponds to that fixed by the Arbitrator for the appointment of its members and which, by analogy, can be considered as the maximum that the Arbitrator had in mind for the Commission to comply with the obligations imposed upon it in that very paragraph of the Award; and,

WHEREAS, the Plebiscitary Commission received on the 12th of August last, or nearly four months ago, the draft of registration and election regulations presented by the Chilean member, and in the first days of October, or nearly two months ago, the draft of registration and election regulations presented by the Peruvian member, and the member representing the Arbitrator has therefore had ample time to examine the points of view of the parties to the plebiscite and to decide upon election regulations that will guarantee the rights of both; and,

WHEREAS, the investigations which the President of the Plebiscitary Commission has thought fit to carry out through his field observers came to an end over two months ago and need not be pursued over an indefinite period of time, since in the entire territory there are but two cities, three small inhabited valleys and not more than eight or ten hamlets; and,

WHEREAS, as the result of the reports of these observers the Plebiscitary Commission adopted, at the meeting of the 2d of November, a "motion of prerequisites," and the resolutions incorporated in that motion have been and continue to be executed *de facto* by the Chilean authorities, although Chile has not recognized in the Plebiscitary Commission any legal power to demand their execution, thereby demonstrating the unalterable will animating Chile to coöperate in the labours of the Commission and to carry out the Award in its letter and spirit; and,

WHEREAS, whatever may be the conclusions to which the investigating committees shall have reached or may hereafter reach, it is a notorious fact that the incidents examined and the complaints presented are not of a character to prevent the Plebiscitary Commission from adopting for the entire registration and voting period all measures necessary to ensure to all qualified voters the free registration and the free casting of their votes to which end Chile has offered the most ample and effective support; and

WHEREAS, the indefinite prolongation of the plebiscitary period cannot alter the electoral position of the parties and is leading to a needless and inconsiderate increase in the expenses the contesting parties are incurring, to the paralyzation of all the profitable activities of the inhabitants of Tacna and Arica, and to what constitutes a still graver injury, namely, the deepening of the animosity which the contest has awakened among those inhabitants; and,

WHEREAS, the object sought to be accomplished by the Washington Protocol was to reestablish cordial relations between Chile and Peru by eliminating the main causes of discord; and

WHEREAS the dilatory proceedings prevent the realization of that object, give rise to new causes of irritation and frustrate, in fact, the noble purposes of the negotiations of that international pact; and

WHEREAS, if one of the parties to the contest resist, actively or passively, the ful-

fillment and execution of the Arbitral Award it is the duty of the Arbitrator to take all necessary steps to accelerate fulfillment and execution of the Award, now therefore,

BE IT RESOLVED:

Numbered one. That the committee to study the registration and election regulations shall present its report, or, in case of difference of opinion, the reports of its members, not later than the 10th of December next and that the Plebiscitary Commission shall proceed to discuss and vote the proposals in successive meetings so that the registration and election regulations may be completed and enacted not later than the 15th of December, 1925.

Numbered two. That the registration boards shall start to function not later than the 20th of December, 1925, and remain open to claimants to the right to vote until the 10th of January, 1926.

Numbered three. That proceedings arising out of registration challenges may begin on the very day the registration board begins to function, namely, the 20th of December, 1925, and continue until the 10th of January, 1926, when the registration will be closed, and that all cases should be decided not later than the 30th of January, 1926.

Numbered four. That the plebiscitary vote shall be taken on the 1st of February, 1926.

AND WHEREAS the Plebiscitary Commission at a session thereof held on the 9th of December, 1925, rejected the foregoing proposed resolution of the Chilean member of said Commission and in substitution thereof adopted the following resolution by a majority vote of the Commission, the Chilean member voting in the negative:

THE PLEBISCITARY COMMISSION TACNA ARICA ARBITRATION

1. WHEREAS, since April 13, 1924, the date of submission of the counter cases to the Arbitrator, and March 9, 1925, the date of the promulgation of the Award of the Arbitrator, the Chilean authorities in Tacna Arica, in disregard of obligations arising from the submission and in violation of the Award, not only have failed and neglected so to exercise the powers of government as to render progress toward a fair plebiscite possible but have used those powers unlawfully to reduce, by means of expulsion and deportation, the number of Peruvian voters in the plebiscitary territory and to place and continue Peruvian voters remaining in that territory in a state of fear and subjection inconsistent with the free exercise of electoral rights.

2. WHEREAS, the Award of the Arbitrator conferred upon the Plebiscitary Commission "marks complete control over the plebiscite . . . subject only to the provisions of this Opinion and Award" (Award, page 55).

3. WHEREAS, in view of conditions actually existing in the territory and in the exercise of authority conferred by the Award, the Plebiscitary Commission on November 2, adopted a resolution, hereinafter referred to as the prerequisites resolution, enumerating certain prerequisites to a fair plebiscite in Tacna Arica.

4. WHEREAS, His Excellency the Chilean member of the Commission, at the session of November 6 and on other occasions, though refraining from expressing an opinion with regard to the prerequisites resolution, gave assurances that as a practical matter his government would cooperate in giving effect to the provisions thereof.

5. WHEREAS, the Commission has passed various resolutions designed to carry into effect the prerequisites resolution, including a resolution respecting entry into and departure from the plebiscitary territory.

6. WHEREAS, compliance by the authorities responsible for the government and

control of Tacna Arica with necessary demands made by the Commission in the performance of its duty has, when accorded at all, been formal rather than substantial.

7. WHEREAS, under date of November 21, 1925, in note number 100, addressed to the President of the Commission, His Excellency the Chilean member made statements as follows:

(A) That his government has given him "instructions to state that Chile will hereafter abstain from participation in any of the proceedings of the Commission or its subsidiary agencies unless they are directly and closely connected with the registration and election regulations and provide for fixed dates for the registration and voting. . . ."

(B) That "as and when Plebiscitary Commission is prepared to proceed with the enactment of those regulations and with the fixing of the corresponding dates the Chilean Government will be very glad to cooperate in the adoption of all measures compatible with the exercise of its sovereignty over these territories which the Plebiscitary Commission may deem necessary to carry out a free and fair plebiscite."

(C) That "The Chilean authorities in Tacna and Arica have received instructions to ignore each and every one of the decisions of the Plebiscitary Commission or its subsidiary agencies which may require their cooperation until the registration and election regulations shall have been enacted and the dates for registration and the holding of the plebiscite shall have been fixed."

(D) That he would not resume his "attendance at the meetings of the Plebiscitary Commission until they shall include in their agenda the registration and election regulations and the dates for the opening of the registration and for the holding of the plebiscite."

(E) That accordingly he proposed a motion which provides in substance that the committee on registration and election regulations shall present its report not later than the 10th of December, 1925; that the Commission shall enact the regulations not later than the 15th of December, 1925; that the registration board shall begin to function not later than the 20th of December, 1925, and conclude their labor on the 10th of January, 1926, that all appeals from registration board shall be decided not later than 20th of January, 1926; and that the plebiscitary vote shall be taken on the 1st of February, 1926.

8. WHEREAS, in his note number 103, dated November 23, 1925, His Excellency the Chilean member, replying to a communication dated November 21 with which the President of the Commission transmitted an authenticated copy of a resolution of the Commission passed pursuant to the prerequisites resolution, for the purpose of carrying out said resolution and requesting the Chilean Government to remove from office, among others, Señor Don Juan Solis and Señor Don José Canales, stated that:

"Señor Don Juan Solis and Señor Don José Canales, subinspectors of Police, Tacna, will not in accordance with the stipulations of my note number 100 of the 21st be removed from office."

9. WHEREAS, under date of November 27, 1925, the President of the Commission addressed a communication to His Excellency the Chilean member in reply to the latter's note number 100 of November 21, in which the following statements, among others, were made:

(A) "If Your Excellency's statements are to be taken literally they are inconsistent with any intention to abide by the Treaty of Ancon, the Protocol of Arbitration, the Award of the Arbitrator, and the decisions of the Plebiscitary Commission."

(B) "If Your Excellency, or Your Excellency's Government, considers that the Plebiscitary Commission has made an incorrect decision, either affirmative or negative, either by way of doing something that it ought not to have done or by refraining from doing something that it ought to have done, and far more if it has exceeded its authority under the Award or failed to obey its prescriptions, the Award itself and the rules of the Plebiscitary Commission provide for appeal to the Arbitrator, whereby any error of

judgment, positive or negative, or any action *ultra vires*, on the part of the Commission may be speedily and summarily corrected. It is clear, therefore, that in failing to take an appeal to the Arbitrator, in announcing Your Excellency's intention, under the instruction of the Chilean Government, to absent yourself from the further meetings of the Plebiscitary Commission until the Commission sees fit to take certain action demanded by Your Excellency, and in announcing that the Chilean authorities in Tacna Arica have been instructed to: 'ignore each and every one of the decisions of the Plebiscitary Commission or its subsidiary agencies which may require their coöperation' until the Commission has taken such action, Your Excellency, and Your Excellency's Government have disregarded the prescriptions of the Award."

(C) "If this attitude is persisted in by Your Excellency's Government, the Commission will be left with no alternative except to report to the Arbitrator the failure of its efforts to carry out the plebiscite under the Award owing to the refusal of the Chilean Government to permit the Commission to function."

(D) "The continuation and completion of this task (*i.e.*, the preparation of the election and registration regulations) would of course involve Your Excellency's coöperation in the proceedings of the Commission and, without waiting for promulgation of registration and election regulations, the reservation by Your Excellency's Government of the instructions given to the Chilean authorities in Taona-Arica to ignore the decision of the Plebiscitary Commission and its agencies. Your Excellency will, I am sure, appreciate that this is vital. . . ."

(E) "In this connection I must remind Your Excellency that it is not within the competence of the Plebiscitary Commission finally and unalterably to 'fix' dates for the registration and for the polling. The paragraph of the Award to which Your Excellency has more than once referred, which makes it the duty of the Commission to 'fix the date for plebiscite and time and places of registration and voting,' is followed by the provision 'the dates, times, and places so fixed may be changed by the Commission.'"

"Considering both of these prescriptions it is plainly the duty of the Commission when determining dates for registration and voting to select dates that are not only fair to both parties but which the Commission has reasonable grounds to believe will enable each of the parties to take all intermediate steps necessary to protect rights and meet obligations."

(F) "I believe that with good will all around the committee on registration and election regulations should be able to report to the Commission by the end of December. If this were done, it seems to me that the Commission might be able to adopt and promulgate the regulations by on or about January 15th, that registration might begin within about 30 days thereafter, and allowing an equal period for registration and the same for appeals, we might look forward to a vote about the middle of April. This is an estimate based on assumed 'good will all round.' No matter how brief nor how long a time it takes, I cannot participate in any plebiscite which does not in my judgment truly represent the free and untrammelled will of the plebiscitary electorate."

(G) "I trust that in view of the foregoing frank exposition of my view in the premises, Your Excellency will see your way to resume participation in the work of the Plebiscitary Commission and that Your Excellency's Government will give such instructions as may be necessary to secure the coöperation of the local authorities upon the understanding that the work of framing the registration and election regulations will be continued with all practicable energy and despatch."

10. WHEREAS, the letter written by the President of the Commission on November 27 was delivered to His Excellency the Chilean member about 9 A. M., on Saturday, November 28, and at the meeting of the Commission which took place about 11 A. M., of the same date the Chilean member read an address in which the proceedings of the Commission are reviewed in a manner that is fragmentary rather than comprehensive and critical rather than constructive and which abounds in direct attacks upon the

motives of his Peruvian colleague and indirect but none the less evident reflections upon the motives of the President of the Commission.

11. WHEREAS, said address was given to the press by His Excellency the Chilean member, as he stated in pursuance to the instructions of his government, in direct violation of the understanding under which the Commission had theretofore operated and pursuant to which only decisions of the Commission and certain documents pertinent thereto collected by the press committee were to be given to the public, and after the President of the Commission had specifically drawn the Chilean member's attention to this agreement, advising him that the publication of his aforesaid address could not but be regarded by the Commission as a conspicuous and most unfortunate violation thereof.

12. WHEREAS, the reading and giving to the press of the foregoing address of His Excellency the Chilean member has undermined the work already accomplished by the Commission, interrupted its regular labors, postponed and rendered more difficult its task, the accomplishment of a free and fair plebiscite, and impaired confidence in the purpose of the Chilean authorities to meet their obligations in connection with the plebiscite except upon their own terms.

13. WHEREAS, His Excellency, the Chilean member of the Commission, in the course of his address of November 28, said, among other things:

"In obedience to the instructions of my government, I have the honor to state that should the Plebiscitary Commission reject any of the proposals contained in my motion to fix a date for the plebiscite, I shall act in strict accordance with my note number 100 of the 21st of this month, and, I must formally reserve, on behalf of my government, the right to adopt any course of attitude which it may deem necessary to safeguard Chile's rights and to save the principle of arbitration and respect for arbitral sentences from the danger to which that principle is now exposed at the hand of the majority of this Commission."

Thus serving notice that even such coöperation as the Chilean member of the Commission and the Chilean authorities had accorded the Commission in the past would be resumed only upon terms dictated by himself and his government.

14. WHEREAS, the letter of November 27 from the President of the Commission to His Excellency the Chilean member has not been answered by the latter except in so far as his address of November 28 may be regarded as a rejection of the constructive suggestions presented in the President's letter.

15. WHEREAS, His Excellency the Chilean member of the Commission has repeatedly announced that his government declines and refused to comply with the decisions of the Plebiscitary Commission within the scope of its authority under the Award of the Arbitrator, except upon the condition that the Commission submit to all the demand of the Chilean member as outlined in the motion set forth in his letter number 100.

16. WHEREAS, respect for the Arbitrator and the rule laid down by him in the Award to the effect that the Commission shall act by majority vote forbid the Commission to permit any member thereof to dictate the conditions upon which compliance with its legitimate decisions will be accorded.

17. WHEREAS, the conditions sought to be established by means of the resolution proposed by His Excellency the Chilean member of the Commission are unjust and destructive of the right of the plebiscitary electorate to be afforded an opportunity to participate in a free, fair and orderly plebiscite.

18. WHEREAS, from every practical point of view and upon every practical assumption the holding of a plebiscite in conformity with the schedule of dates proposed by His Excellency the Chilean member of the Commission is impossible.

19. WHEREAS, if a free, fair and orderly plebiscite is to be held in Tacna Arica conditions in the territory must undergo modification, and the accomplishment of that

modification obviously depends upon adequate and harmonious coöperation by the Chilean authorities with the Commission.

20. WHEREAS, as pointed out by the President of the Commission in his letter of November 27, the Commission in the natural and orderly course of events would have been able to adopt registration and election regulations on or about the 15th of January next, and notwithstanding the interruption of its labors and the division of the time and attention of its members caused by the arbitrary action of His Excellency the Chilean member, as set forth in his communication number 100 of November 21st and his address of November 28th, it may still be possible, with the good will and coöperative effort of all concerned, for the Commission to complete the registration and election regulations on or about the 15th day of January, 1926, now, therefore,

Be it resolved by the Plebiscitary Commission, Tacna Arica Arbitration, that conscious of its responsibility to the Arbitrator, to the parties, and to the people of Tacna Arica, and in view of impossibility from an administrative standpoint of holding the prescribed plebiscite in conformity with the schedule of dates proposed by His Excellency the Chilean member, the Commission is compelled to decline and does decline to accept that schedule.

SECTION 2. That the committee appointed by the Commission to study drafts of registration and election regulations presented by the Chilean and Peruvian delegations respectively and to render a report to the Commission shall present its report, or in case of difference of opinion the reports of its members, as soon as practicable, with a view to the adoption and enactment of such regulations by the Commission on or before the 15th day of January, 1926.

SECTION 3. That the registration and election board shall begin to function as registration boards on the 15th of February, 1926, or as soon thereafter as the Commission shall deem it practicable to do so, and shall continue to function as such for a period of one month.

SECTION 4. That proceedings designed to correct any alleged erroneous ruling of registration board may be begun immediately after such ruling shall have been made of record; and all appeals from such rulings shall be decided at or before the end of three weeks next following the close of the registration.

SECTION 5. That the plebiscitary vote shall be taken on 15th day of April, 1926, or as soon thereafter as the Commission shall deem it practicable to have the vote taken.

SECTION 6. That the foregoing schedule of dates is based upon the assumption that both parties to the plebiscite will proceed expeditiously and in good faith to give full effect to the resolutions and regulations heretofore adopted or which may hereafter be adopted by the Commission, to the end that a fair and orderly plebiscite may be held, it being understood that the schedule is subject to change from time to time if, in the judgment of the Commission, any such change shall appear to be necessary or advisable.

SECTION 7. That the Commission hereby respectfully calls upon His Excellency the Chilean member formally to advise the Commission clearly and specifically whether or not the Chilean Government is prepared henceforth to coöperate effectively with the Commission and especially to instruct its officials and representatives in Tacna Arica, effective as of the date of the Chilean member's reply hereto, thereafter to coöperate adequately in carrying out the regulations and resolutions heretofore adopted or which may hereafter be adopted by the Commission, always having the right of appeal to the Arbitrator in accordance with the provisions of his Opinion and Award and the rules of procedure of the Commission.

SECTION 8. That the President of the Commission be and he is hereby instructed to cause an authenticated copy of this resolution to be presented to His Excellency the Chilean member of the Commission, and that the Chilean member of the Commission

be and he is hereby instructed to cause this resolution to be brought to the attention of the proper Chilean authorities;

AND WHEREAS at a meeting of the Commission held on the 14th day of December, 1925, the Chilean member presented a dissenting opinion to the foregoing decision of the Plebiscitary Commission, said dissenting opinion being dated December 11; and

WHEREAS the Plebiscitary Commission at a meeting held on the 16th day of December, 1925, adopted the following resolution, to wit:

THE PLEBISCITARY COMMISSION TACNA ARICA ARBITRATION

Resolved by the Plebiscitary Commission, Tacna Arica Arbitration, that the portion of the "dissenting opinion and request for certification on appeal" of His Excellency the Chilean member, dated December 11, 1925, read, delivered and filed on December 14, 1925, which sets forth a dissent and appeal from the action of the Commission, on December 9, 1925, in substituting for a resolution to fix the date of the plebiscite introduced by the Chilean member, a resolution on the same subject introduced by the President of the Commission, and in adopting the latter, be and hereby is certified to the Arbitrator under the provisions of the second sentence of paragraph D, page 45 of the Award, as presenting a "question of general importance in relation to the holding or result of the plebiscite;" and that all other portions of said "dissenting opinion and request for certification on appeal" be transmitted to the Arbitrator for such consideration as he may deem proper, on his own motion, under the provisions of the first sentence of said paragraph D.

SECTION TWO. That the President of the Commission be and hereby is instructed to cable to the Arbitrator this resolution, the aforesaid "dissenting opinion and request for certification on appeal," the Chilean member's note number 100, dated November 21, 1925, containing a draft of a resolution to fix the date of the plebiscite, the substitute for said resolution introduced by the President and adopted by the Commission, and the Chilean member's notes numbered 106 and 108, dated respectively November 25 and December 7, 1925, and also to forward to the Arbitrator by mail a copy of each of said documents.

SECTION THREE. That after His Excellency the Chilean member of the Commission shall have delivered to the Secretary General for transmission to the Arbitrator a complete file of all documents, including all the minutes of the meetings of the Commission, which the Chilean member has made a part of his "dissenting opinion and request for certification on appeal" such file shall be transmitted by mail to the Arbitrator by the President of the Commission: provided, that any document included by the Chilean member in the file to be transmitted to the Arbitrator which is not included in the minutes so to be transmitted shall be filed in quadruplicate, one copy to be transmitted to the Arbitrator, one for the President of the Commission, one for the Peruvian member, and one for the Secretariat.

SECTION FOUR. That the President of the Commission be and hereby is authorized to request the Secretary of State of the United States to transmit to the Arbitrator a copy of the letter dated November 27, 1925, addressed to His Excellency the Chilean member by the President of the Commission, and copy of the remarks made by the President at the meeting of December 9, 1925, in introducing a substitute for the Chilean member's resolution to fix the date of the plebiscite; that His Excellency the Chilean member of the Commission be and hereby is authorized to request his government to instruct the Chilean Ambassador in Washington to deliver to the Secretary of State of the United States, for transmission to the Arbitrator, a copy of the Chilean mem-

ber's address delivered at the meeting of November 28, 1925, and a copy of the memorandum read and filed by the Chilean member at the meeting of December 14, 1925, respecting the resolution to fix the date of the plebiscite introduced by the President of the Commission in substitution for a resolution on the same subject introduced by the Chilean member; and that His Excellency the Peruvian member of the Commission be and hereby is authorized to request his government to instruct the Peruvian Ambassador in Washington to deliver to the Secretary of State of the United States, for transmission to the Arbitrator, a copy of the Peruvian member's statement read in the seventh session of the Commission, analyzing the conditions existing in the plebiscitary area; a copy of the remarks of the Peruvian member and a statement of the status of the cases respecting offences committed against Peruvian citizens for which complaints have been lodged in the Chilean courts, which were read during the fourteenth meeting of the Commission, on November 21, 1925; as well as a copy of the remarks made by the Peruvian member during the course of the seventeenth and eighteenth meetings of the Commission, on December 9 and 18, 1925.

SECTION FIVE. That in view of the provisions of the third and last sentence of paragraph D, page 45 of the Award, the Commission respectfully recommends that the Arbitrator communicate to the Commission by cable his determination as to the time and manner in which, and the record upon which, the instant appeals of His Excellency the Chilean member shall be submitted to the Arbitrator.

SECTION SIX. That the Commission respectfully recommends that the Arbitrator communicate to the Commission by cable his ruling as to the effect of the instant appeals upon the past, current and future proceedings of the Commission and its agencies, with special reference to the question whether or not, pending disposition of the instant appeals, the parties are bound to coöperate with the Commission in carrying out its decisions with respect to certain matters or all matters.

WHEREAS Sections 1 to 5 of the said resolution were adopted unanimously and Section 6 adopted upon the affirmative vote of the President and the Peruvian member, the Chilean member abstaining from voting thereon and formulating the following reservation:

Section six of the resolution could be interpreted in the sense that the members of the Commission are to coöperate in carrying out each and every decision adopted by the Commission but as the Commission has adopted and may adopt in the future resolutions affecting, or which may affect and even undermine the laws and jurisdiction of Chile which prevail in these territories in accordance with the Treaty of Ancon and recognized by the Arbitral Award, I am compelled to abstain from voting on this section six and I make formal reservation of the rights of Chile.

I wish to state at the same time, that in every matter outside these referred to, and particularly in the enactment of the registration and election regulations, the Commission can count on the coöperation of the Chilean member.

WHEREAS it is important that the question presented by said appeal, as certified, with respect to the date for holding the said plebiscite and the dates of the proceedings preliminary thereto should be determined with as little delay as possible;

NOW, THEREFORE, in the exercise of the power and right reserved by the Arbitrator in and by said Opinion and Award it is

ORDERED

(1) That the appeal from said decision made by said Plebiscitary Commission on the 9th day of December, 1925, be and it is hereby entertained and allowed;

(2) That said appeal shall be determined upon the documents mentioned in Section 2 of the said resolution adopted by the Plebiscitary Commission on December 16, 1925, to wit: that portion of the said dissenting opinion and request for certification on appeal which sets forth a dissent and appeal from the said action of the Plebiscitary Commission of December 9th, 1925, the Chilean member's note No. 100, dated November 21, 1925, containing a draft of a resolution to fix the date of the plebiscite, the substitute for said resolution introduced by the President and adopted by the Commission, and the Chilean member's notes Nos. 106 and 108, dated respectively November 25 and December 7, 1925, and also upon such written arguments as may be submitted to the Arbitrator on or before the 9th day of January, 1926; and such written arguments may embrace such additional documents and papers pertinent to the question upon said appeal as certified as either party may desire to present to the Arbitrator;

(3) That the Arbitrator reserves for further consideration the question of entertaining an appeal with respect to matters other than those embraced in the said Resolution of the said Plebiscitary Commission dated December 9, 1925, and the Arbitrator directs that in relation to any such other matters the party seeking such appeal shall present to the Arbitrator in writing on or before the 15th day of January, 1926, a statement showing with suitable precision the action or resolution of the said Plebiscitary Commission of which the said party complains;

(4) That until further order or determination by the Arbitrator the said Plebiscitary Commission shall proceed with the performance of its duties under the Opinion and Award dated March 4, 1925, and that this Order shall not be construed as suspending its authority.

(Signed) CALVIN COOLIDGE,
Arbitrator.

By the Arbitrator.

FRANK B. KELLOGG,
Secretary of State.

IN THE MATTER OF THE ARBITRATION BETWEEN THE REPUBLIC OF CHILE AND
THE REPUBLIC OF PERU, WITH RESPECT TO THE UNFULFILLED PROVISIONS
OF THE TREATY OF PEACE OF OCTOBER 20, 1883, UNDER THE PROTOCOL
AND SUPPLEMENTARY ACT SIGNED AT WASHINGTON JULY 20, 1922

*Opinion and Decision of the Arbitrator upon the Appeal from the Decision of
the Plebiscitary Commission made on the ninth day of December, 1925*

January 15, 1926

1. On December 9, 1925, the Plebiscitary Commission adopted a resolution to the following effect:

(a) The Commission declined to accept a schedule of dates proposed by the Chilean member for the adoption of registration and election regulations, for the commencement of the functioning of registration boards, for the early disposition of appeals from rulings of the registration boards, and for the taking of the plebiscitary vote.

(b) The committee appointed by the Commission to prepare drafts of registration and election regulations was directed to report as soon as practicable with a view to the adoption and enactment of such regulations on or before January 15, 1926.

(c) The registration and election boards were directed to begin their functions on February 15, 1926 or as soon thereafter as practicable and to continue to function for a period of one month.

(d) Proceedings to review rulings by the registration boards were required to be expedited so that appeals from such rulings should be decided within three weeks following the close of registration.

(e) The date of the plebiscitary vote was fixed at April 15, 1926 or as soon thereafter as the Commission should deem practicable.

(f) It was provided:

Section 6. "That the foregoing schedule of dates is based upon the assumption that both parties to the plebiscite will proceed expeditiously and in good faith to give full effect to the resolutions and regulations heretofore adopted or which may hereafter be adopted by the Commission, to the end that a fair and orderly plebiscite may be held, it being understood that the schedule is subject to change from time to time if, in the judgment of the Commission, any such change shall appear to be necessary or advisable."

(g) It was further provided:

Section 7. "That the Commission hereby respectfully calls upon His Excellency the Chilean member formally to advise the Commission clearly and specifically whether or not the Chilean Government is prepared henceforth to coöperate effectively with the Commission and especially to instruct its officials and representatives in Tacna-Arica, effective as of the date of the Chilean member's reply thereto, thereafter to coöperate adequately in carrying out the regulations and resolutions heretofore adopted or which may hereafter be adopted by the Commission, always having the right of appeal to the Arbitrator in accordance with the provisions of his Opinion and Award and the rules of procedure of the Commission."

(h) The President of the Commission was instructed to transmit an authenticated copy of the resolution to the Chilean member who was in turn instructed to bring the resolution to the attention of the proper Chilean authorities.

2. On December 16, 1925, the Plebiscitary Commission by resolution certified to the Arbitrator under the appropriate provisions of the Opinion and Award of March 4, 1925 that portion of "the dissenting opinion and request for certification on appeal" of the Chilean member "which sets forth a dissent and appeal from the action of the Commission on December 9, 1925, in substituting for a resolution to fix the date of the plebiscite introduced by the Chilean member, a resolution on the same subject introduced by the President of the Commission, and in adopting the latter" as presenting "a question of general importance in relation to the holding or result of

the plebiscite." Under the same resolution of December 16, 1925, the Plebiscitary Commission transmitted to the Arbitrator all other portions of the said dissenting opinion for such consideration as the Arbitrator might deem proper on his own motion.

3. On December 22, 1925, the Arbitrator made an order allowing the appeal so certified and reserving for further consideration the question of entertaining an appeal with respect to other matters than those embraced in the resolution of December 9, 1925, and as to these matters the Arbitrator directed the party seeking appeal to present in writing on or before January 15, 1926, a statement showing with suitable precision, the action, or resolution of the Plebiscitary Commission of which complaint is made. The order further provided that the Commission's authority should not be regarded as suspended pending the appeal and that the Commission should proceed with the performance of its duties under the Opinion and Award of March 4, 1925. Pursuant to the said order of the Arbitrator, the parties on January 9, 1926, filed briefs accompanied by the pertinent documents required for consideration of the appeal and of the other matters referred to in the dissenting opinion and in the resolution of December 16, 1925.

4. The Agent for the Republic of Chile, on January 9, 1926, filed on behalf of his government a communication addressed to the Arbitrator, which, among other things, declares that the appeal of Chile from the resolution of December 9, 1925 "is respectfully withdrawn in so far as such resolution fixes the time for the submission and adoption of rules and regulations governing the plebiscite and also the times for registration of voters, appeals and casting of the ballots." This communication proceeds to state: "As to other portions of the resolution, however, which make the fixing of such times dependent or conditional upon Chile's giving full effect to certain resolutions and regulations heretofore adopted or which may hereafter be adopted by the Plebiscitary Commission, Chile continues her appeal and submits herewith, in addition to the documents set forth in Your Excellency's order of December 22, 1925, a memorandum pointing out the provisions in the said resolution of December 9, 1925 to which Chile particularly objects as especially affecting the operation of the last mentioned resolution. The Agent for Chile further declares that her appeal upon the resolution of December 9, 1925, is prosecuted in this sense "in order that the resolution may be amended or modified by eliminating therefrom the objectionable assumptions and conditions." From the memorandum referred to by the Agent for Chile and accompanying his communication, it appears that the "objectionable assumptions and conditions" thus drawn into question are found in the provisions of Sections 6 and 7 of said resolution hereinabove quoted.

5. The Arbitrator on due consideration is of opinion that permission to withdraw the appeal, in so far as the schedule of dates fixed by the resolution of December 9, 1925, is concerned, should be granted.

When the order allowing the appeal was made on December 22, 1925, the only specific decision of the Plebiscitary Commission certified for review was apparently the rejection of one schedule of dates and the adoption of another. On examining the two provisions of the resolution to which Chile objects on this appeal, the Arbitrator is of the opinion that Section 6 should not be taken as setting forth conditions modifying or limiting the action of the Plebiscitary Commission in fixing the schedule of dates but rather as intended to express the desire and request that both parties should give their earnest coöperation to the end that a fair and orderly plebiscite may be held in accordance with the terms of the Opinion and Award. Section 7 would seem to be a similar appeal addressed particularly to the Chilean Government as the party charged with the responsibility of administration in the plebiscitary area. These requests do not appear to the Arbitrator to furnish grounds for objection or to constitute specific action of the Commission requiring review. The Commission under the terms of the Opinion and Award has authority to change the dates fixed by the resolution in question and the reference to this authority in the resolution, and the manifest desire that the exercise of this authority should not be required, does not in the opinion of the Arbitrator present ground of appeal.

6. The Arbitrator is not disposed, however, to take a technical view of the situation, and desires, in a considerate and helpful spirit, to assist, so far as he can, in eliminating the differences which have arisen between the parties, acting of course within the limits of the powers which the parties themselves have conferred upon him.

The holding of the plebiscite is but the execution of the agreement of the parties as found in the Treaty of Ancon. In the submission to the Arbitrator, it was explicitly agreed that the Arbitrator was empowered "to determine the conditions" of the plebiscite. The agreement for a plebiscite manifestly would not be satisfied by the holding of a plebiscite as a mere matter of form and the purpose in empowering the Arbitrator to determine the conditions of the plebiscite was to the end that there should be proper safeguards for the holding of a fair plebiscite. Hence the Arbitrator concluded, as the Award states, that the conditions of the plebiscite should be such as would "work substantial justice between the parties in the present circumstances." As it was plainly impossible that all the requisite conditions should be fixed in detail by the Award, it was necessary that a suitable agency should be constituted. The Arbitrator stated in the Award that it was obvious "that the holding of the plebiscite should be appropriately supervised by competent and impartial authority." It was for this purpose, and as one of the conditions determined by the Arbitrator under the submission, that the Plebiscitary Commission was established. The construction of its powers and duties should be determined in the light of the end to be achieved, that is, the holding of a fair plebiscite in accordance with the agreement of the parties.

It was provided in the Award that the Plebiscitary Commission should have "in general complete control over the plebiscite." The specification of the particular powers of the Commission in relation to registration and the casting and counting of the vote was not intended by the Arbitrator to detract from this "complete control" and this control, for which the Award provides, embraces all authority necessary for the determination of the prerequisites of a fair plebiscite. The action of the Commission in determining these prerequisites, and in making its requirements accordingly, is at all times subject to review by the Arbitrator upon proper appeal. But the determinations and requirements of the Commission taken in the exercise of the full authority thus conferred by the Award constitute conditions of the plebiscite with the same force and effect as if prescribed by the Arbitrator directly under the submission, and these conditions are binding upon both parties. From the very moment of its organization, the conditions for the holding of a fair plebiscite in Tacna and Arica became the primary concern of the Plebiscitary Commission. It was and is the duty of the Plebiscitary Commission, in order that appropriate requirements for a fair plebiscite might be made, to take note of the actual situation in the plebiscitary territory and to form its judgment with respect to appropriate measures.

This authority of the Plebiscitary Commission does not derogate from the administrative powers of Chile conferred by the Treaty of Ancon over the plebiscitary territory. As the Arbitrator pointed out in the Award, it was not deemed to be necessary to discuss any question of sovereignty over this territory. It was sufficient to take the express words of the treaty under which the territory was to be in Chile's possession and subject to Chilean laws and authority pending the plebiscite. But this retention of possession and administrative authority were subject to the provision for the taking of the plebiscite and it was stated in the Award that the exercise by Chile of legislative, executive and judicial power should not go to the extent of frustrating the provision for a plebiscite. As both parties had agreed to a plebiscite, both parties were bound to take proper action that it should be fairly held. The agreement of Chile and Peru that the Arbitrator should establish the conditions of the plebiscite carried with it the undertaking to abide by these conditions, and these conditions prescribed by the Award include, as has been said, the requirements made by the Plebiscitary Commission under the authority conferred by the Award. The execution of these requirements is but the exercise by both parties of their jurisdiction respectively in accordance with their agreement. The carrying out of these requirements of the Commission in the plebiscitary area is not in derogation of the administrative authority of Chile but is the use of that authority in accordance with the terms of the Treaty and the Award. This does not involve the assumption either by the Arbitrator or by the Commission of any authority other than that of determining the conditions upon which a fair plebiscite may be held, and if these conditions are not observed by either

party the responsibility must rest upon the party or parties to which the failure may be attributed.

CONCLUSION

The Arbitrator accordingly decides upon the present appeal:

1. That the appeal from that portion of the resolution of December 9, 1925 which fixes the time for the submission and adoption of rules and regulations governing the plebiscite, and also the times for registration of voters, for the institution and conclusion of proceedings to review the rulings of the registration boards, and for the taking of the plebiscitary vote, having been withdrawn, be and the same is hereby dismissed of record.

2. That Sections 2, 3, 4 and 5 of the resolution of December 9, 1925 be and they are hereby construed as an order of the Commission fixing "the date for the plebiscite and the time and places of registration and voting," subject to the power of the Commission to change the same as provided in the Opinion and Award, but not conditioned by or dependent upon any of the other provisions or recitals contained in said resolution.

(Signed) CALVIN COOLIDGE,
Arbitrator.

By the Arbitrator.

(Signed) FRANK B. KELLOGG,
Secretary of State.

IN THE MATTER OF THE ARBITRATION BETWEEN THE REPUBLIC OF CHILE AND
THE REPUBLIC OF PERU, WITH RESPECT TO THE UNFULFILLED PROVISIONS
OF THE TREATY OF PEACE OF OCTOBER 20, 1883, UNDER THE PROTOCOL
AND SUPPLEMENTARY ACT SIGNED AT WASHINGTON, JULY 20, 1922

Order of the Arbitrator

January 28, 1926

WHEREAS, the Plebiscitary Commission, by resolution dated December 16, 1925, certified and transmitted to the Arbitrator, for such consideration as he might deem proper on his own motion, certain portions of the "dissenting opinion and request for certification on appeal" dated December 11, 1925 and filed by the Chilean member with the Plebiscitary Commission on December 14, 1925; and

WHEREAS, the Arbitrator, by his Order of December 22, 1925, reserved for further consideration the question of entertaining an appeal with respect to such matters and directed that in relation thereto the party seeking such appeal should present to the Arbitrator in writing on or before the 15th day of January, 1926 a statement showing with suitable precision the action or resolution of the Plebiscitary Commission of which the said party complains; and

WHEREAS, the Republic of Chile, on the 15th day of January, 1926, presented to the Arbitrator in writing a memorandum and statement relating to the preliminary recitals of the resolution of the Plebiscitary Commission adopted on December 9, 1925; and

WHEREAS, it is the opinion of the Arbitrator that the matters so referred to, other than those dealt with in the Opinion and Decision of the Arbitrator made on the 15th day of January 1926, do not call for further action by the Arbitrator.

Now, THEREFORE, the Arbitrator DECIDES:

That as to those portions of the "dissenting opinion and request for certification on appeal" transmitted to him for such consideration as he may deem proper on his own motion, no appeal is entertained; and orders that in so far as any appeal other than that disposed of by the Arbitrator's Opinion and Decision of January 15, 1926 may be regarded as pending, the same be and is hereby dismissed.

(Signed) CALVIN COOLIDGE,
Arbitrator.

By the Arbitrator.

(Signed) FRANK B. KELLOGG,
Secretary of State.

IN THE MATTER OF THE ARBITRATION BETWEEN THE REPUBLIC OF CHILE AND
THE REPUBLIC OF PERU, WITH RESPECT TO THE UNFULFILLED PROVISIONS
OF THE TREATY OF PEACE OF OCTOBER 20, 1883, UNDER THE PROTOCOL
AND SUPPLEMENTARY ACT SIGNED AT WASHINGTON JULY 20, 1922

*Order Allowing Appeals from Certain Decisions of the Plebiscitary Commission
made on the 30th day of January, 1926*

February 11, 1926

WHEREAS: (A) On the 27th day of January, 1926 the Plebiscitary Commission adopted registration and election regulations governing the plebiscite.

(B) On the 30th day of January, 1926 the Plebiscitary Commission rejected a resolution introduced by the Chilean member requesting certain modifications of Article 5 of said regulations and also rejected resolution introduced by the Chilean member repealing Article 159 (renumbered as Article 123) of said regulations and proposing a new article in lieu thereof.

(C) On the 30th day of January, 1926 the Plebiscitary Commission rejected a resolution introduced by the Peruvian member requesting certain modifications of Article 5 of said regulations.

(D) On the 4th day of February, 1926 the Chilean and Peruvian members each filed a dissenting opinion and request for certification on appeal setting forth a dissent and appeal from the action of the Commission adverse to their proposals, respectively.

(E) On the 8th day of February, 1926 the Plebiscitary Commission certified to the Arbitrator both of said dissenting opinions together with the documents accompanying them respectively as presenting questions which involve the interpretation of the Award and which are of general importance in respect to the holding or result of the plebiscite.

NOW, THEREFORE, IT IS ORDERED:

1. That the said appeals be and they are hereby entertained and allowed.
2. That said appeals shall be determined upon the documents referred to in Section 2 of the resolution of the Plebiscitary Commission certifying the same, to wit—

(A) Articles 5 and 159 (the latter renumbered as Article 123) of the registration and election regulations adopted by the Plebiscitary Commission on January 27, 1926.

(B) The resolutions introduced by the Chilean and Peruvian members on January 30, 1926, including the preambles thereof respectively.

(C) The Chilean member's note No. 128, dated February 4, 1926.

(D) The Peruvian member's note dated February 4, 1926.

And upon such other document or documents as may be transmitted by cable to the Arbitrator by either or both of the appellants on or before the 14th day of February, 1926 in accordance with the provisions of Section 3 of the resolution of the Plebiscitary Commission certifying said appeals.

3. That until the further order of determination of the Arbitrator the Plebiscitary Commission shall proceed with the performance of its duties under the Opinion and Award dated March 4, 1925, and that this Order shall not be construed as suspending its authority.

(Signed) CALVIN COOLIDGE,
Arbitrator.

By the Arbitrator.

FRANK B. KELLOGG,
Secretary of State.

IN THE MATTER OF THE ARBITRATION BETWEEN THE REPUBLIC OF CHILE AND
THE REPUBLIC OF PERU, WITH RESPECT TO THE UNFULFILLED PROVISIONS
OF THE TREATY OF PEACE OF OCTOBER 20, 1883, UNDER THE PROTOCOL
AND SUPPLEMENTARY ACT SIGNED AT WASHINGTON JULY 20, 1922

*Decision of the Arbitrator upon the Appeals from Certain Decisions of the
Plebiscitary Commission made on the 30th day of January, 1926*

February 25, 1926

1. On the 11th day of February 1926, the Arbitrator made an Order allowing appeals from certain decisions of the Plebiscitary Commission made on the 30th day of January, 1926, and determining the time and manner in which, and the record upon which, the said appeals should be submitted.

These appeals which were taken both by Chile and by Peru challenged the interpretation and application by the Plebiscitary Commission of that provision of the Award which declares that "no person shall acquire a vote through residence in said territory . . . if during any part of such required period of residence he . . . has been a government official or civil employee in the political, judicial or fiscal service of either country, or has received compensation as such." The interpretation and application of this provision was embodied in Article 5 of the registration and election regulations adopted by the Plebiscitary Commission on January 27, 1926, which reads as follows:

ARTICLE FIVE.

Scope of the phrase "Government official or civil employee in the political, judicial or fiscal service" of Chile or Peru.

(A) The several registration and election boards will treat the following government officials or civil employees as falling within the scope of the phrase quoted at the beginning of the present article, to wit:

One. The Presidents, Vice Presidents, Ministers, cabinet officers and other executive officials of the two republics. Two. The Chilean intendents. Three. The Chilean Governors. Four. The Chilean subdelegates. Five. The Peruvian prefects and subprefects. Six. The maritime governors. Seven. The captains of ports. Eight. District inspectors. Nine. The judges and the members of all courts. Ten. The fiscals. Eleven. Recording officers charged with the keeping of court records and registers of all kinds; of the public record of births, baptisms, deaths, marriages, incorporations, partnerships and other like statistics and facts; and of records relating to the title to, and liens on real estate. Twelve. Notaries public. Thirteen. Public prosecutors and lawyers whose public duty it is to prosecute or defend civil or criminal actions in the courts or to give legal advice; and persons serving permanently or for fixed periods of time as receivers or trustees of estates or interests in litigation and under the control or supervision of the courts; excluding, however, lawyers who are voluntarily retained in each cause and who serve private interests for compensation paid by the latter. Fourteen. Officials and employees of the customs, the internal revenue and the tax collecting services. Fifteen. Officials and employees of the treasury and of the financial departments of the two governments. Sixteen. Officials and employees of the quarantine, the hygiene, and the public health services. Seventeen. Civilian (or other) officials or employees who, as a regular duty or employment act, as surgeons, physicians or dentists to the army and the navy and the military and naval services; also surgical and medical officials and employees on duty at the army and navy hospitals. Eighteen. Civilian (or other) officials, artificers and employees on duty at the arsenals, public docks, public factories and repair shops engaged in constructing, providing, maintaining or storing arms or ammunition or both for the army and navy, or ships for use by the army, the navy, the lighthouse service, the customs, the internal revenue, the quarantine or other similar services. Nineteen. Civilian (or other) navigating and executive officers on public ships, other than those engaged in a purely commercial service. Twenty. Mayors and other executive officials of the cities

and municipal corporations of either nation or of any other political subdivisions of the Chilean or Peruvian Governments. Twenty-one. Legislators and aldermen. Twenty-two. Officials, superintendents and teachers in the public schools. Twenty-three. Officials, superintendents and inspectors of the public markets. Twenty-four. Secretaries, stenographers, clerks, assistants, and employees of every nature and kind who coöperate or collaborate or assist in the work entrusted to the officials, superintendents, or others mentioned above. Twenty-five. Officials and employees whose duty falls within the scope of the present paragraph or includes some of the duties of the army, navy, carbineers, secret or other police, the secret service or the gendarmerie, even though such duty falls also within the scope of paragraph (B) of this article.

(B) The several registration and election boards will treat the following government officials or civil employees (provided they do not discharge, in part, the duties of the government officials or civil employees mentioned in the preceding paragraph) as not included within the scope of the phrase quoted at the beginning of the present article, to wit:

One. Officials and employees of the Arica Lapaz Railway. Two. Officials and employees of enterprises of a private nature, despite their receiving subsidies from the public treasury. Three. Secretaries, stenographers, clerks, assistants, and employees of every nature and kind, who coöperate or collaborate or assist in the work entrusted to the officials, superintendents, or others, previously in the paragraph mentioned.

(C) The several registration and election boards will treat all government officials and civil employees whose status is not fixed by the two preceding paragraphs of the present article as being within the scope of the phrase quoted at the beginning of the present article. The true status of such officials and employees will be determined as promptly as practicable by the appeals board, in the event of appeals being taken.

2. Chile appealed from the finding and decision of the Plebiscitary Commission with respect to the classes of government officials and civil employees enumerated in items numbered 11, 12, 13, 16, 20, 21, 22 and 23 of paragraph A of said Article 5; and also from the refusal of the Plebiscitary Commission to include officials and employees of the telegraph and postal service among the classes enumerated in paragraph B of said Article 5. Chile further appealed from the refusal of the Plebiscitary Commission to reconsider and modify Article 159 (subsequently renumbered as Article 123) of the regulations, but on February 13, 1926 withdrew the appeal as to that article.

3. Peru appealed from the finding and decision of the Plebiscitary Commission with respect to the classes enumerated in items 1, 2 and 3 of paragraph B of said Article 5.

4. The Arbitrator has received and duly considered all of the documents referred to in the resolution of the Plebiscitary Commission certifying the said appeals and also such other documents as have been transmitted to him pursuant to the Order of February 11, 1926.

Now, THEREFORE, the Arbitrator DECIDES:

1. That the appeal of Chile in so far as it concerns said Article 159 (re-numbered as Article 123), having been withdrawn, be and it is hereby dismissed of record.

2. That the finding and decision of the Plebiscitary Commission as to all other matters involved in the pending appeal by Chile, that is to say with respect to the classes of government officials and civil employees enumerated in items numbered 11, 12, 13, 16, 20, 21, 22 and 23 of paragraph A and with respect to the officials and employees of the telegraph and postal service which the Plebiscitary Commission refused to include among the classes enumerated in paragraph B of said Article 5 of the registration and election regulations adopted on January 27, 1926, be and the same are hereby affirmed.

3. That the finding and decision of the Plebiscitary Commission as to all matters involved in the appeal by Peru, that is to say with respect to the classes of government officials and civil employees enumerated in items 1, 2 and 3 of paragraph B of said Article 5 of the regulations be and the same are hereby affirmed.

(Signed) CALVIN COOLIDGE,
Arbitrator.

By the Arbitrator.

(Signed) FRANK B. KELLOGG,
Secretary of State.

RESOLUTION OF THE PLEBISCITARY COMMISSION TERMINATING THE PLEBISCITARY PROCEEDINGS

Adopted June 14, 1926

The Plebiscitary Commission, Tacna Arica Arbitration, in the exercise of its duties and functions under the award, hereby formulates and declares its findings and conclusions as follows:

One. Pursuant to the terms of the Treaty of Ancon the plebiscitary territory has remained and still remains subject to Chilean laws and authority. In these circumstances the creation and maintenance of conditions proper and necessary for the holding of a free and fair plebiscite as required by the Treaty and the Award constituted an obligation resting upon Chile. This obligation has not been discharged, and the Commission finds as a fact that the failure of Chile in this regard has frustrated the efforts of the Commission to hold the plebiscite as contemplated by the Award and has rendered its task impracticable of accomplishment.

Two. As the result of its experience and observations throughout the course of the plebiscitary proceedings the Commission has the settled conviction that the further prosecution of the plebiscitary proceedings in an effort to hold the plebiscite as contemplated by the award would be futile.

The Commission can not ignore its paramount duty under the award to hold only a free and fair plebiscite as contemplated by the treaty and the award and not to hold a plebiscite which would not be in accord with the intent of the Treaty and the Award.

The Plebiscitary Commission accordingly decides, upon the grounds above stated;

First, That a free and fair plebiscite as required by the Award is impracticable of accomplishment;

Second, That the plebiscitary proceedings be and they are hereby terminated, subject however to the formulation and execution of such measures as may be required for the proper liquidation of the affairs of the Commission and the transmission of its records and final report to the Arbitrator.

BOOK REVIEWS AND NOTES *

Progress and the Constitution. By Newton D. Baker. New York: Charles Scribner's Sons, 1925. pp. 94. \$1.25.

This little book is composed of three lectures delivered on the William H. White Foundation at the University of Virginia.

After a brief sketch of the distinctive characteristics of the Constitution and a definition of Progress, Mr. Baker considers their relations in the three fields of Institutions, Industry, and Foreign Relations.

Progress, as defined in this book, is identified with "change," "whether for better or for worse." There are, the author recognizes, "just a few ultimate moralities" which do not change. "But the atmosphere in which these moralities must function does change"; and so, without setting up any goal or standard, Progress is considered as a condition of change too rapid and too fundamental for old modes of thinking and acting to keep up with it.

Among institutions the popular conception of the office of the President, the relations between the Senate and the President, the status of the Vice Presidency with reference to succession, the contact between the Cabinet and the Congress, and the development of an Administrative Department of Government present phases of "Progress," in the sense that the original intentions and interpretations of the Constitution either do not at present apply or furnish a basis of general agreement.

In the lecture on "The Constitution and Industry," the effect of the introduction of the factory system and the application of steam to transportation are traced with clearness, felicity and effectiveness, occasionally lighted up with a flash of humor. The social and economic necessity for the extension of control over commerce and industry by the Federal Government is well illustrated in the wider interpretation of the so-called Commerce Clause of the Constitution and the decisions of the Supreme Court here cited with regard to subjects of which the founders of our Government could have formed no conception. "The police power," Mr. Baker concludes, "is a great and wholesome, indeed, a necessary power, but it has definite limits and we must not permit it to be used to change our whole political theory, by tolerating gradual and piecemeal attacks upon the constitutional guaranties."

In his discussion of "The Constitution and Foreign Relations," President Wilson's Secretary of War may be expected to have some personal views. It is only just to record the fact that he expresses them with a reserve and an effort to be considerate that are creditable to his sense of fairness and his courtesy.

* The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.—Ed.

Mr. Baker appears to believe that our constitutional limitations in respect to the conduct of international business occasion many embarrassments. He does not, however, point out how these might be avoided, unless it might be by limiting the advice and consent of the Senate to the decision of a majority rather than to the decision of two-thirds of the Senators. To support this view he cites a passage written by Secretary Hay to his friend Henry Adams in a private letter, in which the Secretary, in a somewhat irritated mood as the context shows, considers it a "mistake of the Constitution," that his treaty could not have been ratified "in twenty-four hours" by a majority of the Senators. Secretary Hay felt the same way about the first Hay-Pauncefote Treaty and hesitated to propose to the British negotiator the changes advised by the Senate. Nevertheless, he became reconciled to this and produced a much improved treaty which was adopted by the necessary two-thirds vote.

Referring to the Treaty of Versailles, of which Mr. Baker says, "The major part of the discussion of the treaty in the Senate had no relation whatever to any American interest," he concludes: "A majority of the Senate could have been gotten at almost any time to ratify the treaty, but two-thirds could not be gotten, so that literally half a dozen Senators blocked the reorganization of the world."

Adhering closely to the record, what the Senate did with the Treaty of Versailles, which in its Covenant of the League of Nations was meant to force the United States to accept certain obligations in "the reorganization of the world" which were held to exceed the powers which the Constitution accords to the Government it creates, was to reduce those obligations by reservations as a condition of ratification.

Mr. Baker overlooks the fact that, so far as the Senate was concerned, the Treaty of Versailles failed of ratification because a majority of the President's party voted against it. That majority would, no doubt, have voted for ratification without reservations of any kind; that is, a party majority "could have been gotten at almost any time" to give its consent to unqualified adoption of the President's policy! But what is the object of Senatorial "advice and consent"? Is it not to give the political opposition a chance for expression? It is frequently the case that a majority of the Senators belong to the President's party and are politically controlled by him. Is not this a sufficient reason why a mere majority should not express the voice of the Senate in matters of such vital interest—and sometimes interests which differently affect the different States—as those involved in treaties? And, to submit the question to a practical test, does the country as a whole at present really regret that it was a two-thirds vote that was necessary to ratify the Treaty of Versailles, or would it prefer that the "majority of the Senate which could have been gotten at almost any time" should have been able to ratify that treaty "without the dotting of an *i* or the crossing of a *t*"?

DAVID JAYNE HILL.

The Doctrine of Continuous Voyage. By Herbert Whittaker Briggs. Baltimore: The Johns Hopkins Press, 1926. pp. x, 226. Index. \$2.00.

The first half of this book contains a detailed review of the origin and history of the doctrine of continuous voyage down to the late war. The relation of the doctrine to the Rule of the War of 1756 is shown and a large number of the early prize cases on the question from 1762 to about 1806 are reviewed. Next follows a discussion of the early cases in which the doctrine was applied to blockade and contraband, from which it appears that the first English cases arose as early as 1805 and 1761 respectively.¹ The review of these cases carries the reader down to about 1805. The few cases arising out of the War of 1812, the Mexican War, and the Crimean War are covered, which brings the reader to the famous decisions of the United States Supreme Court in cases arising out of the Civil War. Certain of these decisions gave rise to diplomatic correspondence between the United States and Great Britain and the controversy was finally arbitrated under the Treaty of Washington of 1871. Practically all the claims of Great Britain, on account of the seizure of British vessels, were unanimously disallowed by the Arbitral Commission. The views of publicists on the famous *Springbok* decision are reviewed. From this point the writer proceeds to discuss the doctrine as applied during the Chino-Japanese War, the Italo-Abyssinian War, the Boer War and the Russo-Japanese War. The author next takes up the discussion of the doctrine at the Second Hague Conference of 1907 and the London Naval Conference of 1909. The memoranda presented by the various governments preparatory to the last conference on the doctrine of continuous voyages in respect of contraband and blockade, and the debate on the subject at this conference, are reviewed. The Declaration proposed by the London Conference, however, was never ratified by the Powers on account of the refusal of Great Britain to accept the Declaration, although Italy, Turkey, France and the United States showed a disposition to adopt it.

The latter half of the book deals with the extension of the doctrine of continuous voyage during the World War. The author has made a critical examination of the diplomatic correspondence between the United States and the Allied Powers, particularly Great Britain, in relation to the blockade policy of those Powers, and of the decisions of the prize courts under British Orders in Council, and Italian and French decrees. This review appears to be a thorough and excellent piece of work covering the state papers, the decisions of the prize courts, and the contemporaneous essays on the subject.

¹ The author has misconstrued a statement of mine at page 38 where he indicates that I have referred to the *Eagle* (1803) "as a case in which the doctrine of continuous voyage was applied to contraband," and also at page 39 where he says: "Thus the statement of Woolsey that, 'The earliest case mentioned [by Justice Elliott] in which the doctrine was applied to contraband is that of the *Eagle* decided in May, 1803' . . . seem to be based on a misapprehension." The context of my article shows that I was merely reviewing Justice Elliott's article on "The Doctrine of Continuous Voyages," and not stating my own views.

After a discussion of the extension of the doctrine to conditional contraband and blockade, the author takes up the effect of the doctrine on prize procedure in the matter of visit and search, the introduction of evidence and the burden of proof. In the final chapter the author comes to a discussion of the "test of a continuous voyage," and he reviews the precedents from the Rule of the War of 1756 through the World War. He discusses the various tests used in this period, including the "common stock" test, the consignment-to-order presumption, and the presumption derived from the fact that the ship's papers did not name any consignee or did not name the real consignee. In closing, the author sums up the results of his study in part as follows:

The changes in the law of visit and search, and in prize law and procedure were the most important effects of the application of the doctrine of continuous voyage during the Great War. The British practice of 'speculative seizure' and search in port had no legal precedent; although it was attempted by Great Britain herself in the Boer War cases and was foreshadowed by the United States Supreme Court in the case of the *Springbok*. The statement of the British Government that "the right of a belligerent to intercept contraband on its way to his enemy is fundamental and incontestable" simply begs the question. The belligerent right by contraband or blockade to prevent goods from going to his enemy is a qualified right: his right is dependent on proof that the particular goods he seizes are contraband or are destined for a blockaded port; otherwise he has no right of seizure. And seizure, according to international law, must be based on evidence found on the vessel. The British practice of 'speculative capture' of vessels on a voyage between neutral ports in the hope of justifying seizure on evidence obtained in port and after seizure was an unwarranted procedure wholly contrary to international law (pp. 216-217).

Looking into the future, the author makes these interesting comments in his final paragraphs:

The real problem raised by the doctrine of continuous voyage is whether it can continue to exist without gravely imperiling international maritime law. To the belligerent, struggling perhaps for his very existence, it seems most unreasonable that he should refrain from seizing goods which it is in his power to seize and which he has good reason to believe are going ultimately to his enemy, simply because he has no specific evidence that each particular cargo has an ultimate enemy destination. The neutral, however, has international law on his side in this matter, since it permits him to trade freely with other neutrals and even to trade with the belligerents subject to the belligerent rights of blockade and contraband (in which cases, it is reiterated, the belligerent is under the obligation to prove specific enemy destination).

To the writer there appears no solution short of a rule of international law forbidding neutrals to trade at all with any belligerent. And such a rule would be contingent upon the development of an international civic sense, or feeling of mutual obligation on the part of nations to refrain from trading with belligerents—a feeling which does not now exist. Otherwise, the doctrine of continuous voyage will in the future

play havoc with neutral rights when the belligerents are the big Powers, and it will remain quiescent when the belligerents are the smaller nations and the Powers are neutral (pp. 218-219).

L. H. WOOLSEY.

Englische Geschichte, 1815-1914. By Carl Brinkmann. Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte, 1924. pp. x, 212. Index. 5 Mk.

In this study the author's aim has been to present together British domestic and foreign policies, particularly the development of social legislation and of imperialism. He has divided his book into three sections: the era of reform, approximately 1800-1848; the height of the Victorian era, 1848-1874; and the age of imperialism, 1874-1914.

In Part I he describes the Tory-Whig contest which led up to the first reform bill and the rise of a new gentry based not upon land but upon capitalism. The new colonial policy is analyzed—the opening of trade by the abolition of monopoly rights, the abolition of slavery, the upbuilding of a more bureaucratic civil service, an aggressive program in China and in Africa and the peopling of Australia and Canada with British folk, as well as the discussion of the problem of colonial self-government during the thirties. An interesting chapter is devoted to the success of Palmerstonian diplomacy as it was employed toward France during the July monarchy. In another chapter is provided a concise summary of social legislation and of reformist movements within the churches. Chartism and Manchesterism are dealt with in a chapter distinguished by its interweaving of the political and economic factors which were associated at the beginning of Victoria's reign.

Part II is devoted to the forerunners of imperialism, the beginnings of imperial federation—an analysis of the juridical and economic problems involved—the second reform bill and the Irish question, in connection with which the author gives large attention to the element of political strategy involved.

Part III is developed about four statesmen: Disraeli, Gladstone, Salisbury and Lloyd George, who do not, however, as individuals, receive the consideration that one might have anticipated. The British Empire is described as an "unique composite of aristocratic-feudal and democratic-parliamentary elements, in domestic politics inextricably bound up with the half-military, half-pacific aspects of its external, particularly its extra-European, relationships" (pp. 131-2). The Royal Geographic Society is written down as the propaganda and information bureau of British policy in the Orient (p. 136). The author takes the position that in South Africa and Egypt, Gladstone's policy was a hesitant following of Disraeli, while in India it dared to face the odium of a change of front (p. 157). Regarding the "Kruger telegram" he makes the interesting observation that, instead of creating a breach between England and Germany, it was a warning that

brought them closer together (pp. 175-6). No analysis is attempted of the considerations that led England into the World War.

The book is distinguished for its candor, unmixed with prejudice, and for its numerous brief but enlightening references to personalities, including those of wives and other relevant relatives. Extensive use is made of monograph material, which is the author's main reliance. As a straightforward summary of nineteenth century Britain, and as a source of bibliographical data, Professor Brinkmann's volume is a valuable contribution to the fields of the social sciences as well as to that of history.

HAROLD S. QUIGLEY.

Projet de Code de Droit International Privé. By A. S. de Bustamante y Sirvén. Translated from the Spanish by Paul Goulé. Paris: Recueil Sirey, 1925. pp. 280.

The distinguished author of this draft code of private international law was one of the committee of four jurists appointed by the American Institute of International Law to elaborate such a code after its Lima session in 1924. The committee of four will present the result of its labors for the consideration of the Committee of Jurists of the Pan American Union at its forthcoming session at Rio de Janeiro. The author is also a member of the codification committee of the International Academy of Comparative Law. The present *projet*, containing 435 articles, is intended as the author's basic contribution to both these endeavors. He modestly refrains from regarding the result of his labors with any degree of finality, and announces that when the committees reassemble, he will be the first to propose amendments.

In the introduction to the *projet*, the author endeavors to classify the different rights which man enjoys in the modern state. He divides these rights into two main categories, social and political. He subdivides the former into voluntary or personal rights, being those which affect only the persons who exercise them; and necessary or static, the effects and result of which are extended over the entire social fabric (p. 17). Ordinary commercial transactions are the common examples of the first division, while parental authority is taken as an example of the second. Political rights he subdivides into public and civic; the former guarantee protection and the necessary liberty to exist in an organized state of society, while the latter accord the privilege of taking part in such organization. The inviolability of the home is his example of the former group and suffrage of the latter.

As to aliens, the division depends upon whether local legislation is by its nature intended to apply only to nationals, and if not, does it apply to aliens with the same effect as to native subjects, or does it bear a permissive character, giving a certain play to the forces of personal law, whether national or domiciliary, as the case may be? (p. 25).

The author classifies laws into those having a policy applicable only to

private relations, those which have a local public policy and those which have an international public policy (p. 53).

These are, in large outline, some of the underlying standards forming the background of his scheme. Unfortunately, classification, while constituting an aid to scientific thought, does not of itself accomplish the solution of practical problems. The codifier is still confronted with the task of assigning conflicting laws to the categories to which they belong. It is in the solution of this problem that differences of opinion arise.

Outside the Anglo-American sphere of jurisprudence, the most difficult problem is that of obtaining agreement between states as to whether the national or the domiciliary law shall determine personal status. This the *projet* proposes to solve by applying to aliens the system which the national law provides. It may be the national law itself; but it may also be the domiciliary law. Thus a compromise is effected in a matter of capital importance in all civil-law countries.

The author has been influenced by practical viewpoints, and properly endeavors to conciliate different legislative views. The code is probably not primarily intended for acceptance in all its parts by any jurisdiction following the English common law. The institutions of family law prevailing in civil-law countries differ so widely from our own, that many of the provisions of the *projet* would scarcely be appropriate. But even if the *projet* forms the basis of agreement between a number of nations having similar systems of law, substantial progress would have been accomplished. Its further progress will therefore be viewed with great interest by those who regard with apprehension the increasing number of unsolved problems arising from the application of local legislation to international commerce and intercourse.

ARTHUR K. KUHN.

Le Statut International du Territoire de la Sarre. By Henri Coursier. Paris: A. Pedone, 1925. pp. 150.

This very interesting thesis is divided into five parts by the author, namely: I, The international status of the territories constituting the Saar Basin; II, The theory of the international organization of the Saar Basin as laid down by the Treaty of Versailles; III, Application of the dispositions of the Treaty of Versailles relative to the Territory of the Saar; IV, A critical examination of the régime of the Saar; and V, The future of the régime, being a conclusion. Part IV in particular attempts to answer recent criticisms of the administration of the basin on the following points: (1) the partiality of the present régime, (2) the definition of inhabitants, (3) the protection abroad of the inhabitants, (4) the presence of French troops in the area, (5) the establishment of the franc as the currency, (6) the teaching of French in primary schools, and (7) the objections raised to existing non-conformity with sections 23 and 26 of the Annex.

It is an explanation which does not satisfy, since it merely repeats in a large measure those statements of the Council which have already been set forth. With customary French logic and attention to detail, Coursier outlines existing conditions without attempting any legal analysis as to whether they are justified or not, and as far as this particular work is concerned, such arraignments as that which is presented in Kellor's *Security Against War* still continue to stand. The French point of view is again given complete expression.

On the other hand, if the above is kept in mind, the first three parts are extremely valuable for their detailed explanation of the status of the Saar. The bibliography, with its references to official documents, secondary books, journals, and reviews, will also be found to be helpful.

THORSTEN KALIJARVI.

El Dr. Vicente G. Quesada y sus Trabajos diplomaticos sobre Mexico (Archivo Historico Diplomático Mexicano, Num. 14). Compiled and annotated by Fernando González Roa, Professor of International Law in the University of Mexico. Mexico, Secretaría de Relaciones Exteriores, 1925. pp. 199.

This volume does not present important new materials from the archives of Mexico or any other country. In the main it consists of reprints of extensive excerpts from the diplomatic memoirs and recollections of the distinguished Argentine diplomat and scholar whose name appears in its title. These excerpts relate largely, but not exclusively, to Mexico. The most important topics dealt with are: Quesada's mission in Mexico (1891), his service and decision as arbiter of certain claims of citizens of the United States against Mexico, his discussion of the question of the relation of the Mexican government to the papacy, and certain views which he held regarding the proper relations between Mexico and her neighbor on the north. Thus the book brings together a convenient collection of Quesada's writings, but it does not represent an important contribution to diplomatic literature.

The work is significant for two reasons: First, by virtue of the mere fact that the writings of Quesada should have been included in this official publication of the Mexican government; second, because of the revelations contained in the introduction and the running comments of the editor. In general it may be said that Quesada was a Yankee-phobe, and the editor does not fail to point out this fact. Indeed, he emphasizes it by including in the volume a section dealing with a diplomatic dispute which Quesada engaged in with the United States over the Malvinas (Falkland) Islands. Moreover, Quesada is an advocate of Latin-American solidarity, and González Roa points this out with ardent approval.

In brief this fourteenth volume of the *Archivo Historico Diplomático Mexicano*, like most of the other thirteen, reveals an interesting state of mind in Mexican official circles. This is not the place to criticise or defend

such a complex. It must be understood, however, if the student desires a correct appreciation of the publications in question. They are not exhaustive, but highly selective. Documents revealing hostility toward the United States or reflecting upon our policies or tending to promote friendly relations between the Latin-American republics are given precedence. Such as they are, however, they can not fail to be welcomed by all students of American diplomacy, for the published diplomatic correspondence of Mexico is at present very inadequate. Nevertheless, it is a source of regret that the volume now under consideration does not contain more archive materials not heretofore made accessible to the public.

J. FRED RIPPY.

The Government of China (1644-1911). By Pao Chao Hsieh. Baltimore: The Johns Hopkins Press, 1925. pp. 414. \$3.00.

This is a very valuable contribution to Western knowledge concerning the political organization of the late Chinese Empire. It is also a notable addition to the list of doctoral dissertations presented by Chinese scholars in American universities, for Dr. Hsieh has relied almost entirely upon Chinese materials and his extensive bibliography contains many works which have rarely, if ever, been examined by Western scholars.

The task which confronted Dr. Hsieh was an appalling one. To describe the political organization of China at any time during the Manchu régime would be no easy matter—to describe the changing conditions in the central and provincial governments during the whole period of 267 years would require a work of encyclopaedic dimensions. For in China, to an unusual degree, it is necessary to know how the rules and regulations were applied in practice. Dr. Hsieh has frankly refrained from meeting the latter problem, for he has been "contented with discussing principally the organization of the government, and only occasionally touching upon its operation." A simple statement such as "The rate of exchange between silver and copper was 1,000 small copper cash for one tael of silver" (p. 192), may be considered an economic theory rather than an actual practice.

The fourteen chapters are, in the main, devoted to an account of the organization and functions of the various governmental services at Peking and in the provinces and territories. They will prove an invaluable reference work for the student of Chinese political institutions and history. Dr. Hsieh, however, is not content with presenting the dry details of organization, but frequently adds interpretative comments which are of much value. "Indeed to call the sale of offices one of the principal causes of the Manchu downfall would not be too severe a verdict upon this abominable institution" (p. 113); "One cannot help being impressed by the fact that China, instead of being known as a government of no laws, was really one of a superabundance of bad laws, loosely administered and grossly abused" (p. 137); "Such being the workings of the competitive examination, aside from help-

ing to centralize the government and stabilize the throne, nothing good can be found in it" (p. 180); "Thus inequality in legal protection came from all sides. Justice might be obtained; but the means to that end, law, was all at sixes and sevens, open to the abuse of the influential, an instrumentality of the clever and the wicked, and a constant source of grievances to the good, honest, and yet stupid people" (p. 234). In this study of the old régime will be found much to explain the manifold difficulties which have embarrassed the so-called Republic. Yet the repeated indictments of the Manchus seem overdrawn, for the Chinese officials, always in a great majority, must bear some of the responsibility for the decadence of the Chinese administration.

A few errors in statement and in spelling have been observed, notably on page 288 where a table of the officers and men of the Chinese army in 1885 is given. The first two columns are added to give a third (total), then the three are combined with a fourth to make a new total. The items of this last total (which will probably be accepted by hasty readers) are in every case almost twice as large as they should be. Thus the total number of privates is given as 1,245,647, whereas it should read 632,245. The most serious defect, however, in a work which will be used primarily for reference, is the absence of an index.

PAYSON J. TREAT.

L'Introduction du Droit Civil Français en Alsace et en Lorraine. Études d'Histoire et de Droit par un Groupe de Magistrats, d'Avocats et de Professeurs. Paris: Librairie Générale de Droit et de Jurisprudence, 1925. pp. 166.

One of the interesting legal incidents of the World War and the change of European frontiers was emphasized by the return, after twenty-nine years of absence, of the French civil law into Alsace-Lorraine on the first of January, 1925.

The ideal of French jurists, long pondered before the Revolution and only realized through the power of Napoleon, was the unification of French law. It was Voltaire who said that in France you changed your legal system every time you stepped out of your coach. This remark must appeal to every American lawyer who may be called upon to know something of the jurisprudence prevailing in half a hundred different jurisdictions.

The old Province of Alsace, that interesting borderline between the Romance and Germanic civilization, at the time of the French occupation found itself subjected to a legal situation of a very complex character. Customary law and feudal usage were affected and modified by ancient Canon law. Various cities possessed laws and customs of their own, and the French conquest superimposed upon these laws the royal law prevailing in the French monarchy. In addition to all that, there existed a subsidiary Roman law. This highly complicated situation was finally ended in 1804

when Alsace-Lorraine became part of the legal entity of France, and the Code Civil was there introduced, abolishing all the general and local customs, and laws and regulations which had accumulated during centuries. The Code Civil remained in force not only during the remainder of the French régime, but was continued under the German domination after 1871 and up to 1896, at which time Germany itself had completed its juristic entity by the promulgation of the German Civil Code.

During all these years, Alsace had adapted itself completely to the French legal system. The change to the new German code required some readjustment, but did not really revolutionize the juristic situation in the provinces. The fact is that the two codes which succeeded each other in this territory had a common foundation in Roman law and Germanic custom. Both had grown up in civilizations whose fundamental ideas had much in common. It was thus not difficult for the courts and the people to readjust themselves to the change. In matters relating to the rights of persons and of property the German code was penetrated by ideas native to France and consecrated in the French Civil Code—the equality of men before the law, whatever might be their social condition or religious profession, the allodial character of all property and the general abolition of restrictions upon the power of alienation.

The provinces were, however, not to remain indefinitely under the German code. The French desire for national unity in respect to law, as in other things, and their strongly developed Roman conception of administrative centralization, were soon to affect Alsace. A commission was appointed to prepare a law for the reintroduction into Alsace of the French law. After some years of labor the work of this commission resulted in a proposal, finally passed by Parliament in 1925, which reintroduced the Code Civil, with its various amendments down to date, into Alsace. Nevertheless, some local systems were maintained, especially those concerning the protection of incompetents and certain matters affecting the marriage relation and succession. Thus was reestablished in Alsace and in Lorraine the law which had been applied through the whole of the nineteenth century.

It has been objected that it was unreasonable to substitute the old Code Napoleon for the modern twentieth century German code. This argument overlooks the fact that the French civil law has been profoundly modified since 1804. During those years the original text of the code had been much changed and numerous laws had been added in order to bring it into conformity with changed economic and social conditions. This movement changed some aspects of the Code Civil. It has humanized, democratized and socialized it, especially in its relation to family and succession law.

More interesting still, from the standpoint of the American law, the Code Civil has been enriched by a mass of case law which has adapted it to the economic needs of society. This jurisprudence developed under the direc-

tion of the Court of Cassation "presents a remarkable plasticity, very superior to that of the text of the law because it arises out of a conflict of actual interest." This judge-made law has so many advantages that French lawyers may well query whether its retention is not preferable to a new codification. "Without going into a discussion of that question, it suffices us to note the importance and the value of this source which ceaselessly alimments and rejuvenates the ancient French civil law." In such language does Professor Henri Capitan, Professor in the Law Faculty of the University of Paris, close his excellent article on the reintroduction of the French law into Alsace.

In concluding the study of the local situation in the two provinces, it is interesting to note how Anglo-American law and civil law are moving toward each other, the former now more surely recognizing the value of the formulation of general principles, and the latter discovering the value of that elastic development of law brought about by the courts in the decision of actual cases.

This little book is an admirable study by some of the leading jurists in Paris, in Metz, Strassburg, and in Nancy. It composes an interesting chapter of legal history and emphasizes, through the many differences, the fundamental similarities to be found in European law. It encourages our hope that conflicting views of international legal doctrines may be gradually reconciled and that there is a sufficient basis for agreement to already constitute what is in fact a codification of a great body of international law.

FREDERIC R. COUDERT.

Modern Immigration. By Annie Marion MacLean. Philadelphia: J. B. Lippincott Co., 1925. pp. xii, 393. Index. \$3.00.

Ever since the increasing numbers of the human species first began to press upon the resources of the habitat, and the evils of overpopulation began to be felt, the natural remedy has always seemed to be movement. Scarcely anything in the whole history of human activities has been more significant than the wanderings of groups of people seeking easier conditions of life, sometimes seeking the means of life itself. In the early stages of human civilization, covering untold tens of thousands of years, these movements were unopposed by any human obstacles. They were venturings into uninhabited territory, which benefited alike those who went and those who stayed.

Eventually, however, this situation came to an end, because there were no more uninhabited lands to be appropriated. But the need for movement did not diminish, but rather augmented, as populations continued to grow. Consequently there followed a vast stretch of time when movements took the form of violent and hostile attempts to encroach upon the land of other groups. Recorded history consists very largely of a chronicle of these attempts. Finally the discovery of the American continents and other

favorable regions restored the possibility of peaceful movements between friendly countries, which constitute what we call modern immigration.

The United States was the foremost of the countries which received these enormous streams, and for many decades it hardly occurred to anyone that the situation might not continue indefinitely. Within the past few years, however, we have witnessed an abrupt termination of unlimited immigration, and the doors have been forever closed to all except a select few. This change has brought into new prominence the other immigrant receiving countries, and has emphasized strikingly the fact that immigration is not an American problem, but a world problem. The great questions now obtrude themselves: If the United States has stopped the greatest outlet of immigration, how long will it be before the other countries, however hospitable they may now feel, will follow suit? and, When there are no more voluntary immigrant receiving countries, what form will the immemorial expedient of population movement take? Will we return to some type of violent, forcible movement, or will we find some other means of dealing with the incubus of overpopulation?

To those who recognize population and migration as the most insistent international problems of the post-War epoch, Dr. MacLean's book will prove a valuable aid. It contains a brief summary of the immigration situation in each of the chief receiving countries, a review of the principal laws on the subject, and an estimate of the national attitude toward the problem. The various aspects of the individual human interests involved are also sketched. A large portion of the volume is devoted to a compilation of the United States laws and regulations on immigration and naturalization. There is thus assembled a mass of data not elsewhere easily accessible.

HENRY PRATT FAIRCHILD.

The Chinese Abroad. By Harley Farnsworth MacNair. Shanghai: The Commercial Press, 1924. pp. xxiv, 340. Index. \$3.00 Mex.

Dr. MacNair, who is Professor of History and Government in St. John's University, Shanghai, China, is well known by his other publications in the fields of Chinese history and politics. In the present volume he has dealt in an able manner with a subject of substantial interest, not only to the Chinese themselves, but to all nations having relations with the Chinese. The materials for the work he has had to gather from a great variety of sources. The care and industry with which he has done this gathering, and the judgment and impartiality with which he has dealt with his facts, give to his volume a high value. The following from among the chapter-headings of the volume will indicate the character and importance of the topics considered: "The Relation of China to Her Nationals Abroad," "Chinese Acquisition of Foreign Nationality," "The Chinese Alien-Merchant and Free Laborer," "The Contract Laborer," "The Chinese Student Abroad,"

"The Protection of Alien Chinese through Chinese Authorities." In no other work can the reader find so much information upon these points. There have, of course, been other studies dealing with the Chinese living in particular countries, as, for example, Coolidge's *Chinese Immigration* [into the United States] and Campbell's *Chinese Coolie Emigration to Countries within the British Empire*, but, until now, there has been no work dealing comprehensively with all phases of the problems, national and international, created by the emigration to so many quarters of the globe of between eight and nine million of the Sons of Han.

With regard to the manner in which the Chinese have been treated by the governments of the countries in which they have settled, one fact stands out clearly so far as the United States is concerned, and that is that, however much we may pride ourselves upon having pursued in China a more liberal and enlightened policy than have the other "Treaty Powers," we have little reason for congratulating ourselves upon the consideration we have shown the Chinese dwelling within our midst. As regards the entrance of Chinese into the United States, it is well known that the Exclusion Act of Congress of 1888 was in direct violation of the treaty of 1868 and of the supplemental treaty of 1880 with China, and was recognized so to be by the Supreme Court of the United States in the case of *Chae Chan Ping v. United States* (130 U. S. 581), but nevertheless held validated as a municipal law because of the provision of the United States Constitution which, without placing one intrinsically above the other, declares that laws of the United States made in pursuance of the Constitution and treaties made under the authority thereof shall be the supreme law of the land.

A fact which stands out prominently in all accounts of economic conditions in the Pacific possessions of the Western Powers is the extent to which these possessions are dependent for their industrial and commercial prosperity upon the industry and business shrewdness of the eight millions of Chinese living within them. Notwithstanding this fact, these Chinese have been, in many cases, exploited in a manner which certainly would not have been the case had they been Caucasians or had they had back of them a militarily powerful home government. This disregard of the welfare of the Chinese is at present strikingly shown in the opium policies of Great Britain, France, Portugal and the Netherlands, all of which countries legalize and derive large revenues from the sale of smoking opium, which, for the most part, and, in some cases, exclusively, is consumed by the Chinese. However, this is a subject not considered by Dr. MacNair.

Dr. V. K. Wellington Koo furnishes an introduction and Dr. Fang F. See a foreword to Dr. MacNair's volume.

W. W. WILLOUGHBY.

Latin America and the War. By Percy Alvin Martin. Baltimore: The Johns Hopkins Press, 1925. pp. xii, 582. Index. \$3.50.

This is the expanded version of a series of lectures delivered in 1921 at the Johns Hopkins University on the Albert Shaw Foundation.

In an introductory chapter Professor Martin discusses the general factors which predisposed the majority of Latin American states to regard with favor the Allied cause; he then proceeds to consider, in the body of his work, the stresses and changes to which the relations of the separate republics were subjected as the war progressed; and finally, reverting to general considerations, he concludes with some observations on the effects of the war on their national and international life.

Of the various factors which influenced the foreign policies of these countries, Professor Martin regards sympathy for the principal powers of the Entente group as the most important. Bound to France by cultural ties, they looked upon her as the champion of Latin civilization. Indebted to England for reasons historical, economic and social, they had been accustomed for a century to consider her as a barrier against foreign interference from whatever source. Influenced by the presence within their borders of a numerous and welcome Italian population, they were profoundly moved by the entry of Italy into the war. The bonds of union which thus stretched across the Atlantic were strengthened by a common feeling of indignation at German methods of warfare, and by common interest and sympathy among the American nations. To this last factor, continental unity, the author does not attach too much importance. Indeed, his brief reference to it in his introductory chapter leaves the reader in doubt; but as the story unfolds, the conviction grows that it played no inconsiderable part in determining the course of action of a majority of the republics.

There were other influences, to be sure, operating in a contrary direction, and Professor Martin points these out. By a highly organized and skillfully directed economic and intellectual penetration effected during the decades preceding the war, Germany had acquired a hold on Latin America which was difficult to shake. Moreover, the Allied Powers were not uniformly fortunate in their dealings with the Latin American Republics. Such measures as the Black List, and decrees against the non-importation of certain products, aroused dissatisfaction and led to demands for reprisals. The movement of Pan-Hispanism, on the one hand, and distrust of the United States, on the other, reacted measurably in favor of the Central Powers. And yet, in spite of all counteracting forces, the attachments between these countries and the Allied Powers grew firmer as the conflict progressed. Antipathy for Germany developed correspondingly, and eventually eight of the twenty republics declared war; five broke relations with Germany, and of the seven remaining neutral, all but one or two leaned toward the cause of the Allies.

The reader is not led, however, to infer that Latin-American policy was

determined wholly by sentiment. On the contrary, he is made to see that the more important republics at least, declared war, broke relations, or remained neutral for reasons of a more practical sort. The first to declare war were Cuba and Panama. They were closely bound to the United States by treaty, yet their course was determined by their own national interests. Less evident were the motives of the Central American Republics, Costa Rica, Guatemala, Honduras and Nicaragua, though each had its peculiar reasons for declaring war, apart from sympathy and apart from any undue influence which the United States may have exerted over them. Haiti declared war, but as the republic was at the time occupied by United States marines, no deduction can be made as to its real attitude. The clearest case is that of Brazil. Its policy was frankly Pan-American. None the less it was actuated mainly by national considerations. The events leading up to its declaration of war were strikingly similar to those which induced the United States to enter the contest. The repeated attacks of German submarines on Brazilian ships, occasioning the loss of Brazilian lives and property, caused the government first to break relations, then partially to revoke neutrality, and finally to recognize and proclaim a state of war.

The states which broke relations with Germany were Peru, Bolivia, Uruguay, Ecuador and the Dominican Republic. Those remaining neutral were Argentina, Chile, Colombia, Mexico, Salvador, Venezuela, and Paraguay. Of those which severed relations, Uruguay presents the most interesting study. When the United States declared war, the Uruguayan Republic had suffered no act of aggression or attack upon its rights. It accordingly proclaimed its neutrality. It extended, however, its "moral sympathy and solidarity" to the United States, and shortly afterward issued a declaration to the effect that no American country at war with the nations of another continent would be treated by the Uruguayan Government as a belligerent. This action was followed by the severance of relations with Germany "solely on the principle of high solidarity with the defenders of right and justice who are at the same time the stalwart defenders of the sovereignty of the small nations." In the meantime the Government of Uruguay bent every effort to effect a concert of American nations in the interest of a common struggle against Germany. "The ideals and principles of Pan-Americanism," says Professor Martin, "to which many of the Latin American countries in the past had rendered merely lip service, were in the case of Uruguay, adopted as the norm of her international policy." Its Pan-American efforts were unremitting, but they failed, as the mild attempt of President Wilson to achieve the same end failed. Such failures prove no lack of essential unity among American Republics. They merely demonstrate that whatever unity exists is not in the nature of a defensive alliance.

To the subject of Argentina's neutrality Professor Martin devotes a long and interesting chapter. In this republic, as elsewhere in Latin America,

public opinion favored the Allies. The national legislature, the press and a large and influential element of the population demanded drastic action against Germany, particularly after the Luxburg revelations. But President Irigoyen held firmly to a neutral course. This led to charges that he was partial to Germany. Professor Martin admits that the nearness of the events and the serious *lacunae* in the documentary evidence rob any conclusions which may be made at the present time of the stamp of finality. After examining all the available evidence, however, he became convinced that Irigoyen's policy was neither pro-German nor pro-Ally, though toward the close of the war it gravitated toward a neutrality favorable to the United States and the Allies. In stubbornly maintaining neutrality the Argentine President may have been influenced in part, Professor Martin thinks, by a desire to concentrate the energies of the nation on certain domestic reforms for which his party stood sponsor; in part by a disinclination to follow in the wake of the United States; and in part by the ambition to have Argentina seize the opportunity for assuming a position of leadership among the Latin American nations. As evidence of this last consideration the author points to the repeated, though unsuccessful, attempts of the President to assemble a Latin American congress at Buenos Aires. In the light of the whole history of Argentine foreign policy, this view seems plausible.

Chile maintained neutrality with dignity and success. Within such limits however as international law permitted, the government interpreted its obligations, the author thinks, in a sense distinctly advantageous to the United States and the Allies. Popular sympathy, at first divided, turned steadily toward the Allied cause, and when the Armistice was signed the event was celebrated in the press and by great public gatherings as though it were a victory of Chile itself. The situation of the Colombian Republic was complicated and difficult. Geographical considerations gave to its action the highest importance, and the presence of strong pro-German influences, together with the existence of a smouldering resentment against the United States, lent an element of doubt as to the course it might pursue. Yet Professor Martin concludes after a careful scrutiny of the official acts of the government, that Colombian neutrality was preserved without the slightest bias in favor of Germany. So much he could not say of Venezuela, though technically that government in no way departed from a neutral course. The attitude of Mexico toward the war is still a matter of controversy and Professor Martin brings to bear upon the subject no important new information.

As to the general effects of the war on the Latin American countries, Professor Martin inclines to the belief that the good results preponderate over the evil. On the whole, the republics acquired a graver sense of national responsibility, and a more sober consciousness of national dignity. Their public conscience was aroused and their public opinion was invested with new power. They learned self-reliance, established their commercial

and financial relations upon a more solid foundation, and drew into closer relations with the United States and the rest of the world as well. "To our sister republics," says Professor Martin, "is no longer applicable the half contemptuous charge made in pre-war days that they stand on the margin of international life."

Professor Martin has given a good general view of Latin America and the World War. From sources widely diverse and ordinarily inaccessible he has industriously gathered and carefully digested a vast array of facts and he has presented the results in a lucid and readable form. But he disappoints the reader in some respects. His treatment of the legal questions involved is not wholly satisfactory, and a certain lack of detachment on his part vitiates the work to some extent.

JOSEPH B. LOCKEY.

The Problem of International Sanctions. By D. Mitrany. New York: Oxford University Press, American Branch, 1925. pp. viii, 88. \$0.85.

This little book is an elaboration of a memorandum which the author prepared for the American group responsible for the *Draft of a Treaty of Security and Disarmament*. The author believes that "sanctions really are the crux of the difficulties which clog our efforts to organize peace" (p. v). We cannot do without them (p. 2). The peaceful settlement of international disputes and sanctions are completely interdependent (p. 72).

Assuming that "it is not at present practical policy to make participation in military sanctions obligatory," that a reliable system of international security is nevertheless indispensable, and that it will be better to begin with a modest system which can be relied upon to work (p. 26), the author proceeds to subject to critical examination the scheme of sanctions in the League Covenant, the Geneva Protocol, and proposed regional pacts. He is convinced that "the military sanction must remain an extreme measure, to be adopted only in exceptional circumstances; and no country may be forced into taking it whose sentiment or interests or means are opposed thereto" (p. 27). Economic sanctions must be the chief reliance, and even economic sanctions should be carefully confined. "In the general function and effect of economic action one can distinguish three phases: preventive, repressive, and punitive; and it is neither in the League's interest nor in its spirit to have much to do with the last" (p. 45). "To put it positively, in support of the League's economic sanctions, members should not, as a general rule, be bound to do more than to cut off supplies and economic facilities which the aggressor State might draw from their own territories" (p. 42). The only definite general obligation approved is "that of not giving assistance to the aggressor" (p. 55). This means that the League Covenant's machinery of sanctions should be moderated in the hope that so moderated it may really be made effective (p. 75).

The efficacy of even a moderate plan of economic sanctions may be de-

feated by the United States. So, for Europe, American policy becomes all-important. The United States is not expected to share in keeping European peace. But may it be counted upon not to hamper the European nations in keeping peace among themselves? Would it be ready to withhold money and materials from a European state which had accepted a test of aggression and by that test had been convicted as an aggressor? "Benevolent neutrality towards the League" on the part of the United States, the author concludes, would "at last enable the League to prove itself a trustworthy guardian of international peace, without having to rely on armies and navies for its watch" (p. 88).

Mr. Mitrany has given us a clear and luminous discussion of a problem of the first importance. Whether readers accept his premises or agree with his conclusions or not, they will find his study of exceptional interest both from the viewpoint of international politics and of international law.

EDWIN D. DICKINSON.

The Diplomatic Relations of Great Britain and the United States. By R. B. Mowat. New York: Longmans, Green & Co., 1925. pp. xi, 350. Index. \$5.50.

The outstanding importance of Anglo-American relations to the cause of world peace at the present time is, in itself, a sufficient justification for another book on this inexhaustible subject. The task has been appropriately undertaken by Professor R. B. Mowat, who, under the exchange system has been chosen as Acting Professor of History in the University of Wisconsin during the current year. It is high praise to say that his study of *The Diplomatic Relations of Great Britain and the United States*, forms a worthy companion-piece to the late Professor E. A. Dunning's study of the same field.

The viewpoint of both these historians, while eminently national, is distinctly sympathetic in outlook. Both treat even the most controversial moments of the long history of Anglo-American relations—as they should be treated—in a tone of friendly understanding. It is, moreover, gratifying to note that the Oxfordian tradition, at least, still holds out against the temptation of rewriting Great Britain's diplomatic history to conform to the new Continental policy regarding the League of Nations. Conveniently ignoring Castlereagh's exact definitions of coöperation and Canning's jubilant phrase "England has resumed her isolation," these attempts, more or less ingenuous, to explain away the reasons for England's isolationist policy in the past have not lightened the task of the historian of Anglo-American amenities. Professor Mowat is relieved of the necessity of taking a certain critical stand, noticeable in the writings of a recent historical school. This has for its basis a desire to ignore the underlying mutuality of policy arising from the fact that for geographic reasons alone Great Britain and the United States have heretofore been generally considered as equally devoted

to a policy of disassociation from Continental European affairs, so far as circumstance allowed. His treatment of the "hand in hand" policy of the Monroe Doctrine is therefore logical, if eminently orthodox and without departures from the views advanced by Professor Alison Phillips in his famous Oxford lectures.

Professor Mowat recognizes, plausibly enough, that while the Monroe message rejected "the idea of an entangling alliance with Great Britain," it was consistently at one with the implications of British policy when "it warned off the Powers of the Old World from the New." In this connection the author is at pains to avoid the somewhat outworn controversy with respect to the authorship of the famous doctrine. He says:

It was not Monroe alone who did this, nor Adams: they were both impelled by the deep, instinctive feelings of their people. It was the danger to their free institutions, menaced as they thought by the Holy Alliance, by "the principles of European solidarity"—that made the Americans offer a repellent front to Europe and goes far towards explaining their subsequent continuous tendency towards isolation.

With respect to Anglo-American coöperation, he pertinently adds:

It may be that the United States has got peace and quiet and prosperity from the decision to remain outside European politics. It is, however, permitted to an historian to regret that Canning's idea was not tried too, if only for a brief experiment, to see how an Anglo-American entente would work in the world.

Professor Mowat notes the very high standard of character and personality that, almost without exception, has marked the representatives of Great Britain at Washington and of the United States in London. His narrative stresses the personality of the ministers and ambassadors of both countries as forming one of the basic reasons for what, taken as a whole, is a splendid record of coöperative diplomatic achievement. He has much to say concerning the personal relations of John Quincy Adams and Stratford Canning; of Rush and George Canning; of Webster and Ashburton; of Seward and Lord Lyons; of Hay and Pauncefoot, etc., to mention but a few of the names which illustrate the long honor roll in this record of mutual effort at peace and understanding. Close beneath the surface of even the most acute diplomatic situations was always to be found a strata, if not of mutual sympathy, at least of mutual respect. It is especially his analysis of this personal element that makes this book a valuable aid, not only to the student of international affairs, but also to the general reader.

W. P. CRESSON.

Grundprobleme des Voelkerbundes. By Hans Wehberg. Berlin-Friedenau: Hensel and Co., 1926. pp. 108. 3.50 Mk.

This is a collection of sixteen essays, all but three of which have been published during the last five years in various European magazines. One of

those unpublished is Dr. Wehberg's essay on "Germany and the League of Nations," which he offered in 1924 in competition for the Filene Peace Prize, and for which he received honorable mention.

The essays proceed in logical order from a consideration of the work of the Hague Conferences to the League of Nations as a community of peace and as a guarantee of security, and on to the League's future tasks, closing with appendices including the League's Covenant, distribution of expense among its members, and a list of outstanding books (all in German) on the Hague Conferences and the League.

The author rightly regards "the work of The Hague" as the foundation of all recent international structures, both in the direction of substituting pacific settlement for war, and in that of reducing and limiting national armaments. The Hague, he believes, suffered a temporary eclipse in the World War, but its spirit is still alive and fruitful. The Court of Arbitration, Commissions of Inquiry and, particularly, the long series of treaties of arbitration, have applied The Hague principles in many important ways. In fact, so numerous were the arbitration treaties, and so much wider in scope than they were before 1914, that they alone justify calling the years since the War, "the Epoch of Peace."

Dr. Wehberg's critique of the League of Nations, its achievements and possibilities, is keen and helpful; but it is chiefly interesting to non-Germans because of its pacific and progressive spirit. If this spirit is largely representative of the New Germany, it gives solid ground for an optimistic outlook on Germany's and the world's future progress and prosperity.

On one point only, but that a fundamentally important one, does Dr. Wehberg reflect the antiquated theory of the militarists. He still believes, with most Europeans, that military force is the ultimate sanction of international obligations; and although he argues bravely for "disarmament," he still clings to the use of national armaments for "defensive" and "enforcement" wars.

WILLIAM I. HULL.

Westlake's Private International Law, 7th Ed. By Norman Bentwich. London: Sweet & Maxwell, Ltd., 1925. pp. xxxix, 471. Index. £1.7.6 net.

It is only three years since Mr. Bentwich, pursuant to a wish expressed by his old teacher, the late Professor Westlake, brought out the sixth edition of this standard work, whose first edition bears the date of 1858. Though still detained by official duties at Jerusalem, where no adequate law library is accessible, he has felt the new edition requisite from the fact that English courts, which particularly engross his attention, have since then rendered nearly one hundred decisions "which are a basis of fresh rules or have amplified the rules formulated by Professor Westlake." Among those thus elucidated are "Jurisdiction over foreign sovereigns" and the "Extent to

which there may be a waiver of exemption by appearance and participation" (p. 272 *et seq.*).

"The persistent litigation of the Kelantan Government," he says, "has given fresh precision to these rules." Furthermore, the earlier decisions as to the immunity of foreign government vessels from process have been fully sustained and applied, even where the ship had passed from sovereign ownership or employment, where the cause of action arose during such ownership or employment (pp. 268-9). A growing feeling of jurists, however, is recorded in favor of fixing a limit to such complete immunity. The effect of revolutionary legislation on the existence and the property of juridical persons is shown to have been considered, but not yet fully ascertained, in the case of Russian banks and Russian ships. Rates of exchange applicable on foreign judgments and foreign transactions, affected by enormous fluctuations, have been much dealt with, as well as the liability of foreign companies to income tax. As to this last topic Dr. Bentwich says "the subtlety of lawyers is constantly pitted against the subtlety of Revenue Commissioners."

Several decisions of the Privy Council have elaborated novel aspects as to Oriental domicile, and the Treaty of Lausanne has brought to an end over five hundred years of extraterritorial jurisdiction in the Turkish Empire.

Some leading cases have been decided on jurisdiction in divorce and judicial separation, and on the transfer of movables and the situation of shares and debts.

In England, by Act of 1922 the right of inheritance has been extended to foreigners, and the institution of the Free State of Ireland has resulted in remarkable rulings as to British law in the territory of the new government, and many more such seem impending. Dr. Bentwich thinks, since the World War, the main attention in international conventions has been directed to public international law, but that its early application to the development of private international law is indicated and anticipated.

The modifications shown fully warrant a new edition of a classical work like this of Professor Westlake, whose name continues in honor and authority among scholars and judges. Its convenience to jurists, practitioners, and all dealing on the subject is obvious. It may be added that the new volume exceeds the old by but thirty pages, thus averaging but ten pages of growth a year.

CHARLES NOBLE GREGORY.

BOOK NOTES

The Diplomatic Relations of the United States and Brazil. Vol. I. *The Portuguese Court at Rio de Janeiro.* By Joseph Agan. Paris: Jouve et Cie., 1926. pp. 146.

This little volume is concerned with the relations between Brazil and the United States from the establishment of the Portuguese Court at Rio de

Janeiro in 1808 to the return of John VI to Portugal in 1821. It is based on careful research and is a contribution of value to our diplomatic history. Unfortunately, however, the work is marred by serious defects. It is miserably printed, typographical errors are numerous, and in places the English is bad. In a foreword the author announces his intention of publishing four additional volumes, embracing the period of the Empire and the period of the Republic as well. The undertaking is commendable, but it is to be hoped that in the remaining volumes the defects of the first will be avoided.

J. B. L.

The Protection of Trade-Marks, Patents, Copyrights and Trade-names in China. By Norwood F. Allman. Shanghai: Kelly & Walsh, Ltd., 1924. pp. iii, 207. Index.

This valuable handbook, written by a former American Consul in China, analyzes the conditions of protection of industrial and intellectual property in China. Prior to the Chinese statute of 1923, relating to trade-marks, such protection was diplomatic rather than legal. As to patents and copyrights, protection is still dependent on treaties and understandings of the Powers with China, and on agreements between the various nations themselves, respecting infringements by their own nationals. The latter agreements are of especial interest by reason of the fact that the Chinese seldom manufacture fraudulent imitations of foreign articles, the principal infringers being foreigners using the Chinese markets. The book is invaluable in giving a ready insight into the most important treaties and diplomatic correspondence and in providing a translation of such fragmentary Chinese regulations as may already exist. The author points out the necessity for better protection and makes suggestions to this end.

A. K. K.

The United States Senate and the International Court. By Frances Kellor and Antonia Hatvany. New York. Thomas Seltzer, Inc., 1925. pp. xix, 353.

This book represents an earnest and, on the whole, a competent effort to prepare and form public opinion concerning the controversy which culminated in the Senate's recent stirring debates in connection with the adherence of the United States to the Permanent Court of International Justice. Its appearance when this struggle was imminent was apparently timed to furnish students of the question (notably, it is rumored, the "civic study circles" of the Federation of Women's Clubs) with a convenient summary and analysis of the facts underlying this important question. Whether or not the authors' purpose was accomplished is a matter open to doubt. The book, however, remains as a useful monument to their industrious research and a refutation of the charge that women can never be realists. The authors listed eight changes in the protocol of adherence, which they deemed

advisable in order to separate the Court from the League. It is a compliment to their prescience that five, at least, of these conditions have been met by the revised Swanson resolution. The three remaining *desiderata* were as follows: (a) Provision should be made respecting judges for the presence of a national of every party when one party has a national, or for the withdrawal of all nationals in advisory proceedings; (b) the intervention by groups of States between parties in the Court should be made impossible, whether these form a part of the League or not; (c) the expenses of the Court should be completely detached from the instrumentalities of the League.

W. P. CRESSON.

REVIEW OF CURRENT PERIODICALS

BY CHARLES G. FENWICK

1. AMERICAN BAR ASSOCIATION JOURNAL, March, 1926

American and British Claims Arbitration Tribunal, by Howard S. Le Roy (pp. 156-160), surveys the work of the tribunal, the second of its kind between the two countries dealing with the general arbitration of pecuniary claims, and discusses the several points of law raised in the respective cases and the decisions reached by the tribunal.

Ibid., April, 1926. The Comparative Law Bureau of the American Bar Association contributes articles (pp. 242-274) on *An Inter-American Negotiable Instruments Law*, by Charles S. Lobingier, on *Reform in the Turkish Judicial System*, by Crawford M. Bishop, on *Sovereignty in Judicial Interpretation*, by Charles Pergler, on *Latin American Legislation*, and on *European Literature and Legislation*.

Ibid., May, 1926. *Some Phases in the Development of International Law*, by Hon. R. E. L. Saner (pp. 332-335), is a presidential address before the American Branch of the International Law Association and sketches the development of arbitration between nations culminating in the establishment of the Permanent Court of International Justice.

2. CANADIAN BAR REVIEW, January, 1926

Some Aspects of Treaty Legislation, by A. W. Rogers (pp. 40-45), deals briefly with the interesting question of the extent of the power of the Parliament of Canada to legislate for the execution and enforcement of treaties entered into by the Dominion Government.

Ibid., May, 1926. *The Progressive Codification of International Law*, by Norman Mackenzie (pp. 302-306), is a note from Geneva on the work being done by the Committee of Jurists appointed by the Council of the League of Nations.

3. JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW, November, 1926 (Vol. VII, Part IV)

Sir Graham Bower contributes a note on *Territorial Waters* (pp. 137-141) in which he argues for a more elastic handling of the problem which will take into account the different purposes for which jurisdiction is claimed. *The Nationality of Married Women*, by Chrystal Macmillan (pp. 142-154), points out the changes that have recently taken place in national legislation and emphasizes the necessity of making any international arrangements conform to the new order. *Suits between States within the British Empire*, by Sir W. Harrison Moore (pp. 155-170), discusses an interesting point of federal constitutional law with special reference to Australia.

Ibid., February, 1926 (Vol. VIII, Part I). *The Dominions and Treaties*, by Sir W. Harrison Moore (pp. 21-37), returns to the much controverted question of the international character of the members of the British Commonwealth and touches in conclusion upon the effect of the membership of the Dominions in the League of Nations in respect to the unity of the British Empire. *The League of Nations and Mosul*, by A. Berriedale Keith (pp. 38-49), summarizes the action of the Council of the League of Nations and of the Permanent Court in reference to the dispute between Great Britain and Turkey. *Foreign Corporations in International Public Law*, by E. H. Feilchenfeld (pp. 81-106), is the first installment of a careful study with elaborate references to English and Continental authorities. *Dr. Lundstedt against the Law of Nations*, by T. A. Lacey (pp. 107-110), is a sharp critique of Dr. Lundstedt's recent volume on "Superstition or Rationality in Action for Peace." *The Decisions of the Anglo-German Mixed Arbitral Tribunal*, III, by Everard Dickson (pp. 111-124), continues the very useful summaries printed in previous numbers of the JOURNAL.

4. FOREIGN AFFAIRS, April, 1926

What is Disarmament? by Tasker H. Bliss (pp. 353-368), is a commentary upon the principle that effective disarmament is dependent upon the condition precedent of making provision for the general security. *How the World Court has Functioned*, by Nicholas Politis (pp. 443-453), is a brief survey by an expert of the organization and procedure of the court. *America's Position in Radio Communication*, by James G. Harbord (pp. 465-474), argues that in view of the world-wide extension of American privately-owned electrical systems the contemplated Washington Radio Conference must frame its convention so as to accord with the status of such property under the American constitution.

Ibid., July, 1926. *The Future of the League*, by A. Lawrence Lowell (pp. 525-534), is a brief but thoughtful comment upon the problems involved in the organization of great and small states within the League of Nations in the light of the Locarno agreements and of the admission of Germany to the League. It is supported by an interesting study of *Germany at Geneva* by William E. Rappard (pp. 535-546). *Waterways Problems on the Canadian Boundary*, by Henry Lawrence (pp. 556-573), discusses the possibilities of new canals and the practical solution of the difficulties created by the Chicago drainage system. *National Monopolies of Raw Materials*, by Jacob Viner (pp. 585-600), is a stimulating discussion of one of the most important practical problems of international politics. *Aerial Armament and Disarmament*, by Edward P. Warner (pp. 624-636), contains a careful and impartial estimate of the practical difficulties involved in the international control of aerial armaments.

5. MICHIGAN LAW REVIEW, March, 1926

The Legal Position of Foreigners in Soviet Russia, by Leo Zaitzeff (pp. 441-460), discusses the important features of recent Soviet legislation covering the civil and political rights of individuals, the position of foreign business firms in Russia, copyrights and patent rights, the arbitration of industrial disputes, judicial organization and procedure, and testate and intestate succession.

Ibid., May, 1926. *Jurisdiction over Foreign Corporations*, by Maxwell E. Fead (pp. 633-656), is exclusively concerned with interstate relations under American constitutional law. *The Court of Claims: Its jurisdiction and Principal Decisions Bearing on International Law*, by J. H. Toelle (pp. 675-697), reaches the conclusion that "a high level of justice has been meted out in so far as the jurisdiction of that body permitted."

6. UNIVERSITY OF PENNSYLVANIA LAW REVIEW, March, 1926

The Codification of International Law, by Roland S. Morris (pp. 452-463), criticizes the conception of codification in the form of a fixed body of rules, such as the proposed code of "American International Law," and advocates instead the method of the Committee of Experts of the League of Nations by which particular subjects are selected which call for, as well as admit of, constructive legislation. *Carriage of Goods by Sea—The Hague Rules*, by F. Cyril James (pp. 672-690), deals with an important question of maritime law and advocates the passage of the bill pending before Congress (H. R. 14166, A Bill Relating to the Carriage of Goods by Sea).

7. WEST VIRGINIA LAW QUARTERLY, December, 1925

The New Law of Nations, by Edwin D. Dickinson (pp. 4-32), undertakes to show the probable development of the international law of the future by examining three of the fundamental questions raised by the existing law, namely, how the nations have gained admission into and retained membership in the international community, what rights the recognized members of the community have acquired and what obligations they have incurred, and what could be done if rights were flouted or obligations evaded. The conviction is expressed that the new law of nations will place less emphasis upon the rights of states as separate and isolated entities and more upon the common well-being of the great society of nations.

8. YALE LAW JOURNAL, April, 1926

Some Phases of the Administrative and Judicial Interpretation of the Immigration Act of 1924, by Philip C. Jessup (pp. 705-724), deals with one of those domestic questions which have important international reactions. His conclusion is that, while the Act is not perfect, it has on the whole been sensibly interpreted and administered and is "one of the most humanitarian systems of restricted immigration ever devised."

Ibid., June, 1926. *Suggestions Concerning an International Code on the Law of Nationality*, by Richard W. Flournoy, Jr. (pp. 939-955), follows up previous contributions by the same writer by an examination of efforts now being made to settle conflicts of nationality laws by international agreement. Four problems are considered: that of naturalization, that of dual nationality, that of no nationality, and that of the nationality of women who marry men of different nationality. The writer recognizes that as long as standing armies and the accompanying necessity of conscription continue the obstacles to general agreement will be hard to remove, but that much may be accomplished by persistent and intelligent effort and a spirit of reasonable conciliation.

THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

BY MANLEY O. HUDSON

Bemis Professor of International Law, Harvard Law School

It was inevitable that the end of the World War should be followed by a revival of interest in the systematic development of the law of nations. Such a result was foreseen by W. E. Hall as long ago as 1890, but the extent of the revival and its consequences were pictured by him in terms altogether too sanguine.¹ Many of the people who have expected the experience of the war to be capitalized in an immediate clarification of the laws of war must have been greatly disappointed by the events of the past years. A struggle which aroused so many passions, which divided a large part of the human race into hostile camps, could not possibly have produced the conditions necessary for building a new law which would embody the common views of people in many countries; but perhaps it did serve to direct attention to the lawless character of international relations in certain fields, and thus gave to politicians and lawyers opportunity for extending and improving the law governing such relations. If there has not been a general unanimity of opinion as to the method to be followed and the direction to be taken, the opportunity has not been neglected, and currents are now under way and agencies have been created which promise a continued if not a consistent progress for the future.

The pre-war world was sadly lacking in machinery for the development of the law of nations. The First Peace Conference at The Hague in 1899 succeeded in promulgating three international conventions which were quite generally ratified,—a Convention for the Pacific Settlement of International Disputes, a Convention respecting the Laws and Customs of War on Land, which embodied in some degree the Brussels Draft Declaration of 1874 dealing with the same subject, and a Convention for the adaptation of the Geneva Convention of 1864 to Maritime War. The Second Peace Conference at The Hague in 1907 promulgated thirteen new conventions, three of which amended the conventions of 1899, and eleven of which dealt with questions relating to the conduct of war. If these conventions constituted a significant contribution to international law, most of them did not deal with the problems most insistently emphasized in current public discussion, and they had comparatively little effect either on the life or on the political thought of the time.

The Hague Conferences created the Permanent Court of Arbitration, which continues to serve a most useful function, but they did not succeed in setting up any permanent machinery for the continuous handling of international problems and the continuous development of law. The Final Act

¹ See Hall, *International Law*, 3rd ed. (1890), preface.

of the Second Conference contained a recommendation that a third conference be held, to consider among other things "the preparation of regulations relative to the laws and customs of naval war," and that a preparatory committee should be set up some two years in advance to ascertain "what subjects are ripe for embodiment in an international regulation." Some steps were later taken toward the establishment of such a preparatory committee; but on June 22, 1914, the Government of the United States suggested the postponement of the Conference from 1915 until 1916,² and soon thereafter the war so changed the whole international situation that the *vœu* of 1907 was all but forgotten. With all that has intervened, the problem must now be considered from other angles.³ If a third general conference should ever be held at The Hague, it will be so different from the conferences of 1899 and 1907 and the conference originally envisaged for 1915 that it can hardly be said to be a continuance of the same series; it will probably not be convoked by a Czar of Russia, states will probably be represented which were hardly dreamed of in 1907, problems will probably be considered which will bear little resemblance to those dealt with by the previous conferences.

In the western hemisphere, an effort was also under way before the war for systematizing the development of international law. At the Second Conference of American States held in Mexico, a convention was signed on January 27, 1902, which would have set up a "committee of five American and two European jurists" to draft a code of international law,⁴ but the convention was not ratified. At the Third Conference of American States at Rio de Janeiro in 1906, a new convention was signed creating a Committee of Jurists to prepare drafts of codes of both public and private international law, "regulating the relations between the nations of America." Professor John Bassett Moore was the representative of the United States on this commission. It was first planned that this commission should meet in 1907, but for various reasons, including delay in the ratification of the convention, the meeting was postponed until 1912. At that time six sub-committees were set up and their assignments covered a wide range of subjects; maritime war and the duties of neutrals, war on land and claims growing out of it, pacific settlement of disputes, status of aliens, domestic relations and succession, and other matters of private international law. A second meeting of the commission was set for 1914, but was not held.

The Fifth Conference of American States meeting at Santiago in 1923 recommended the reestablishment of the committees set up at Rio de Janeiro in 1912, and envisaged the "gradual and progressive" codification of "American" international law. It recommended a second meeting of the Commis-

² U. S. Foreign Relations, 1914, p. 10.

³ See, however, the hearings before the Committee on Foreign Affairs of the U. S. House of Representatives, 69th Congress, 1st Session, May, 1926, in the course of which numerous persons advocated a Third Hague Conference for the Codification of International Law.

⁴ See Minutes and Documents of the Second Pan-American Conference, p. 716.

sion of Jurists in 1925, but this meeting has been postponed and will not be held before 1927. The Government of the United States will be represented on the Commission by Dr. James Brown Scott and Professor Jesse S. Reeves. In preparation for the meeting of the commission, the Governing Board of the Pan-American Union sought the coöperation of the American Institute of International Law, and on March 2, 1925, the Governing Board voted to transmit to the various governments a collection of thirty projects elaborated by the American Institute.⁵ These projects will undoubtedly prove of assistance to the commission when it meets, though few of them deal with matters of first importance, and some of them seem to be quite beyond the range of probable realization. The history of the Commission of Jurists first provided for in 1902, again agreed upon in 1906, actually brought together in 1912, reconstituted in 1923, and now possibly to meet for a second time in 1927, can hardly be very reassuring to those people who talk about the codification of international law as if it were to be achieved once and for all, at a single world conference working for perhaps a few months.

The end of the war was bound to be followed by a fresh effort to achieve a restatement of certain parts of international law, as well as new international legislation to govern those relations of states not covered by the existing law. Such effort was naturally linked with the new method of conference and co-operation called the League of Nations, and the whole history of international law records no more significant development than the results which have been achieved in this relatively short period. A large body of new conventional law has come into existence which, if it does not greatly affect the principles of the customary law, has had the effect of widely extending the field of law-governed international relations. The multipartite conventions which have been drawn up since the war, by conferences held under the auspices of the League of Nations, include the following: ⁶ twenty-three international labour conventions, some of which have been widely ratified; a convention and statute on freedom of transit, signed by some thirty-three states and adhered to by four states which did not sign; a convention and statute on the régime of navigable waterways of international concern, signed by some twenty-seven states and adhered to by four states which did not sign; a declaration recognizing the right to a flag of states having no sea-coast, signed by some thirty-one states and adhered to by seven others; a convention and statute on the international régime of railways, signed by some thirty-three states and adhered to by two others; a convention and statute on the international régime of maritime ports, signed by some twenty-five states and adhered to by three others; a convention relating to the transmission in

⁵ See the volume entitled *Codification of American International Law*, published by the Pan-American Union, Washington, 1925.

⁶ The annex to the annual report to the Assembly of the League of Nations on the work of the Council and the Secretariat tabulates the progress of this process of international legislation. See League of Nations Document A, 6 (a), 1926, Annex.

transit of electric power, signed by some eighteen states; a convention relating to the development of hydraulic power affecting more than one state, signed by some seventeen states; a convention for the suppression of the traffic in women and children, signed by some thirty-two states and adhered to by five others; a convention for the suppression of the circulation of and traffic in obscene publications, signed by some forty-three states and adhered to by four others; a convention concerning the traffic in opium signed by some thirty-four states; a convention for the supervision of the international trade in arms and ammunition and implements of war, signed by some thirty states; a protocol for the prohibition of the use in war of asphyxiating, poisonous, or other gases and of bacteriological methods of warfare, signed by some thirty-five states; a protocol on arbitration clauses in commercial matters, signed by some twenty-eight states; a convention relating to the simplification of customs formalities, signed by some thirty-five states and adhered to by one other; a convention regarding the measurement of vessels employed in inland navigation, signed by some twenty states.

This international legislative activity has in no way arrested similar activities which were already under way on a more limited scale before the war. The work of the International Maritime Committee, for instance, has been continued with marked success, and it has had the satisfaction of seeing six of its codes of maritime law embodied in international conventions. The Brussels Conference of 1922 adopted a convention on the law of carriage of goods by sea which has now been signed by leading commercial states, as well as a convention on shipowner's liability, and a convention on maritime mortgages and liens. The very recent Brussels Conference of 1926 adopted a convention on immunity of state-owned ships, as well as a convention amending the 1922 convention on maritime liens and mortgages.

The President of the International Maritime Committee, M. Louis Franck, has recently assured us:⁷ "The time is thus not far off when by far the greatest part of the law relating to maritime commerce and shipowning will be uniform, and that it will be permissible to speak of the new law of the seas." Similarly, the Hague Conferences on Private International Law, organized before the war, have continued their work, and the fifth conference meeting at the Hague from October 12 to November 7, 1925, drew up two draft conventions for submission to the approbation of the governments represented, a draft convention dealing with bankruptcy, and a draft convention dealing with the recognition and execution of judicial decisions.

But a more systematic effort to restate, improve, and codify the traditional body of international law has been insisted upon, and a widespread public opinion has developed in certain countries which attaches great importance to such an effort. The insistence proceeds largely from the view that a re-

⁷ Franck, "A New Law for the Seas: An Instance of International Legislation," 42 *Law Quarterly Review*, p. 25 (January, 1926); Franck, "The New Law for Seas. Further Progress," 42 *Law Quarterly Review*, p. 308 (July, 1926).

statement and codification might have some influence on the possibility and likelihood of war, and it seems probable that the large anticipations from such an effort are doomed to disappointment.

In 1920, the Advisory Commission of Jurists constituted by the Council of the League of Nations to draft the statute of the Permanent Court of International Justice, meeting at The Hague, went outside of its mandate to adopt a recommendation proposed by Mr. Elihu Root in the following terms:⁸

I. A new inter-State Conference, to carry on the work of the two first Conferences at the Hague, should be called as soon as possible for the purpose of:

1. Re-establishing the existing rules of the Law of Nations, more especially and in the first place, those affected by the events of the recent War;

2. Formulating and approving the modifications and additions rendered necessary or advisable by the War, and by the changes in the conditions of international life following upon this great struggle;

3. Reconciling divergent opinions, and bringing about a general understanding concerning the rules which have been the subject of controversy;

4. Giving special consideration to those points which are not at the present time adequately provided for, and of which a definite settlement by general agreement is required in the interests of international justice.

II. That the Institute of International Law, the American Institute of International Law, the *Union juridique internationale*, the International Law Association and the Iberian Institute of Comparative Law, should be invited to adopt any method, or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the various Governments, and then to the Conference, for the realisation of this work.

III. That the new Conference should be called the Conference for the Advancement of International Law.

IV. That this Conference should be followed by periodical similar conferences, at intervals sufficiently short to enable the work undertaken to be continued, in so far as it may be incomplete, with every prospect of success.

This recommendation does not seem to have been preceded by any extended discussion at the meetings of the committee. While there must be general approval of the desire to give every possible guide to the Permanent Court of International Justice to be used in its finding the law which it may apply, the recommendation of the committee could hardly have been more unhappily conceived. Any attempt at that time to restate the laws of war or to formulate the modifications made necessary by the World War, must almost certainly have tended to vindicate the views then prevailing among the governments of those countries which considered themselves victors in the war. It would have been difficult at that time to have had any collaboration from Germany or Russia or Turkey, and without the collabora-

⁸ Records of First Assembly, Meetings of Committee, I, pp. 422-464.

tion of Germany, at any rate, a restatement of the laws of war would probably have produced few desirable results. Even the governments of countries opposed to Germany in the war might have been reluctant to state their own practice in the form of legislation which might later embarrass them, as instanced by the failure of the governments represented at the Washington Conference on Limitation of Armaments in 1922 to ratify the treaty relating to the use of submarines and poison gas in war.

In addition, the uncertainty of international relations in 1920, the precarious stage of the new experiment in international organization, and the extreme difficulty of effecting the necessary reconciliation between various states, rendered the time most inopportune for such an attempt as the Advisory Committee envisaged.

It is not surprising, therefore, that when the recommendation came before the Council and Assembly of the League of Nations there was little enthusiasm for it and it failed of adoption. Lord Robert Cecil, representing the Union of South Africa, declared that it would be "a very dangerous project at this stage in the world's history," and that we had not "arrived at sufficient calmness of the public mind to undertake" such a step "without very serious results to the future of international law."⁹ Moreover, in the meetings of the International Labour Conference in 1919 and 1920, in the meeting of the Paris Passport Conference in 1920, in the meeting of the Financial Conference at Brussels in 1920, and in the meeting of the Conference on Transit and Communications then planned for 1921, a beginning had been made with what promised to be a very fruitful functional development of international law. It was not until this new process had been more thoroughly established that the nations represented in the Assembly of the League of Nations were willing to consider a more general effort to develop international law.

At the Fifth Assembly of the League of Nations, on September 8, 1924, Baron Marks von Würtemberg, Minister of Foreign Affairs of Sweden, offered the following resolution:¹⁰

The Assembly:

Taking note of the report of the Council on the work accomplished by the League of Nations for the conclusion of agreements on matters of international law; and

Recognizing the desirability of incorporating in international conventions or in other international instruments certain items or subjects of international law which lend themselves to this procedure, such conventions or such instruments to be finally established by international conferences convened under the auspices of the League of Nations, after preliminary consultation with Governments and experts:

Requests the Council:

(1) To invite the Members of the League of Nations to signify to the Council the items or subjects of international law, public or private,

⁹ Records of the First Assembly, Plenary Meetings, p. 746.

¹⁰ Records of the Fifth Assembly, Minutes of First Committee, p. 97.

which in their opinion may be usefully examined with a view to their incorporation in international conventions or in other international instruments as indicated above;

(2) To address a similar invitation to the most authoritative organizations which have devoted themselves to the study and development of international law;

(3) To examine, after the necessary consultations, the measures which may be taken with respect to the various suggestions presented in order to enable the League of Nations to contribute in the largest possible measure to the development of international law;

(4) To present a report to the next Assembly on the measures taken in execution of this resolution.

This resolution was carefully studied in the First Committee of the Assembly, and after a report by a subcommittee, it was adopted by the Fifth Assembly on September 22, 1924, in the following terms:¹¹

The Assembly:

Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to communications and transit, the simplification of customs formalities, the recognition of arbitration clauses in commercial contracts, international labour legislation, the suppression of the traffic in women and children, the protection of minorities, as well as the recent resolutions concerning legal assistance for the poor;

Desirous of increasing the contribution of the League of Nations to the progressive codification of international law:

Requests the Council:¹²

To convene a committee of experts, not merely possessing individually the required qualifications but also, as a body, representing the main forms of civilisation and the principal legal systems of the world. This committee, after eventually consulting the most authoritative organisations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty:

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be the most desirable and realisable at the present moment; and

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

It is to be noted that the resolution of the Fifth Assembly did not envisage the preparation of any global code of international law, nor did the Assembly seek to have the Committee of Experts invested with any power to attempt

¹¹ Records of the Fifth Assembly, Plenary Meeting, p. 125.

¹² The Council set up the committee by a decision taken on December 11, 1924. League of Nations Official Journal, February, 1925, p. 143.

a codification of single subjects. The committee set up by the Council is instructed to consult the most authoritative organizations which have devoted themselves to the study of international law. It is warned to trespass in no way on the official initiative which may have been taken by particular states, for dealing with particular subjects.

It is to prepare a provisional list of subjects which may be usefully regulated by international agreement at the present time. It is to have this list communicated for comment to the governments of all states whether members of the League or not, and after studying such comments, it is to report to the Council as to the possibility of a fruitful attempt at codification, and as to the method which could be followed in undertaking it. The Assembly also envisaged the possibility of eventual conferences which might deal with the subjects selected by the committee.

The procedure is to be compared with that which was outlined in the Convention of Rio de Janeiro of August 23, 1906, setting up the International Commission of Jurists. The Rio de Janeiro commission was to draft codes which were to be submitted to the Fourth International Conference of American States for embodiment in one or more treaties. The Santiago Conference of 1923 contemplated that "the resolutions of the Commission of Jurists shall be submitted to the Sixth International Conference of American States, in order that, if approved, they may be communicated to the governments and incorporated in the convention." It thus appears that the resolution of the Fifth Assembly is much more restricted, and there is no danger of hasty action which might later be regretted.

The committee constituted under this resolution has been christened, somewhat ambitiously, "Committee of Experts for the Progressive Codification of International Law." It consists of the following members:

M. Hammarskjöld (Sweden), Governor of Upsala, President.

Professor Diena (Italy), Professor of International Law at the University of Pavia.

Professor C. Botella (Spain), President of the Franco-German Mixed Tribunal.

Professor J. L. Brierly (Great Britain), Professor of International Law at All Souls College, Oxford.

M. Henri Fromageot (France), Jurisconsult to the Ministry of Foreign Affairs of the French Republic.

Dr. H. Gustavo Guerrero (Salvador), Minister at Paris.

Dr. B. C. J. Loder (Netherlands), Judge of the Permanent Court of International Justice.

Dr. Barboza de Magalhaes (Portugal), Professor of Law at the University of Lisbon.

Dr. Adalbert Mastny (Czechoslovakia), Minister at Rome.

Sir Abdur Rahim (India), Member of the Council of India.

Dr. M. Matsuda (Japan).

Dr. Szymon Rundstein (Poland).

Professor Walther Schücking (Germany).

Dr. José León Suarez (Argentina), Dean of the Faculty of Political Science at the University of Buenos Aires.

Professor Charles De Visscher (Belgium), Professor of Law at the University of Ghent.

Dr. Wang-Chung-Hui (China), Deputy-Judge of the Permanent Court of International Justice.

Mr. George W. Wickersham (United States), President of the American Law Institute.

Thus constituted, the committee is unquestionably representative of the main forms of civilization and the principal legal systems of the world. It also has the advantage of containing in its personnel men familiar with different phases of international life, and the members of the committee would seem to enjoy within their own countries the confidence of their governments and their fellows in the legal profession.

The committee held its first session at Geneva from April 1 to April 8, 1925, and selected for consideration a number of subjects and subcommittees and *rapporteurs* to investigate each of them.

The topics chosen by the committee at its first session for investigation and consideration, were listed in the following manner:

(1) The Committee appoints a Sub-Committee to enquire:

(a) Whether there are problems arising out of the conflict of laws regarding nationality the solution of which by way of conventions could be envisaged without encountering political obstacles;

(b) If so, what these problems are and what solution should be given to them.

Sub-Committee: M. RUNDSTEIN (*Rapporteur*),
M. DE MAGALHAES,
PROFESSOR SCHÜCKING.

(2) The Committee appoints a Sub-Committee to examine whether there are problems connected with the law of the territorial sea, considered in its various aspects, which might find their solution by way of conventions and, if so, what these problems are and what solutions should be given to them. In particular, the Sub-Committee will enquire into the rights of jurisdiction of a State over foreign commercial ships within its territorial waters or in its ports.

Sub-Committee: M. SCHÜCKING (*Rapporteur*),
M. DE MAGALHAES,
MR. WICKERSHAM.

(3) The Committee appoints a Sub-Committee to examine what are the questions concerning diplomatic privileges and immunities which would be suitable for regulation by way of conventions and what provisions on this subject could be recommended.

Sub-Committee: M. DIENA (*Rapporteur*),
M. MASTNY.

(4) The Committee appoints a Sub-Committee to enquire into the legal status of Government ships employed in commerce with a view to the solution by way of conventions of the problems raised thereby.

Sub-Committee: M. DE MAGALHAES (*Rapporteur*),
Mr. BRIERLY.

(5) The Committee appoints a Sub-Committee to examine whether there are problems connected with extradition which it would be desirable to regulate by way of general conventions and, if so, what these problems are and what solutions should be given to them.

Sub-Committee: Mr. BRIERLY (*Rapporteur*),
M. DE VISSCHER.

(6) The Committee appoints a Sub-Committee to examine:

(a) Whether, and in what cases, a State may be liable for injury caused on its territory to the person or property of foreigners;

(b) Whether, and, if so, in what terms it would be possible to contemplate the conclusion of an international convention providing for the ascertainment of the facts which may involve liability on the part of a State, and forbidding in such cases recourse to measures of coercion before the means of pacific settlement have been exhausted.

Sub-Committee: M. GUERRERO (*Rapporteur*),
M. DE VISSCHER,
M. WANG-CHUNG-HUI.

(7) The Committee appoints a Sub-Committee to examine the possibility of formulating rules to be recommended for the procedure of international conferences, and the conclusion and drafting of treaties, and what such rules should be.

Sub-Committee: M. MASTNY (*Rapporteur*),
M. RUNDSTEIN.

(8) The Committee appoints a Sub-Committee to examine whether and to what extent, it would be possible to establish, by an international convention, appropriate provisions to secure the suppression of piracy.

Sub-Committee: M. MATSUDA (*Rapporteur*),
M. WANG-CHUNG-HUI.

(9) The Committee appoints a Sub-Committee to examine whether, and to what extent, it would be possible to draw up treaty provisions concerning the application in international law of the conception of prescription, whether as establishing or as barring rights, and what such provisions should be.

Sub-Committee: M. DE VISSCHER.

(10) The Committee appoints a Sub-Committee to enquire with reference, *inter alia*, to the treaties dealing with the subject, whether it is possible to establish, by way of international agreement, rules regarding the exploitation of the products of the sea.

Sub-Committee: M. SUAREZ.

(11) The Committee appoints a Sub-Committee to examine whether it is possible to lay down, by way of conventions, principles governing the criminal competence of States in regard to offences committed outside their territories and, if so, what these principles should be.

Sub-Committee: Mr. BRIERLY (*Rapporteur*),
M. DE VISSCHER.

The committee also decided that "the various problems connected with war and neutrality are adjourned for consideration at a later date."

With respect to the subject of private international law, the committee took the following decision "Examination of the problems which fall within the field of private international law is adjourned to the next session of the Committee. In the interval a Sub-Committee is appointed to draw up a list of such problems for discussion by the Committee." It appointed on this Sub-Committee: Mr. Brierly (*Rapporteur*), and M. De Visscher.

The committee did not fail to consult various organizations which it deemed to meet the description of "the most authoritative organisations which have devoted themselves to the study of international law." It selected the following:

- (1) The Institute of International Law.
- (2) The International Juridical Union.
- (3) The International Law Association.
- (4) The Iberian Institute of Comparative Law.
- (5) The International Academy of Comparative Law.
- (6) The Society of Comparative Legislation.
- (7) The American Society of International Law.
- (8) The International Maritime Committee.
- (9) The American Institute of International Law.

The results of the consultation do not seem to have been very satisfactory, although numerous suggestions have been submitted to the committee.

The second session of the committee was held at Geneva from January 12 to January 29, 1926. The committee had before it the reports of its various subcommittees, as well as the suggestions of some of the "authoritative organizations" consulted. With respect to three of the topics previously chosen, a definite decision was taken that these should not be embodied in the provisional list to be prepared by the committee; and with respect to seven of the topics, it was decided that questionnaires should be circulated to various governments. The action taken is more specifically, as follows:¹³

(1) *Conflict of laws regarding nationality.* Without pronouncing either for or against the solution proposed for various particular problems, the committee decided to communicate the subcommittee's reports on this subject to the governments as a questionnaire (No. 1). The report contains a preliminary draft of a convention for the settlement of certain conflicts of laws regarding nationality. One article of this draft deals with the subject of naturalization, which the committee decided is not "capable of being treated by way of international regulation at the present time."

(2) *Territorial waters.* The subcommittee's report on this subject has also been communicated to the governments as a questionnaire (No. 2). The committee does not pronounce either for or against the general princi-

¹³ The documents were published by the Secretariat of the League of Nations, lettered C. P. D. I., and were republished in the Special Supplement to this JOURNAL for July, 1926

ples set out in the report. The report, as prepared by Professor Schücking, contains a draft of a possible convention.

(3) *Diplomatic privileges and immunities.* It was decided that the subcommittee's report on this subject should be communicated to the governments as a questionnaire (No. 3). The committee expressed the opinion that "the one solid basis for dealing with the subject is the necessity of permitting free and unhampered exercise of the diplomatic functions and of maintaining the dignity of the diplomatic representative and the State which he represents and the respect properly due to secular traditions." The introductory statement of the committee in this case fortunately lists a number of questions to which governments receiving the report may address themselves specifically.

(4) *Legal status of government ships employed in commerce.* On this subject the committee made a definite report to the Council of the League of Nations, to which it annexed the report of its subcommittee. It was observed that the subject had already been studied at two international conferences called by the International Maritime Committee at Gothenburg and Genoa, and that the Government of Belgium had been requested to call a diplomatic conference to deal with the subject. The committee was of the opinion that the subject was one which it is desirable and perfectly realizable to regulate by international agreement, and it suggested that such an agreement could be reached either as a result of the initiative of the International Maritime Committee, or in such other manner as the Council may deem appropriate. The report came before the Council on June 7, 1926, and at that time the Council was informed that a diplomatic conference had been convened by the Belgian Government, and that on April 10, 1926, a convention for the codification of certain rules concerning immunities of government-owned ships employed in commerce, had been signed by representatives of Germany, Belgium, Brazil, Denmark, Spain, Esthonia, France, Great Britain, Hungary, Italy, Mexico, Norway, Netherlands, Poland, Roumania, the Serb-Croat-Slovene State, and Sweden. In view of this happy situation, the Council adopted the view of the Committee that the convention signed at Brussels had made further action unnecessary.¹⁴

(5) *Extradition.* After a close study of the report of the subcommittee, the committee considered that certain questions connected with extradition were susceptible of being dealt with by way of general international conventions. These questions are the following:

1. The question whether and in what conditions a third State ought to allow a person who is being extradited to be transported across its territory.
2. The question which of two States both seeking extradition of the same person from a third State ought have to priority over the other.
3. The questions which arise as to the extent of the restrictions on the right of trying an extradited person for an offence other than that for

¹⁴ See League of Nations Official Journal, July, 1926, p. 858.

which he was extradited, and on a State's right to extradite to a third State a person who has been delivered to it by way of extradition.

4. The question as to the right of adjourning extradition when the person in question has been charged or convicted in the country where he is, for another crime.

5. The question of confirming the generally recognized rule by which the expenses of extradition should be entirely borne by the claimant State.

In spite of this view, however, the committee reached the further conclusion that the difficulties in the way were too great for such a solution to be realizable in the near future. The subject was, therefore, dropped from possible inclusion in the provisional stage of questions which the committee will frame.

(6) *Liability of a state for injuries suffered by foreigners on its territory.* Without either pronouncing for or against the general principles of responsibility set out in the report of the subcommittee, the committee decided to communicate the report to the various governments as a questionnaire (No. 4). At the same time it submitted the following question as one closely related to the main question: "Whether, and if so, in what terms, it would be possible to frame an international convention whereby facts which might involve the responsibility of States could be established, and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement have been exhausted."

(7) *Procedure of international conferences and the conclusion and drafting of treaties.* The committee decided to communicate to the various governments the report presented by the subcommittee, as a questionnaire (No. 5). Without envisaging the possibility of establishing by international agreement a body of rules which would be binding on the various states, the committee selected for itself a more modest rôle. It would be sought to place at the disposal of the states concerned rules which could be modified in each concrete case, but whose existence might save discussion, doubt, and delay. The report contains two lists of questions which are thought susceptible to regulation, though in this instance it would seem that something other than a binding international treaty is envisaged by the *rapporteur*.

(8) *Suppression of piracy.* The committee decided to communicate the report of its subcommittee to the governments as a questionnaire (No. 6). The report contains a series of eight draft provisions for the suppression of piracy, upon which the committee as a whole does not pronounce.

(9) *Prescription.* In view of the enforced absence of Professor De Visser, the *rapporteur*, consideration of this question was postponed.

(10) *Exploitation of the products of the sea.* It was decided to communicate to the various governments as a questionnaire (No. 7) the report of the subcommittee dealing with this subject, and the committee emphasizes "the urgent need of action." The report which was drawn up by M. Suarez (Argentine) contains an outline of possible agenda for a conference to deal with the subject.

(11) *Criminal competence of states in respect of offences committed outside their territory.* After a study of the report of the subcommittee, the conclusion was reached that international regulation of this subject by way of a general convention, "although desirable, would encounter grave political and other obstacles." However, the committee decided to communicate to the governments the report of the subcommittee "in order to give them an opportunity of profiting by the light thrown on the subject."

The Assembly resolution fortunately envisaged consultation with the governments of various states whether members of the League of Nations or not. The list of governments with which the committee is in communication, therefore, includes the Government of the United States of America, as well as those of Germany, the Union of Soviet Republics,¹⁶ and Turkey. Whether many governments will be willing to commit themselves to the desirability of attempting international conventions at this stage of the committee's work may be thought to be doubtful. Certainly most of the "questionnaires" are not so drafted as to greatly facilitate the giving of definite responses. Nor are the governments likely to desire to address themselves to the numerous questions in some of the reports which have hardly passed beyond the stage of subcommittee formulation. But the replies which have been requested for October 15, 1926, are to be awaited with interest, and it is a satisfactory phase of the situation that a promising process is actually under way.

On December 19, 1925, the British Government addressed to the Secretary-General of the League of Nations a communication relating to the question of reservations to conventions negotiated and signed under the auspices of the League of Nations. This action was inspired by the reservation made by Austria on September 30, 1925, in signing the Opium Convention of February 19, 1925. The communication came before the Council of the League of Nations in March, 1926, and the Council decided to request the Committee of Experts for the Progressive Codification of International Law to report on the question of the admissibility of reservations to general conventions, and the president of the committee constituted a subcommittee for the purpose, composed of Professor Brierly, M. Fromageot, Professor Diena, Dr. Guerrero, and Dr. Mastny. The committee has also lent its assistance to the Council in studying the Italian proposal for the establishment of an International Institute for the Unification of Private Law.

The beginning which has thus been made represents a significant achievement. We are a long way from any general international code. We are still a long way from any legislative results of the committee's work. We are perhaps a long way from any conference. But an excellent committee is at work, it has found a method to follow, it has given evidence of serious interest, and in the course of several years we should know much more about the possibilities of legislative effort with respect to numerous subjects than

¹⁶ The Government of the Union of Soviet Republics has declined to make any reply.

we know today. One can hardly proclaim that this process is likely to have any great influence immediately on the international policy of our time. But it may smooth the course of international life as it is affected by legal complications in some fields, and it may also improve the order and symmetry of our system of the law of nations. If the legal profession cannot encourage the extravagant hopes which codification has recently aroused, it can devote itself with enthusiasm to the simplification and clarification of the existing law.

THE MIXED COURTS OF EGYPT

BY JASPER Y. BRINTON

Justice of the Court of Appeals, Mixed Courts of Egypt

"I have often taken occasion to remark that next to the Church, the Mixed Courts are the most successful international institution in history." (Farewell address of Sir Maurice Amos, Judicial Adviser to the Egyptian Government, Alexandria, March 25, 1925, *trans.*)

"The Mixed Courts and their bar are to be numbered among those institutions which do the highest honor to humanity. The Courts, through their jurisprudence, and the Bar through its erudition and its eloquence, enjoy a world-wide reputation which has long been familiar to me." (Address of Professor Leon Duguit, Dean of the Law School of the University of Bordeaux, and (1925-6) Dean of the Law School of the University of Egypt, Cairo, February 12, 1926.)

Amid a scene of fitting dignity and in the presence of a gathering that represented all that was most distinguished in the Egyptian world, the Mixed Courts of Egypt, assembled in their Palace of Justice at Alexandria, celebrated their fiftieth anniversary on the twenty-seventh day of February last.

To a few of those there present—Egypt's elder statesmen—the scene naturally recalled those ceremonies of equal dignity, and indeed of royal pomp, held a half century before at the beautiful palace of Ras-el-Tin, on the Mediterranean, a few miles distant, when the ruling monarch of Egypt, the Khedive Ismail, inaugurated in person the régime of the Mixed Courts. Seldom, indeed, have royal prophecies been more happily fulfilled than that in which the Khedive, as he inaugurated the new régime, expressed his belief that the event would mark the beginning of a new era in the civilization of Egypt. During the half century that has intervened between these two occasions, the Mixed Courts have grown from a modest output of judicial labor and a highly unstable tenure of existence, into an institution which has stood like a rock at the foundation of the prosperity of Modern Egypt, an institution which, with a personnel of sixty-five judges, recruited in no small part from among the leading jurists of Europe, and fifteen hundred employees, renders annually some thirty thousand written opinions, maintains a great land-registry system, is responsible for an annual net revenue to the government of a million pounds, and exercises legislative functions of a unique and most important character.

Two aspects suggest themselves, from which this institution may be viewed: The one is that of a going judicial concern. It is the aspect of the worker toiling to keep the wheels of justice grinding evenly; of the servant of the law, lost in the task of keeping abreast of an ever-increasing flood of litigation and totally unconcerned with considerations of national or inter-

national character. It is this aspect which invites us to a survey of a judicial organization of uncommon interest, embodying in the main the traditional features of the historic Latin system, but replete with incidents, analogies, and peculiarities of procedure that cannot fail to arrest the attention of any student of comparative legal institutions.¹ The other aspect is the international, that of an institution organized by international concert to meet an international problem, and which functions under the protection of the Powers from whom it draws much of its vitality.

Of these two aspects, it is the second which doubtless presents the greater interest to readers of this JOURNAL and which, for lack of space to cover any larger field, will be specially dwelt on in this article. It is important, however, in order not to lose the proportions of our subject, to keep the other aspect well in mind, for it is, after all, on the quality of the performance day by day, of its purely judicial labors, labors which, despite many differences in detail, are essentially similar in kind to those which fall to the lot of all other modern judicial systems, that the success of the Mixed Courts has been founded.

And first, and very briefly, as to the international contacts involved in the founding of the courts. Our inquiry here may well begin with a question that comes naturally to the mind of any one who has followed recent history in the Near East: How comes it about that Turkey and her former vassal state of Egypt, having started with the indentical régime of capitulations, have worked out the same problem to such widely different results? How is it that at a time when Egypt is resounding with tributes to the half-century's labor of the Mixed Courts, Turkey is proudly exhibiting a completely nationalized and reorganized judicial system, which constitutes certainly one of the most encouraging achievements of the builders of her new régime? ² The answer to these questions points us to the real origin of the Mixed Courts. They are the offspring, not of the classic system of capitulations, as those ancient privileges had become consecrated in Turkey in a series of treaties familiar to all students of international law, but of a system of completely distorted capitulations which, as developed in Egypt, threatened to throttle the whole commercial life of the country.

Without undertaking to review, even briefly, the capitulatory system as it existed in Turkey in the nineteenth century, it will be sufficient to recall that under the Ottoman capitulations the Ottoman tribunals had original jurisdiction over all civil and commercial cases³ involving foreigners and

¹ The writer hopes to be able to publish during the coming winter a small volume covering the judicial as well as other features of the Mixed Courts.

² This last observation is based upon personal investigations made of the Turkish judicial system, by the writer, first in 1919, as a member of the Harbord Mission, and later in 1924 and in 1925, as a friendly and unofficial visitor, interested in the development of judicial institutions in the Near East.

³ The phrase "civil and commercial," it is perhaps needless to say, merely indicates the fundamental distinction, running through the entire Latin system, between litigation in-

Ottoman subjects, as well as criminal jurisdiction over foreigners (except in the case of citizens of the United States, Belgium and Portugal, which latter countries asserted, with varying degrees of success, a right to exercise criminal jurisdiction over their subjects by virtue of treaties whose text and whose interpretation had been the subject of interminable diplomatic dispute⁴). The limitations under which this Ottoman jurisdiction was exercised, both as to the assistance of consular dragomen and, as to the special composition of the so-called commercial tribunals, specially created for that class of cases, need not detain us in this brief sketch. The one important point is that, normally, the Turkish system should have been strictly followed in Egypt, and that practically it was departed from in the most radical manner. In Turkey, ever jealous of foreign encroachment, the system was kept pretty closely to the limits set by treaty, and its operation became a source of continual diplomatic controversy. It worked badly to the end, so badly that at the time of its disappearance there was nothing to be said in its favor except a doubt as to the ability of Turkey to assure reasonable guarantee of justice to foreigners in the Turkish courts.

In Egypt, however, a far different attitude on the part of her local rulers led to far different results. The creator of modern Egypt, the Albanian adventurer Mehemet Ali, born in the same year as Napoleon and by 1807 master of Egypt by right of conquest, had different views as to the value of European civilization, and appreciated justly the necessity of European coöperation in the completion of his many imposing projects for the internal development of his country. He encouraged Europeans to come as travelers to Egypt, invited French savants to join his sons in their expedition to the Sudan, and made it his settled policy to attract European enterprise by every means in his power, and to afford the stranger in the land the amplest measure of protection.⁵ But protection naturally enough spelled privilege, and the appetite for privilege grew with what it fed on. Little by little the consuls enlarged their jurisdiction; little by little the Egyptian authorities, lulled into indifference, perhaps, by their master's example, admitted the new pretensions. Before long, the consuls, applying liberally the maxim *actor sequitur forum rei*, had asserted and secured to themselves jurisdiction in *all* cases, civil, commercial, and criminal, where their subjects were involved as parties defendant. This was an altogether novel

volving merchants and commercial affairs, and litigation not so characterized. The distinction is not merely reflected in different modes of procedure and of proof, and in the confining of bankruptcy to the case of merchants, but is responsible for the separate organization of commercial as distinguished from civil chambers in all courts which follow the Latin system.

⁴ See Brown, *Foreigners in Turkey*, p. 76; Moore's *Digest*, II, p. 701.

⁵ See the admirable doctoral thesis submitted in 1912 to the Law Faculty of the University of Montpellier by the writer's Egyptian colleague of today in the Court of Appeals, M. Bahi Ed Dine Barakat, under the title *Des Privilèges et Immunités dont Jouissent les Etrangers en Egypt vis-à-vis des Autorités Locales* and bearing dedication to Saad Zaghloul Pacha (p. 163).

expansion of consular jurisdiction, unsupported by the capitulations and based purely on usage, a usage, however, which soon acquired the force of law. But this development was accompanied by another consequence of radical and far reaching character. The consul's jurisdiction was necessarily confined to the enforcement of the laws of his own country, except in so far as those laws expressly called for the application, in special cases, of the foreign law. Therefore, foreigners were subject only to their own laws, as such laws were interpreted by their own consuls. Thus the laws of the country where they resided, being unenforceable in any forum against them, became for them practically non-existent, and the consequence was none other than the establishment of a complete immunity both of jurisdiction and of legislation. The evils which resulted from the existence of such a system can be readily imagined. The administration of justice in Egypt fell into what was aptly termed a state of judicial chaos. When parties contracted, they did not know before what jurisdiction they might be called upon to plead. Whenever a possibility of litigation arose it was always the object of one party to get his hands on whatever property there might be involved so as to provoke the suit before his own consul. Suit had to be brought in as many forums as there were defendants. A foreigner of different nationality could not be brought into the principal cause. Appeals from consular decisions were generally not heard in Egypt. The situation was intolerable. Well might the American consular representative report to the State Department that consular courts "were choked with thousands of cases which, owing to disputed jurisdiction, unjust decisions, lack of executive power, etc., can never be settled until some reform is introduced."⁶

Such was the condition of affairs when the greatest statesman that modern Egypt has produced, the Armenian, Nubar Pasha, Prime Minister under the Khedive Ismail, opened a campaign which, judged alike by the sustained generalship and resource with which it was conducted, by the heavy odds by which it was opposed, by the success which finally crowned it, and by the witness which fifty years of the enjoyment of its fruits bears to the almost prophetic wisdom of its leader, is entitled to be ranked among the foremost diplomatic achievements of modern history. To quote Lord Milner, it has earned for Nubar a claim "to the lasting gratitude of Egypt as well as to the respect of the civilized world."⁷ The opening gun in Nubar's campaign took the form of a report made in 1867 to his sovereign, the Khedive, in which he vigorously exposed and denounced the evils of the existing system and submitted his project for a reform.⁸ Space forbids

⁶ The evils of the system had been but little tempered by the extension into Egypt in 1861 of the Turkish system of Mixed Commercial Courts which had proved themselves incompetent and in every way inadequate.

⁷ Milner, *England in Egypt*, Chapter IV.

⁸ The following passage from this report is typical of Nubar's forceful manner of expression and contains a concise summary of the grievances at which his attack was aimed:

us to follow the highly eventful history of the negotiations of the ensuing eight years. It is a chapter of engrossing diplomatic interest, replete with historic sidelights and human touches, punctuated and materially influenced by the opening of the Suez Canal, interrupted by the Franco-Prussian War, and with the stage moving in turn from Cairo to Constantinople, from Constantinople to Paris, from Paris to London, and so on throughout the capitals of Europe, until the final stage was set at the Palace of Ras-el-Tin, Alexandria, on June 25, 1875, on the occasion to which reference was made at the beginning of this article.⁹

Nubar's original plan contemplated the establishment of a system of Mixed Courts whose judges should be evenly divided between Egyptians and Europeans and which should exercise jurisdiction in all civil and commercial cases arising between foreigners and natives, as well as general criminal jurisdiction over foreigners. Later he extended the scope of his project so as to include in the jurisdiction of the new courts all commercial suits between Egyptians themselves, all civil litigation between Egyptians which the parties might agree to submit to the new courts, and *all* crimes, misdemeanors and police offenses committed in Egypt either by Egyptians or by foreigners. The chief difficulty with these projects was that they were ahead of the times. A generation later they might well have hoped for success. As it was, they were vigorously opposed by many and varied foreign interests and encountered the very special hostility of France, the approval of whose parliament was only finally secured by the bold stroke of the Khedive in inaugurating the new courts in advance of French acceptance, thus creating a *fait accompli* to which the French parliament promptly bowed.

"The jurisdiction which determines the relations between Europeans and the Government of Egypt and the inhabitants of the country," he complains, "is no longer based on the Capitulations. The Capitulations exist only in name. They have been replaced by an arbitrary law of custom, varying with the character of each new diplomatic chief,—a law based upon precedents frequently abusive, which has been permitted to take root in Egypt through force of circumstances and constant pressure and a desire to make easy the lot of the foreigner. It leaves the Government powerless in its relation to such foreigners and the people without guarantee of even justice. Such a state of affairs violates the letter and violates the spirit of the Capitulations; it impedes the country in the development of its resources; it prevents it from putting its true riches at the service of European enterprise and capital; it destroys its progress and brings moral and material ruin in its train."

See, for an English translation of this report, *Diplomatic Correspondence*, Department of State, 1868, Pt. II, p. 151.

⁹ New interest has been given to this chapter through the act of King Fouad in placing at the public disposal the personal correspondence of his father, the Khedive Ismail, with Nubar Pasha during the latter's travels in Europe in search of European support for the proposed reforms. This correspondence has been summarized in a lively manner by the Attorney General (Procureur-General) of the Mixed Courts, Firmin van den Bosch, a Belgian jurist well known also as an essayist, in his address at the Semi-Centennial celebration, published in the memorial volume of the occasion known as the *Livre d'Or*, or Golden Book.

It is gratifying to be able to record that the attitude of the United States throughout this struggle was one of which Americans may feel justly proud. From the first, our representatives participated actively and with friendly interest in the negotiations, and the personal thanks extended by the Khedive to our diplomatic representative at the inauguration ceremonies bespoke more than a formal expression of appreciation of a support that had been sincere and effective.¹⁰

The agreement finally reached between Egypt and the Powers took the form of a document known as the *Règlement d'Organisation Judiciaire*, or Statute of Judicial Organization,¹¹ which was accepted by each of the nations in turn, in form according to the requirements of its governmental system, thereby assuming the character of a treaty requiring for its amendment the consent of all the Powers who were thus party to it.

This document provides for the establishment of the Mixed Courts of Egypt, outlines their organization, provides for the selection of the foreign members, defines the jurisdiction of the Courts, and fixes their duration. Broadly speaking, it establishes a system somewhat similar to the Federal judicial system of the United States, with an appellate court, known as the Court of Appeals, sitting at Alexandria, and with District or Trial Courts sitting at Cairo, Alexandria, and Mansourah. The judiciary, as since materially increased in number, comprises, as has been stated, sixty-five judges, sixteen of whom (ten Europeans and six Egyptians) sit in the Court of Appeals. The foreign membership in the Courts is covered by a proviso of the *Règlement* (as since amended) that judgments in the Trial Courts shall be rendered by three judges, of whom two shall be foreigners, and that the decisions of the Court of Appeals shall be rendered by five judges, of whom three shall be foreigners. Judicial appointment is for life and is made by the King of Egypt.¹² The choice of the foreign judges needed to maintain the indicated proportion is covered by a proviso that their selection shall rest with the Egyptian Government but that "in order to obtain a satisfactory guarantee of the qualifications of the persons whom

¹⁰ See article by the writer of this article in the *Livre d'Or* (*supra*), under the title "The American Participation in the Founding of the Mixed Courts."

¹¹ For an English translation, see Messages and Documents, Department of State, 1873-1874, Part 2, p. 1112, as communicated by the American Minister to the Ottoman Porte, to Secretary of State Fish, April 21, 1873.

¹² The *Règlement* provides that all judges of the same class shall receive the same salaries. These were fixed by a schedule attached to the *Règlement* and, of course, are under the same protection as the other international obligations contained in that instrument. They are paid by the Egyptian Government and may not be reduced without the consent of the Powers. They have, however, recently been slightly increased. Salaries in the Trial Courts now range from 1400 to 1800 Egyptian pounds; those in the Court of Appeals from 1800 to 2200, according to length of service, the maximum being reached in eight years. The Egyptian pound slightly exceeds in value the pound sterling. Retirement on pension is provided for after fifteen years' service if a judge is 55 years of age. The compulsory retirement age is 65 in the Trial Courts and 70 in the Court of Appeals.

it shall choose," the Egyptian Government will communicate "unofficially" ('*officieusement*' as distinguished from '*officiellement*',—the choice of the word was made as a concession to the *amour propre* of Egypt, but is without practical importance) with the foreign government involved, and agrees to appoint only persons who have attained the assent and authorization of their own government.

The distribution of the foreign seats among the several Powers was not covered by the *Règlement d'Organisation Judiciaire*, but was made the subject of special diplomatic conventions and correspondence by which it was provided that each of the seven great Powers, the United States, Great Britain, Italy, Russia, Germany, France and Austria, should be entitled always to one seat in the upper court, and that these Powers, as well as each of the several remaining capitulatory Powers, should be entitled to representation, in general to two members each, in the lower courts.¹³

The jurisdiction of the Mixed Courts, as defined by the *Règlement*, covers all civil and commercial litigation between foreigners and natives as well as that between foreigners of different nationalities. A broad interpretation has led to the development of the theory of "mixed interest" as the test of jurisdiction. As practically all litigation of any importance (including proceedings in bankruptcy) presents some such "mixed interest," the result has given the Mixed Courts a dominating position amid the many and varied judicial institutions of the land. This position is emphasized by the extraordinarily broad character of the jurisdiction exercised by the Courts over the Egyptian Government, whose protection against "diplomatic raids" was one of the causes leading to their establishment.¹⁴

The acceptance by the Powers of the establishment of the new system with jurisdiction as has been defined above, implied a relinquishment *pro tanto* of the jurisdiction of the consular courts.¹⁵ In the case of Great

¹³ The war has since eliminated Germany, Austria, and, temporarily at least, Russia, from their right to representation in the Mixed Courts, although the Russian representative in the Trial Courts, who happens to be one of its most experienced and able members, still retains his seat. The German and Austrian members, however, were obliged to leave Egypt at the opening of the war. Today, in addition to the four remaining great Powers, the Court of Appeals includes judges chosen at will by the Egyptian Government, from Spain, Norway and Belgium, as also a representative of Greece, which, in recognition of the size of her colony in Egypt and the commercial importance of her interests, has been conceded a seat in the upper court. England, as a result of appointments made during the régime of martial law, at a time when a plan was being projected for the radical reform of the Mixed Courts under British trusteeship, has at present three judges on the Court of Appeals.

¹⁴ As an example of this jurisdiction may be mentioned the recent decision of the Court of Appeals in the case of the Turkish Tribute Bonds, involving an amount generally estimated at some eighteen million pounds. Immediately upon the handing down of this decision the Egyptian cabinet took the necessary measures to comply with the judgment.

¹⁵ The establishment of the Mixed Courts did not affect the continuance of such privileges under the existing system of capitulations as were not necessarily supplanted by the new régime. These privileges consisted in immunity from personal taxation without the assent of their governments, inviolability of domicile and protection from arbitrary arrest, and a

Britain, however, this implied relinquishment was supplemented by an Order in Council formally suspending consular jurisdiction in the Orient.¹⁶ In the case of the United States, owing to the statutory creation of the existing consular courts, our government was of opinion that the temporary surrender of that jurisdiction should be covered by similar statutory authority. For this reason, the passage of an Act of Congress was secured authorizing the President to suspend such jurisdiction as soon as he had received satisfactory assurance of the organization of the new tribunals on a satisfactory basis. Such action was actually taken in the form of a Presidential proclamation under date of March 27, 1876, immediately following the opening of the Courts.¹⁷ In the meantime, as already indicated, the United States had participated in the inauguration of the Courts, and the American judges had been appointed and had entered upon their duties.¹⁸

The duration of the new system was fixed by the *Règlement* at five years, during which period no change was to be permitted. After that time, read the *Règlement*, "if experience had not confirmed the practical usefulness of the judicial reform, it shall be open to the Powers, either to return to the old order of things, or to consider in conjunction with the Egyptian Government, what other arrangements shall be adopted."¹⁹ Happily, experience did confirm the "usefulness" of the reform, although the Powers acted, to say the least, with circumspection. It was to a long series of periodic renewals for periods varying from six months to five years that the new régime owed its continued existence up until 1921. In that year, Egypt was able to publish a decree indefinitely extending the duration of the Courts, a duration which is of course dependent on the continued adhesion of the Powers to the régime.

In the opening of this article reference was made to the negligible rôle

right to continue to invoke the jurisdiction of the consular courts except as to matters falling within the new jurisdiction of the Mixed Courts. (See *infra*.)

¹⁶ See Hertslet's Commercial Treaties, Vol. XII, p. 303.

¹⁷ See Act of Congress, March 23, 1874 (18 U. S. Statutes at Large, p. 23) and Presidential proclamation, March 27, 1876 (*Ibid.*, Vol. 19, p. 662). Also see Fifth Annual Message of President Grant, Dec. 1, 1873, Vol. VII, Messages and Papers of the Presidents, ed. 1898, p. 238.

¹⁸ The first American member of the Court of Appeals, the Hon. Victor Barringer, a former Attorney General of North Carolina, was commissioned June 24, 1875. The first American member of the Trial Courts, Hon. George S. Batcheller, was commissioned November 10, 1875. The present American members of the Trial Courts are Hon. Pierre Crabites, commissioned June 8, 1911, and Hon. Robert L. Henry, D.C.L., Oxford, commissioned November 10, 1924.

¹⁹ Referring to the question of the right of Egypt to withdraw from the régime, Lord Cromer, in his report for 1897, refers to the view of the Egyptian Government "which is supported by many eminent jurists in England and elsewhere, that Egypt has a right to withdraw at will from the Mixed Tribunals."

See also the interesting contribution to the *Livre d'Or*, under the title *Du Retard Apporté par Certaines Puissances à leur Adhésion au Renouvellement des Pouvoirs des Tribunaux Mixtes*, by the French representative on the Court of Appeals, Hon. Bernard Favenc.

played by national or international interests in the workings of the Courts. The complete absence of national partisanship is brought into relief by the fate of one of the reservations contained in an Egyptian-Franco protocol of 1874, the benefits of which were later conceded to the other capitulatory Powers. This reservation recorded that the French Government, having requested that one of the European judges should always be, as far as possible, of the same nationality as the European party litigant, the Egyptian Government undertook to call the matter to the attention of the new magistracy, who alone were responsible for matters of internal organization. Presumably the suggestion was duly called to the attention of the magistracy aforesaid, but whatever its fate at the time, happily no trace of its influence exists in the functioning of the Courts today. Apart from the utter impracticability of applying any such principle to a system as large and as overburdened as the Mixed Courts, the principle itself of course would violate the whole spirit of the institution as consisting essentially of a single judicial unit. The particular nationality of the parties litigant is, generally speaking, an utterly negligible element in the work of the Courts, one indeed for the most part unnoticed. Moreover, as a practical consideration, it may be added that, if any attempt had been made to carry the principle into effect, it would inevitably have been rendered largely inoperative by the wide latitude of judicial challenge which has been admitted from the promulgation of the earliest Rules of Court. Not only is the right of challenge for cause defined in wide terms, but in all civil cases before the Court of Appeals, as well as in all cases in which the decision of the Trial Court is final, there is a right of peremptory challenge of one judge. The idea of challenging a judge because he is of the nationality of an opponent is not one which has ever found countenance in the Mixed Courts, and in spite of the terms in which it is conceded, the use of the right of peremptory challenge is very infrequent.

There is another feature in the history of the Courts which emphasizes happily this element of national non-partisanship and is not without interest from the international standpoint. It happens to have been most gracefully expressed on the occasion of the Fiftieth Anniversary of the Courts in words which gain a double significance as coming from the British High Commissioner. After commenting in complimentary terms upon the absence of those jealousies and cliques which might even have been expected in an institution thus constituted, and on the exhibition of "that same spirit of mutual tolerance and respect which has more lately, on the larger field of European affairs in the League of Nations, done so much to cement the peace of a troubled epoch," Lord Lloyd refers to the choice by the judges of the Court of Appeals of the important office of President of that tribunal, and continues:

The choice has always fallen on the most eminent and most able of the Judges, regardless of his nationality and with no preference given

to those belonging to the greater Powers. During the last twenty years we have seen successively as President of the Court of Appeals, M. de Korizmics, an Austrian, M. Moriondo, an Italian, M. Gescher, a German, Mr. Sandars, an Englishman, M. Larcher, a Portuguese, M. Laloe, a Frenchman, M. Eaman, a Belgian, and finally yourself, Monsieur le President, a Greek. This fact is merely typical of the independent and unprejudiced attitude which the Mixed Tribunals have always shown towards all those who have had to deal with them.

The Mixed Courts, as thus devised and set in motion by the coöperation of Egypt and the Powers, have continued to function without any material organic change until the present day, unaffected by the many political changes which have since swept over the country. In one respect, however, an important enlargement has been made in the functions of the Courts, touching materially the interests of the Powers in Egypt. At every stage, moreover, in the development of Egyptian problems, the future status of the courts has played a part in the discussion. These points of international contact will be briefly passed in review.

And first of all a few words as to the relation between Great Britain, as the occupying Power, and the Mixed Courts, as an institution occupying both a national and international status. In 1891 the unsatisfactory conditions obtaining in the administration of justice in the native courts led to the appointment, on the insistence of Great Britain, of an Englishman as Judicial Adviser to the Ministry of Justice, a post which has been continued to the present day.²⁰ The influence and activities of this office have naturally varied with political conditions. As far as relates to the Mixed Courts, such power could of course not extend beyond the scope of activities properly exercisable by the Egyptian Government itself, with due respect for the treaty agreements creating the Courts, as they have been outlined above. However, in the preparation and advocacy before international commissions of needed projects of reform, in the making of investigations necessary to a proper selection of foreign judges, and in general in maintaining close contact with the entire judicial family of the Mixed Courts and in acting as an intermediary between the Courts and the Government in all matters touching their common interests, the activities of this office have been of large usefulness. The Mixed Courts owe much to the services which have been rendered them by the British Judicial Advisers.²¹

²⁰ In referring to the powers of the first Judicial Adviser, Lord Cromer observed that it was understood that the Minister of Justice "will take no important step without previous consultation and agreement." It is interesting to recall that the maintenance of this post was exacted as one of the conditions of the abandonment of the occupation of the Alexandria Customs House, seized by the British military authorities after the murder of the Sirdar in 1924.

²¹ The first British Judicial Adviser was Sir John Scott, whose labors effected invaluable reforms in the administration of native justice. At the opening of the war this post was occupied by Sir Malcolm Mellwraith, who had held office since Sir John Scott's retirement in

Unfortunately the creation of the Mixed Courts did not completely solve the problem of the capitulations in Egypt. Two important evils were left untouched. First, the complete *legislative* immunity of foreigners, which made it necessary to secure the approval of the Powers to any laws intended to affect their subjects; and second, the continued *jurisdictional* immunity of foreigners in matters of criminal law. The Consular Courts still functioned in cases of crime, other than police offenses, and the result was the impotency of the Egyptian Government to enforce the criminal laws of the country against many classes of dangerous criminals, whose activities and example were highly subversive of public morals.²² Throughout almost the entire history of the Mixed Courts these two evils have been the subject of projects of reform involving, in some measure, the cooperation or reorganization of the Mixed Courts.

The most vigorous of these campaigns was that conducted by Lord Cromer who, throughout his long and illustrious pro-consulate in Egypt, was tireless in his efforts to put an end to both these evils. His indignation was particularly aroused by the vicious features of what he termed "legislation by diplomacy," and his principal efforts were centered on the creation of an international Legislative Council with power to legislate for foreigners. Lord Cromer's project also included "as a detail, albeit a very important detail," the transfer of the consular jurisdiction, not to the Mixed Courts but to a new system of courts to be established by the Council. His opposition to the transfer of the consular jurisdiction to the Mixed Courts was based upon his belief that such an extension of what he termed "the international principle" (a principle to which he appears to have been constitutionally opposed) did not harmonize with Great Britain's position of political predominance in Egypt, and that the progress of the country could be "guided far more efficiently by one than by several Powers." Despite, however, his monumental achievements in the solution of other problems of Egyptian administration, in this particular field Lord Cromer's efforts were unsuccessful. But his administration records one step forward, which, while regarded as of minor importance at the time, has since proved both important and significant. It leads us

1898. The long series of able and exhaustive reports which record the work of these two officials bear testimony to a loyal and effective devotion to the interests of the Mixed Courts. In 1916 Sir Malcolm McIlwraith was succeeded by Sir William Brunyate who, in turn was succeeded, in 1919, by Mr. (later Sir) M. Sheldon Amos, one of the most brilliant figures that England has ever contributed to the Egyptian Civil Service. His retirement in the spring of 1925 was the subject of flattering testimonials of regard from the Mixed Courts. The present holder of the office, the Hon. John H. Percival, is a jurist of long experience in the native courts, and one of the most respected figures in the Egyptian judicial world.

²² "Its paralysing effects are chiefly felt in the sphere of criminal law, where it has hampered for generations the repressive powers of the government and the law courts, throughout the whole gamut of crime, from murder down to the infringement of the liquor regulations." Sir Malcolm McIlwraith, former Judicial Adviser (Egyptian Gazette, Dec. 1918).

to a consideration of those unique legislative functions of the Mixed Courts to which reference has already been made.

The jurisdiction of the Mixed Courts over the trial of police offenses has already been referred to. The list of such offenses was defined in the Penal Code adopted at the time of the founding of the Courts. Sufficiently complete at the time, this list soon became out of date and inadequate, and the attempts of the Egyptian Government to enlarge it without securing the consent of the Powers were defeated by decisions of the Court of Appeals. Diplomatic negotiations ensued and in 1889, to quote Lord Cromer, "after vast travail the diplomatic mountain did at last bring forth a small but not altogether ridiculous mouse." The "mouse," which later proved to be a creature of somewhat more formidable proportions, took the form of an agreement conferring on the Court of Appeals on behalf of the Powers the authority to approve police regulations proposed by the Egyptian Government, thereupon rendering offenses under such regulations triable in the Mixed Courts. The scope of this approval is quasi-legislative and quasi-judicial. In its examination of new projects the Court of Appeals is to confine itself to ascertaining that the proposed regulations are "common without distinction to all the inhabitants of the territory"; that they contain no provision contrary to the text of any treaties or conventions (*i.e.*, including the privileges guaranteed by the capitulations); and finally that they carry no penalties in excess of those properly applicable to police offenses ("contraventions"), *viz.*, a week's imprisonment and the fine of a pound.

The exercise of the new powers was followed by the most happy results. The phrase "police regulation" contains wide possibilities, which have been generously explored, and the fact that to the penalties above indicated may be, and frequently are, added the severe sanctions of forfeiture of property and the closing of unlawful establishments has gone far to put teeth into what might otherwise prove to be inadequate measures. Such laws, moreover, are often of a highly comprehensive character, according to the police and other officials effective powers of administrative action.

The relief afforded by the agreement of 1889 was, however, but partial. The obnoxious system of legislation by diplomacy still obtained as to all changes in the Mixed Codes, which frequently demanded revision, as well as to all questions of taxation which did not fall within the scope of the codes. New diplomatic conferences ensued and a second agreement was finally reached between Egypt and the Powers in 1911, creating a special legislative assembly in the Mixed Courts with power to approve modifications and additions to the "mixed law" or *legislation mixte*, a phrase which, while primarily directed to the mixed codes, is sufficiently broad to include legislation of a general character intended to be applied to foreigners, excepting measures involving the imposition of new taxes.

The convening of the Special Legislative Assembly established by this

second measure is a more formal proceeding than the simpler system just referred to, provided in the case of police measures. In the Legislative Assembly representation is provided for every capitulatory Power, certain members of the lower courts thus joining their colleagues of the upper court on these important occasions. The deliberations of the Assembly are preceded by elaborate investigations and reports, and experience has shown that the system is calculated to give full protection to the foreign interests which it is designed to protect. Up to date it has been responsible for the approval of a number of important changes in the codes and of several general laws of large public importance. The system, of course, is open to the objection that it confides legislative powers to a judicial body. The answer is the purely practical one that the necessities of the case offered no practicable alternative. As Lord Cromer puts it, and his long and unsuccessful efforts to devise such an alternative give peculiar force to his observation, "In Egypt, legislators have to be caught where they can be found. As a legislative machinery composed of judges was ready to hand, that machinery had to be utilized in default of anything better."²³

The opening of the war suspended further projects for the reform of the capitulatory régime in Egypt. Martial law was proclaimed on November 2, 1914, but on the same date a proclamation was issued stating that the powers exercised by the military authorities "were intended to supplement and not to supersede the civil administration." The Mixed Courts accordingly continued to function undisturbed during the entire period of the war, conceding however the force of law to the series of military orders issued under authority of the régime of martial law and covering the successive declarations of moratoria, the legal rights of enemy subjects and a variety of topics more or less related to military activities.

It may be recalled that shortly after the opening of the war (December 18) Egypt was declared a British protectorate. On the following day the Khedive Abbas was deposed and the Khedivate conferred upon Prince Hussein Kamel with the title of Sultan. In a letter addressed to the new ruler, the British Government reminded the Sultan of its frequent declarations that the system of the capitulations was no longer in harmony with the development of his country, but declared that in its opinion "the revision of these treaties may most conveniently be postponed until the end of the present war."²⁴ As the war drew to its close, however, it was

²³ Cromer, *Modern Egypt*, p. 435.

²⁴ From an address delivered in England shortly before the end of the war by Sir Malcolm Mellwraith and republished in the *Egyptian Gazette*, Alexandria, December, 1918, it appears that prior to the issuing of this declaration the British Government had considered the advisability of taking the position "that the declaration of the protectorate had *ipso facto* terminated" the capitulations (the suggestion of course did not contemplate the suppression of the Mixed Courts), but that "partly for political reasons; and largely because the Egyptian Government was not yet ready with the requisite machinery and technical staffs required for superseding the existing arrangements, it was decided to make no change during

decided to renew the attack on the ancient problem, and, in 1917, a commission was appointed by the Egyptian Government to study the reforms that would be necessitated or rendered possible by the anticipated abolition of the capitulations at the end of the war. The labors of this commission included plans for a complete reorganization of the Mixed Courts. Although the commission issued no report, its labors being prematurely terminated by political events, a general impression prevailed "that it contemplated the supersession of the Mixed Tribunals by new courts in which the English language and British legal procedure would predominate, a measure which would entail disabilities on the native bar and paralyze the foreign advocates who had hitherto used the French language."²⁵ The storm of protest which followed the discovery of this intention constitutes one of the most spirited incidents in the history of the Mixed Courts, and effectively demonstrated the futility of any plan of reform involving a break with the traditional Latin system.

A new attempt at reform involving the Mixed Courts was made by the Milner Mission, which visited Egypt in 1919, and in the negotiations which took place in London in the fall of the following year with the Egyptian representatives the question of an adaptation of the Courts to a new capitulatory program was discussed. A tentative solution was then sketched under which, *inter alia*, Egypt was to recognize Great Britain as the protector of the foreign privileges guaranteed under the capitulations (which were to be reduced to reasonable proportions) and Great Britain on her part was to endeavor to secure from the several Powers a transfer to her, as trustee, of their capitulatory rights. These agreements with the Powers were to provide for the closing of the foreign Consular Courts so as to render possible the reorganization and extension of the jurisdiction of the Mixed Courts, and the application to all foreigners in Egypt of the legislation (including legislation imposing taxation) enacted by the Egyptian Legislature with the approval of the British Government. Concurrently with the discussion of these projects, which, needless to remark, failed to result in any agreement between the two Powers directly involved, Great

the war." The observation recalls a significant footnote inserted by Lord Cromer in his report for 1904 (p. 7) referring, without comment, to the opinion of a French jurist (Gabriel Jaray) that the recognition of a protectorate would justify the suppression of capitulations, if the reorganization of the country in question was sufficiently advanced to afford proper guarantees of good administration.

²⁵ Report of Milner Mission, London, 1921, p. 13. In a lecture delivered at Cambridge University in August, 1924, Sir Malcolm Mellwraith, a former Judicial Adviser, strongly deprecates this movement, which, he states, he had always opposed during his long term of office, and adds that his views on the subject were shared by both Lord Cromer and Lord Kitchener. See *Egyptian Gazette*, Alexandria, Sept. 13, 1924. It may be added that proceedings in the Mixed Courts are conducted entirely in French, and with the exception of an occasional opinion in Italian, all opinions and decisions are rendered in the French language.

Britain undertook the projected negotiations with the Powers and secured the consent of several of the smaller capitulatory nations. The consent of most of the larger Powers, however, had not been received at the time when changed political relations between Great Britain and Egypt entered into the new phase leading to the Declaration of Independence of February 28, 1922, and the promulgation of the present Constitution on April 19, 1923.

By the former of these documents the question of "the protection of foreign interests in Egypt" was included among the four points reserved for future discussion and "friendly accommodation." By the second document, all foreign rights existing under the capitulatory régime, including the régime of the Mixed Courts, were specifically guaranteed.²⁵ The problem of the reform of so much as remains of the abuses of the system of the capitulations in Egypt became thus once more relegated to the indefinite future awaiting for its solution the energy and ingenuity of some worthy successor to Nubar, for the task will not be an easy one.

As already indicated, the two points at which reforms must be directed are the suppression of the Consular Courts and the devising of a plan to free Egypt from the existing restrictions upon legislation for foreigners in matters of taxation. Neither of these involve impairment of the existing structure of the Mixed Courts. As to the consular jurisdiction, criminal or civil or both, this could conceivably be transferred to some other tribunal specially organized for the purpose, and in such case the Mixed Courts would be in no manner involved. Presumably, however, the effort will be to transfer such jurisdiction to the Mixed Courts, in which case additional equipment in the shape of increased judicial personnel must be provided, and certain additional guarantees covering the conduct of prosecutions will doubtless be demanded by the Powers.

The situation, as far as the Mixed Courts are concerned, is somewhat similar to the case of the legislative problem. The aid of the Mixed Courts may or may not be invoked in devising a method to liberate Egypt from her present legislative disabilities. Obviously it would be possible to enlarge the powers of the Legislative Assembly of the Mixed Courts to cover the remaining legislative field. Such an extension would at least have the merit of simplicity and was foreshadowed during the war by the memoir submitted to the Powers by the Egyptian National Delegation. "For all that concerns legislation and the imposition of taxes," reads the memoir, "foreigners can be assured every guarantee in the existence of an international organization already functioning in the country and whose approval will be required to all laws and taxes which are to be applied to foreigners.

²⁵ "L'application de la présente Constitution ne peut avoir pour effet de porter atteinte aux obligations de l'Egypte envers les Etats Etrangers, ni aux droits que les Etrangers auraient acquis en Egypte en vertu des lois, des traités, ou des usages reconnus." Egyptian Constitution, Article 154.

The system of the legislative assembly of the Court of Appeals, in operation already under the law of November 11, 1911, and as it can be better adapted to its new rôle by the addition of certain other elements selected from outside, will respond perfectly to this need." Whether, however, this is to be the direction in which reform will lie, it would indeed be rash to predict.

In conclusion, the question may be asked: What is the standing of the Mixed Courts in the Egyptian world and what is the outlook for their continuance? The question is one for the political prophet, but as a contribution to its answer, it may be of interest to refer to a few recent expressions of Egyptian political feeling.

It is highly significant that throughout the bitter struggle for independence conducted by the Egyptian leaders since the closing of the war, the Mixed Courts, so far from figuring among those restraints upon her sovereignty which it was Egypt's avowed object to throw off, have on the contrary been the subject of marked and friendly exception. Thus in the appeal issued by Egyptian leader Zaghloul at the end of the war to the foreign residents and diplomatic representatives in Egypt, and in which the political aspirations of Egypt were vigorously proclaimed, we find this language:

We seek complete independence, but not an independence which shall affect the capitulatory rights of foreigners, either as concerns the laws or the jurisdiction of the Mixed Courts, or as concerns the inviolability of domicile or individual liberty. Whatever has been said or written to the contrary can only have emanated from the enemies of our national cause.

Many other similar utterances by prominent representatives of Egyptian nationalism could be quoted. One will suffice. Speaking at a banquet of the Mixed Court bar in 1924, at a moment when a Nationalist ministry was in power, one of Zaghloul's chief lieutenants, a lawyer in the forefront of the fight for Egyptian independence, did not hesitate to proclaim that the Mixed Courts responded to the necessities of the geographical, ethnical and economic situation of Egypt; that they constituted in Egypt "the best judicial organization it would be possible to devise"; and that the party in power was aware of this fact and was determined that no attempt to destroy or materially modify the institution should be permitted. As a fitting epilogue to these expressions may be cited the messages of congratulation received on the occasion of the Semi-Centennial Celebration from representatives of the Nationalist movement in Egypt. Most significant of these was a telegram from Zaghloul excusing his absence on account of ill-health but presenting his cordial sympathies on the occasion and his best wishes to the judicial family.

The chapter closes then in happy augury for the future of the Mixed Courts. At a time when all manifestations of foreign influence in the political institutions of Egypt are being submitted to the closest scrutiny,

no serious voice is raised in their attack and every well informed Egyptian will concede not only their present but their probable long continued future usefulness to his country. The secret of this position of confidence resides in two facts, first, the solid service that the Mixed Courts render the country, and second, in a form of organization which is peculiarly well adapted not to conflict with the Egyptian sense of national dignity.

In what large measure and in what varied directions these services have touched Egyptian life has nowhere been more finely expressed than in the following words of one of her most eminent native jurists, today the writer's colleague on the Court of Appeals:²⁷

In guaranteeing to all the inhabitants of Egyptian territory a law of universal application and in treating all parties as equal before that law, the Mixed Courts recalled Egypt to the true ideal of justice, prepared her for the assimilation of western ideas, and paved the way for the reform of her native courts and many other reforms which followed in natural consequence. As this instinct of justice developed among the people, a sense of personal dignity freed the laborer from his meek submission to the rule of force. Little by little the Egyptian people, being governed in their relation with foreigners by the new code of laws, became familiar with its provisions. In learning thus to understand their obligations they came to understand their rights. By the same token, the people became a less easy prey to the unscrupulous foreign adventurer, unhappily too numerous in the Levant, and notably so in a country whose commercial activities attract all races. Finding herself thenceforth the better protected against those who had hitherto mercilessly exploited her, Egypt commenced to lose suspicion of the foreigner, to deal with him without mental reservations. Thus was she brought to give her material support to those great enterprises which were soon formed for the commercial development of the entire land. The door was open to western civilization and the dream of Nubar Pasha began to find itself realized. (Translation.)

To these considerations must be added the altogether exceptional character of the litigation presented to the Mixed Courts, due to the peculiar admixture of national and religious elements present in Egypt. It is a labor which indeed invites the coöperation and untiring efforts of the most competent European jurists. It is a labor of a peculiarly complicated and arduous character which must be efficiently performed if the commercial life of the country is not to suffer. Egypt realizes that to attempt to dispense with the coöperation of those who are thus faithfully serving her in the performance of the highest of public functions would be but a blow struck at her own prosperity.

Apart, however, from the mere question of services rendered, of *quid pro quo*, the essential relation of the Mixed Courts to the governmental system of the country and to its sovereignty is a vital element in deter-

²⁷ Soubhi Ghali Bey. Article in *Revue de Droit International et de Législation Comparée*, Paris, 1908, Vol. X. Republished in the *Livre d'Or* of the Semi-Centennial of the Mixed Courts, Alexandria, 1926, p. 431 *et seq.*

mining their popularity. International in certain of their aspects, the Courts are none the less an integral part of the judicial system of Egypt and an expression of its national sovereignty.²⁸ They render justice in the name of the Egyptian sovereign and are paid by the Egyptian treasury. They were not imposed on Egypt, but were the result of her own initiative and energy. They do not belong to the capitulations. Rather are they a suppression of the capitulations, which, in their proper sense, could be abolished tomorrow without affecting the functioning of the Courts. Inviolability of domicile, immunity from new taxation, the consular courts, these remaining expressions of capitulatory privilege in Egypt, have no essential relation to the Mixed Courts. They merely express existing rights to which the Mixed Courts give protection as they give to all other rights based on law or treaty, and in the modification of which the Courts are in no manner directly concerned.

Then again, the Egyptian himself plays a large and honorable part in the judicial labors and administration of the Mixed Courts. The Egyptian judges, while in a minority, occupy positions of equal dignity with their European colleagues, and the large army of employees is principally composed of Egyptian subjects. There is indeed nothing here to arouse native jealousy or to encourage any tendency to seek to suppress the Mixed Courts for the sake of securing possession of a handful of overworked judicial posts. Well, indeed, might one of the most respected of Egyptian judges remark on the occasion of the recent Semi-Centennial Celebration:

By reason of their essentially Egyptian character, the Mixed Courts in no manner infringe our national sovereignty. On the contrary, they constitute an essential element in our judicial system, and one which is essential to the development of our country. Their fifty years of service is the best proof of this. Such an institution surely belongs to the nation itself to whose prosperity it has so largely contributed.²⁹

It cannot be doubted that this is the view of the intelligent and educated Egyptian of today. The Mixed Courts fill a rôle too large, and play a part too difficult, in the movement of Egyptian life, for any Egyptian in his senses to dream of abolishing them at the present time. Some day they will go, presumably by the gradual elimination of the foreign judges and

²⁸ "The Court will always be an Egyptian Court. If our governments accept the project, it is that they are consenting to submit their subjects to the jurisdiction of an Egyptian tribunal, in view of the sufficiency of the guarantees that have been offered." (Statement of the American representative, Mr. Charles Hale, before the Commission of 1869 [28 Dec.].)

"The Tribunals, though established with the concurrence of the Powers, were intended to be Egyptian Tribunals; and it is probable that they would never have come to be regarded as International Tribunals in the sense now current, if their establishment had not almost exactly synchronized with the utter collapse of autonomous Egyptian government." (Mr. [later Sir] Wm. Brunyate, note to Lord Cromer's Report for 1904, p. 93.)

²⁹ Ragheb Bey Ghali, Judge of the Alexandria Mixed Trial Courts. Article "Du Caractère National des Tribunaux Mixtes," *Livre d'Or*, p. 253.

a fusion with the native courts. But this day is far in the future. There is little likelihood that it will arrive until long after the little band of foreign judges who are now serving Egypt will have passed away. In the meantime the Mixed Courts will continue to present to a world which is struggling towards the organization of nations in the cause of justice, an encouraging example of the power of the Science of the Law, when once invoked and pursued in honest accord by a group of nations, to resolve international jealousies and to triumph over national partisanship.

REPRESENTATION IN LEAGUE OF NATIONS COUNCIL

BY DENYS P. MYERS

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The "Council crisis" in the League of Nations in 1926 has presented a problem in actual international coöperation of some moment. Whether it is permanently solved or only temporarily settled, it can not fail to have a profound effect upon the fundamental bases of international law. The difficulties and decisions at Geneva give practical interpretations to the "juridic equality" of states, which is the most elusive characteristic of the unit of international relationship. Subjective considerations—"particular national, historic, cultural and other qualifications"—did not prevail over objective considerations—the effort "to give the widest and most equitable representation" on the Council.¹ Progress may be said to lie on the objective side in international affairs, since there sound and practical general principles may best be evolved.²

The Geneva problem which developed in March was a growing pain of the Council, which is neither a legislative nor the executive organ³ of the members of the League of Nations which have associated themselves under the Covenant. It is perhaps a committee of management for the entire membership, with constitutional authority to act under specified conditions. It consists of three categories of members: (1) states permanently represented; (2) states selected by the Assembly to be represented; (3) states represented when they are concerned in specific questions, for those questions only. The permanent members are assumed to have interests so wide that all international business concerns them; but, whatever their own policy may be, their representatives in the Council act in a fiduciary capacity as part of an organ administering the Covenant, to which all members of the League are contractants. There has never been any doubt of Germany's being qualified for permanent membership in the Council. When the Berlin Government was finally persuaded to apply for membership in the League, it was with the

¹The British representative, Minutes of the 40th Session of the Council, Minute 1758.

²The tendency among writers to base the conception of the state on objective attributes rather than on subjective theory, derived from metaphysical sovereignty, is general and salutary. It accords with the modern scientific practice of dealing with realities more than with philosophic concepts. See particularly Feodor Martens, *Traité de droit international*; James Lorimer, *Institutes of the Law of Nations*; George Grafton Wilson, *International Law*; Charles G. Fenwick, *International Law*; Roscoe Pound's essay, "Philosophical Theory and International Law," in *Bibliotheca Visseriana*, I, at pp. 75-78, and Jesse S. Reeves, *La Communauté internationale* (Paris, Hachette, 1925), Chs. I and IV.

³Report on the Relations between . . . the Council and Assembly, I, pars. a and b, Records of the First Assembly, Plenary Meetings, p. 318.

supposed understanding⁴ that such Council membership would be accorded. When a special session of the Assembly was convened to admit Germany, three candidates⁵ for permanent seats in the Council appeared. Poland's candidacy seemed to be based on a claim of its importance and a desire to match Germany politically. Spain's was based on historical grounds, and Brazil's upon a claim for more appropriate American representation. Germany was unwilling to accept admission to the League if the membership of the Council were simultaneously increased beyond itself. In the end the declination of Brazil to vote Germany a permanent seat without receiving one itself resulted in the Assembly adjourning without taking action on German admission and the Council appointing a Committee on the Composition of the Council.

Such are the salient facts of the "crisis." They draw attention to the whole scheme of representation in the Council, and invite setting down a record of the essential elements of the questions raised. The origin of the Council as an organ of the League, the position of its permanent and its nonpermanent members, and the problem of electing nonpermanent members will be considered.

All post-armistice official projects for the construction of peace machinery contemplated some sort of an executive body less numerous than the whole number of states in the organization. The problem of arranging the representation in such organ in a manner satisfactory to all obviously touches closely the susceptibilities of states. On that rock the attempt to organize a Court of Arbitral Justice broke in 1907. But in the stress of the World War, the old negations were thrown to the winds and a practical international establishment was built up in the Supreme War Council, under which, after great effort, coördination of warlike activities was realized by the victorious belligerents. It was "composed of the prime minister and a member of the Government of each of the great powers whose armies are fighting on the [western] front." Back of it, however, was organized an interallied conference in which all belligerents, or at least 17 of them, were represented. Thus the war left a coördination in which the most responsible states assumed executive functions and the lesser ones participated in the general deliberations, as well as in any decisions that concerned them.⁶ The Paris Peace Conference met with the Supreme War Council and many of its subsidiaries still functioning.

⁴The Brazilian note of December 1, 1924 (Records of the Special Session of the Assembly, Third Plenary Meeting, p. 25) was interpreted by Germany as agreeing to its exclusive election as a permanent member. The original note stated the eventual Brazilian claim, but was revised by the Brazilian representative at Geneva after consultation with his colleagues on the Council (William E. Rappard, "Germany at Geneva," *Foreign Affairs*, IV, p. 544). The Brazilian Government evidently did not abide by the action taken in its name by its representative.

⁵The Chinese claim was not exclusively for a permanent seat.

⁶No adequate account of the institution has been given. My brochure of October, 1918, seems to remain the only general summary, "The Supreme War Council" (League of Nations, I, No. 7, World Peace Foundation).

PLANS BEFORE THE PEACE CONFERENCE

Throughout the duration of the World War numerous plans were developed for creating a league of nations. The schemes of individuals or organizations are too numerous for review in any case and, besides, invariably overlooked the problem of representation in an organ of limited membership.⁷ Another group of plans, sponsored by neutral or defeated states, was much more serious and detailed in content, but did not contribute in the first instance to the solution of the problem of representation.⁸ A third group, originating with members or committees of victor governments, touched the problem in a very definite form and threw light on its intricacies.

President Wilson drafted a plan on the trip across the Atlantic, using as bases the report of the British committee which had been sitting under Lord Phillimore, a plan developed among the members of the House Inquiry, the Smuts suggestions and others.⁹ The Wilson draft seems to have been discussed with Clemenceau, Lloyd George and Cecil on January 10, 1919. It provided that "the action of the signatory powers . . . shall be effected through the instrumentality of a body of delegates which shall consist of the ambassadors and ministers of the contracting powers accredited to H. and the minister for foreign affairs of H." The body of delegates was to have the right to discuss any matter within the jurisdiction of the league or affecting the peace of the world upon its own initiative. Art. II continues:¹⁰

but all actions of the body of delegates taken in the exercise of the functions and powers granted to them under this covenant shall be first formulated and agreed upon by an executive council, which shall act either by reference or on its own initiative and which shall consist of representatives of the great powers together with representatives drawn in annual rotation from two panels, one of which shall be made up of the representatives of the states ranking next after the great powers and the other of the representatives of the minor states (a classification

⁷ Schemes for Maintaining General Peace, by Lord Phillimore (Foreign Office, Historical Section, Peace Handbooks No. 160) is a sufficient reference. The paper is by the chairman of an official British Committee on the League of Nations, whose confidential reports of March 20 and July 3, 1918, played a preliminary part in the responsible negotiations, but did not, however, definitely touch the question here considered.

⁸ Among those readily available are; Swiss: Message from the Federal Council of Switzerland . . . concerning the Question of the Accession of Switzerland to the League of Nations (Cambridge, England, 1919), p. 218 (French edition, Message 1119, Annexes, p. 101); German: Sen. Doc. No. 149, 66th Cong., 1st sess., p. 14.

⁹ Of these only the Smuts plan was separately published, *The League of Nations; a Practical Suggestion*. Lord Robert Cecil's plan provided for regular conferences, which "would constitute the pivot of the league." There would be an "annual meeting of prime ministers and foreign secretaries of British Empire, United States, France, Italy, Japan and any other states recognized by them as great powers." There was to be a quadrennial meeting of representatives of all states included in the league, which "will be determined at the peace conference."

¹⁰ Treaty of Peace with Germany. Hearings . . . (Sen. Doc. No. 106, 66th Cong., 1st sess.), pp. 1165-66.

which the body of delegates shall itself establish and may from time to time alter), such a number being drawn from these panels as will be but one less than the representatives of the great powers; and three or more negative votes in the council shall operate as a veto upon any action or resolution proposed.

This "American draft" was printed for use without alteration of the provisions quoted, though President Wilson did make some changes elsewhere. The draft was submitted to David Hunter Miller and Gordon Auchincloss for expert criticism. They made comments and suggested alternative text. The comment on the above passage was in part as follows:¹¹

The states are to be divided into three classes: (a) the great powers; (b) the states ranking next after the great powers; (c) the minor states.

This classification is to be established in the first instance by the Body of Delegates. Here is one exception, presumably, to the requirement that the Body of Delegates can act only after its action is formulated and agreed upon by the Executive Council. . . .

All would agree that there are now five great powers, but nothing can be imagined as much more likely to cause discord than an attempt to have some thirty or forty states classify themselves into "powers ranking next after the great powers" and "minor states."

At the outset there would be nine members of the Executive Council and presumably, though not specifically stated, two members would be drawn from each of the two panels yearly. . . .

Of course the control of the League must in reality be with the great powers. It is submitted that it would be simpler and cause less friction to provide directly for an Executive Council of nine powers, including the five great powers, the other four to be elected annually by the Body of Delegates without being eligible for reelection until representatives of all the other member powers have served on the Council.

As to the negative vote, it was suggested that a quorum be required in which unanimity should prevail, in order to prevent action when "only six members were present, even if it were unanimous." The suggested draft read:¹²

The Executive Council shall be composed of the representatives of nine powers, including always Great Britain, France, United States of America, Italy and Japan.

At the first meeting of the Body of Delegates and annually thereafter, the Body of Delegates shall, by majority vote, choose four other contracting powers, whose representatives shall constitute the remaining members of the Executive Council for the ensuing year. But no power shall be chosen for a second or subsequent time as one of such four powers unless all other contracting powers (other than the five powers heretofore specifically named) have been so chosen since the previous choice of that power.

¹¹ *Ibid.*, pp. 1181-2, col. 2. The discussion of the German-American-British plan for allocating judges of a court at the Second Hague Conference might be cited as a precedent for the comments.

¹² *Ibid.*, pp. 1181-2, col. 3.

Any decision, vote, action or recommendation of the Executive Council may be made only by seven or more votes.

For some time previous to the Peace Conference a French Ministerial Commission on the League of Nations had been whipping ideas into shape. In fact, its conclusions are dated June 8, 1918, six months before the conference was opened. The French plan substantially reversed the American, both in names and functions, as can be seen from a few quotations:¹³

V. The International Council representing all the nations adhering to the Covenant for the reign of peace through organized law is established as follows:

1. Each associated state is represented either by the head of its Government or by a representative of this Government furnished with the necessary powers to engage the responsibility of his state by his vote.

2. The International Council in plenary session alone has the power to decide upon all matters within its competence. . . .

4. The members of the International Council appoint by agreement among themselves the members of the Permanent Delegation which, between its sessions, receives communications intended for the Council, prepares its work, preserves its archives and, in cases of urgency, notifies the members of the Council and proposes the convening of an extraordinary session.

5. The members of the Permanent Delegation are 15 in number; they are appointed for years; their appointments may be renewed.

The Italian delegation to the Peace Conference also had a plan, according to which the "big five" were to invite other states to a conference and all participants were to agree to several fundamental principles, of which the first was:¹⁴

All states are equal in law; inequalities in fact shall not be adduced in defense of any act, omission or pretension irreconcilable with respect for the rights of others and with the fulfilment of the international duties of each.

The large body in this scheme was a periodic conference, in which a two-thirds vote was to control. Art. 5 of the main document says:¹⁵

A Council composed of one representative each from the powers which have taken the initiative in respect to this act and which are named in the preamble [United States, France, British Empire, Italy and Japan] and of four representatives of the other contracting powers, chosen by each conference, . . . shall in general meet annually and at any time when circumstances may require, in order to deal with general affairs of common interest which call for or require more speedy decisions.

¹³ *Conférence des préliminaires de paix, Commission de la Société des nations. Procès-verbal No. 1*, p. 16. These minutes are printed but not published. The copy used here was received by the writer from a government without restrictions, but as it is in French, the excerpts here given may not always correspond to the English edition which exists.

¹⁴ *Ibid.*, p. 17.

¹⁵ *Ibid.*, p. 19.

This Italian proposal in other details suggests the present Council of the League of Nations, especially with regard to duties of inquiry or conciliation.

DISCUSSIONS IN PEACE CONFERENCE COMMISSION

On January 25, 1919, the Preliminary Peace Conference in plenary session appointed a commission to study the constitution of the League of Nations. In the interval Mr. Miller, the American expert, and Sir Cecil Hurst, juriconsult of the British Foreign Office, had been designated by their Governments to study the projects in evidence and to seek agreement. Their joint draft was submitted by President Wilson, chairman of the commission, to its first meeting on February 3, when the French and Italian proposals were also introduced. The American-British draft was accepted as the basis of the commission's work. Art. III of that draft read in part:¹⁶

The representatives of the states members of the League directly affected by matters within the sphere of action of the League will meet as an Executive Council from time to time as occasion may require.

The United States of America, Great Britain, France, Italy and Japan shall be deemed to be directly affected by all matters within the sphere of action of the League. Invitations will be sent to any power whose interests are directly affected, and no decision taken at any meeting will be binding on a state which was not invited to be represented at the meeting.

This proposal was strongly reminiscent of the rules of procedure of the Preliminary Peace Conference. The principle behind the rules was the recognition of "powers with general interests" (United States, British Empire, France, Italy and Japan, all belligerents); "belligerent powers with special interests," and others with the same. Those with "general interests" attended "all sessions and commissions"; belligerents with "special interests" attended "sessions at which questions concerning them are discussed." States otherwise defined were recognized as having "special interests" for the purposes in hand. Those which had "broken off diplomatic relations with the enemy powers" were entitled to "attend sessions at which questions interesting them will be discussed." Neutrals and states in process of formation, on being summoned by the general interest group, were heard "at sessions devoted especially to the examination of questions in which they are directly concerned, and only in so far as those questions are concerned."¹⁷

¹⁶ *Ibid.*, p. 4; English text in Sen. Doc. No. 106, p. 1227.

¹⁷ The rules, with their precise distinctions may be quoted:

"I. The Conference summoned with a view to lay down the conditions of peace, in the first place by peace preliminaries and later by a definitive Treaty of Peace, shall include the representatives of the Allied or Associated belligerent Powers.

"The belligerent Powers with general interests (the United States of America, the British Empire, France, Italy and Japan) shall attend all sessions and commissions.

"The belligerent Powers with special interests (Belgium, Brazil, the British Dominions and India, China, Cuba, Greece, Guatemala, Haiti, the Hejaz, Honduras, Liberia, Nicaragua,

The distinctions then made are no longer valid, but they produced a principle which goes far to reconciling the contradictions of a theory of state recognizing equal rights with the patent facts of life, which demonstrate that states are of all sorts of forms, sizes, weights, influence, force and value in the world. The principle is more easily phrased than applied. The League of Nations Commission started with the representatives of ten states, the "big five" and Belgium, Brazil, China, Portugal and Serbia. At its second session on February 4 the commission was in receipt of a request from Czechoslovakia, Greece, Poland and Rumania for representation, which was granted, their delegates sitting from the fourth session, February 6.¹⁸ After a draft was completed, a committee of the commission had a meeting with delegates of the following neutral states: Argentina, Chile, Colombia, Denmark, Norway, Paraguay, Netherlands, Persia, Salvador, Spain, Sweden, Switzerland, Venezuela.¹⁹ They made many amendments to the draft which were accepted. The mere recital of these changes shows how flexibly the rule had to be applied.

The discussion of the projected Art. III was reached at the second meeting of the commission on February 4. "A long discussion ensued on the subject of representation," the minutes record.²⁰ Epiteacio Pessoa of Brazil laid his finger on a real fault in the draft. He said:²¹

By Art. III the five great powers will have permanent delegates in the Executive Council, while the other powers will be represented only when their interests are directly affected. But since in this case the interested small powers can not take part in the settlement—because they are disputant parties—it follows that all the decisions will be taken by the great powers. This is, therefore, not an organ of the League of Nations but an organ of five nations, a sort of tribunal to which everybody will have to submit. The first proposal was more liberal. It granted permanent delegates to all the powers and it is not obvious why this principle should be abandoned.

Belgium, Serbia, China and Portugal rallied to this criticism, and France and Italy supported it. Britain called attention to the practical inconven-

Panama, Poland, Portugal, Rumania, Serbia, Siam and the Czechoslovak Republic) shall attend sessions at which questions concerning them are discussed.

"Powers having broken off diplomatic relations with the enemy Powers (Bolivia, Ecuador, Peru and Uruguay) shall attend sessions at which questions interesting them will be discussed.

"Neutral Powers and States in process of formation shall, on being summoned by the Powers with general interests, be heard, either orally or in writing, at sessions devoted especially to the examination of questions in which they are directly concerned, and only in so far as those questions are concerned." (This JOURNAL, Supplement, XIII, p. 109.)

¹⁸ *Conférence des préliminaires de paix, Commission de la Société des nations. Procès-verbal* No. 2, p. 2; No. 3, p. 1; No. 4, p. 1.

¹⁹ *Ibid.* Comité chargé de l'audition des délégués des puissances neutres, P.-V. Nos. 1. et 2, 1.

²⁰ *Ibid.*, Procès-verbal No. 2, p. 2.

²¹ *Ibid.*, p. 3.

ience of increasing the number of members of the Council, but on the insistence of the others the discussion went over to permit a new proposal to be prepared.

This was laid before the third meeting of the commission on February 5 by M. Orlando of Italy. The pertinent parts of the new draft were:²²

The Executive Council shall consist of the representatives of the United States of America, the British Empire, France, Italy and Japan, together with two representatives of the other states members of the League, appointed by the whole number of Delegates in accordance with the principles and in such manner as they may deem proper. Until the appointment of these two representatives of the other states, the representatives of and of shall be members of the Executive Council. . . .

. . . [At its] meetings may be discussed any question appertaining to the sphere of action of the League or likely to endanger the peace of the world.

Calls shall be addressed to all the powers before attending a meeting of the Council at which questions concerning their interests are to be discussed and no decision taken at a meeting shall be binding upon a power which has not received a call to attend it.

M. Hymans of Belgium proposed that, in addition to the five big states, there should be five others, instead of two, "so that these powers should be equal in number with the first." M. Vesnich of Serbia proposed that the number should be four, elected by the Assembly. M. Pessoa supported Belgium, but disagreed with the procedure for choosing the delegates. "Why," he asked, "are the representatives of the great powers to be chosen by themselves and those of the little ones by the Assembly? From this angle the Serbian proposal is preferable." France supported the Serbian number of four. The text was adopted on this reading with the question of the number reserved for further discussion.²³

The second reading of the text at the ninth session on February 13 developed some discussion, but the "principle of the majority plus one for the great powers" was adopted without question. Four was the number of lesser states that was fixed upon. Judge Pessoa of Brazil "recognized that the question can not be exclusively solved by rigorously applying legal principles. Account must be taken of the injunctions of political reason." He thought it was not reasonable that the big states appointed their delegates directly while "those of the small states are elected by the assembly of Delegates, that is, under the influence of the collaboration of the big states."

M. Hymans of Belgium made the point which definitely foreshadowed the holding of a Council place for Germany. He foresaw "complications on the day when the states that could be defined as of medium size would be admitted to the League, which might have the effect of eliminating the little powers," if the number four were strictly adhered to. Elasticity was desir-

²² *Ibid.*, *Procès-verbal* No. 3, p. 4.

²³ *Ibid.*, p. 1-2.

able, said Lord Robert Cecil, while Léon Bourgeois of France remarked that the total of nine "might be modified by circumstances, but it is essential to maintain the proportion between the big and little powers expressed by the relation of five to four." President Wilson remarked "that the League will be able itself to solve questions that come up in the future."²⁴

On February 14 the text as it then stood was adopted as a preliminary report at a plenary session of the Peace Conference and, with minor changes of phraseology and the number for the other states fixed at four, the Italian proposal was given to the world for public discussion.²⁵

SUGGESTIONS FROM NEUTRALS AND ADOPTION

On March 20 representatives of thirteen neutral states met members of the commission and suggestions were made respecting the article on the composition of the Council. M. Venizelos of Greece opened the discussion by stating that the intention of the Covenant "had been to avoid any infringement of sovereignty." Definite proposals were presented by Chile, Denmark, Norway, Spain and Sweden. Denmark thought the small states ought to have eight elected Council delegates; Norway thought the whole Council ought to number fifteen at least; Sweden felt that the number of "secondary states" should be increased; while Spain presented a claim to a "special situation" for itself. The Netherlands and Switzerland favored the Danish idea. M. Venizelos of Greece, speaking as the representative of a small state on behalf of the commission, expressed what proved to be the final judgment:²⁶

The representatives of the states with limited interests had done their best within the commission to secure an equitable representation in the Executive Council. He believed they had succeeded in obtaining the number of four representatives. If the representation of states with limited interests was too large, the Executive Council could not in reality function under satisfactory conditions. It had seemed impossible to exceed this proportion of five to four. But, without any decision having been taken on the point, there was apparent agreement in thinking that, if later other great powers are represented in the Executive Council, other representatives of powers of limited interests will also be admitted.

Throughout the discussions there had up to this point been a constant confusion in some minds as to the character of representation, doubtless due

²⁴ *Ibid.*, *Procès-verbal* No. 9, p. 4-6.

²⁵ *Ibid.*, *Procès-verbal* No. 10, p. 17; Preliminary Peace Conference, Report of the Commission on the League of Nations, p. 5. The text was practically that finally adopted (Sen. Doc. No. 106, p. 265).

²⁶ *Conférence des préliminaires de paix, Commission de la Société des nations. Comité chargé de l'audition des délégués des puissances neutres*, P.-V. Nos. 1 et 2, pp. 6-7.

The committee represented the United States, British Empire, France, Belgium, Greece and Serbia. The neutrals represented were: Argentina, Chile, Colombia, Denmark, Netherlands, Norway, Paraguay, Persia, Salvador, Spain, Sweden, Switzerland and Venezuela.

to the fact that methods of voting had not been determined. M. Pessoa in the commission had suggested more than once the inequity of the five big states appointing their delegates, while they also participated in the election of the representatives of the states of limited interests through their votes in the Assembly. He seems to have made the point both in contemplation of a representative acting as an individual and also as an official. The relative merits of personal and official representation were not discussed, but the decisions taken by the commission resulted in applying the principle of official representation only.

The neutrals had considered this possible dual character of representation. Chile, for instance, wished to insure maximum freedom from control in electing Council members, and proposed: "Each of the five great powers will have the right to appoint a representative on the Executive Council; it would, therefore, be just to leave to the secondary powers the right to designate by themselves the four states which shall represent them."²⁷ Denmark, on the other hand, contemplated either a personal representation or voting by individual majority, for her proposal was: "The Executive Council shall consist of two representatives respectively of the United States of America, the British Empire, France, Italy and Japan, together with eight representatives of the other states members of the League of Nations elected by the delegates of these latter states in the Assembly."

At its eleventh session, March 22, the commission considered the neutrals' suggestions. The British Empire proposed that the states permanently represented on the Council should not vote in the Assembly on the election of the nonpermanent members. The United States suggested a variant, that "they not participate in the selection of the four other members." Belgium reverted to the personal representation idea, proposing as an amendment: "The Executive Council consists of nine members elected by the Assembly of delegates. They shall be citizens of different states among which will necessarily be included five representatives of the United States, the British Empire, France, Italy and Japan." Serbia, Poland, Belgium, Portugal and Italy entered into an exchange of views, following which the amendments were not maintained.²⁸ The character of the Council was not thereafter debated, the final text of the Covenant corresponding with the discussions summarized reading:

Art. 4. The Council shall consist of representatives of the Principal Allied and Associated Powers [United States of America, the British Empire, France, Italy and Japan], together with Representatives of four other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Greece and Spain shall be Members of the Council.

²⁷ *Ibid.*, p. 21, where all the proposals are collected.

²⁸ *Ibid.*, *Procès-verbal* No. 11, pp. 3-5.

What became the second paragraph of Art. 4 of the Covenant, by which Council membership may be increased, was proposed by Lord Robert Cecil on March 22. The text voted at that time, subject to future editing, read: "With the approval of the majority of the Assembly, the Executive Council may name by selection to the Executive Council the representatives of other states than those mentioned above."²⁹ In the Covenant as it went into effect this decision had been edited into this form:

With the approval of the majority of the Assembly, the Council may name additional members of the League, whose representatives shall always be members of the Council; the Council with like approval may increase the number of members of the League to be selected by the Assembly for representation to the Council.

It appears from the records that certain ideas lay behind the decisions reached. Taking account of the "injunctions of political reason," the Council was to consist of five permanent members possessing "general interests" and of four nonpermanent members of "limited interests," representative of their group and elected by them, since they would constitute the majority of the Assembly. Moreover, any member concerned with the business before the Council would be, and is, represented.

INDIVIDUALS REPRESENT GOVERNMENTS

If there had been any doubt during the deliberations of the League of Nations commission respecting the character of the representatives, it was speedily resolved. At the third meeting of the second session of the Council, February 13, 1920, Signor Maggiorino Ferraris (Italy) was *rapporteur* on the subject of procedure. The draft rules before the Council made no direct reference to the character of representatives, but Signor Ferraris "proposed that the names of the representatives, or their substitutes, should be notified to the Secretary-General by the minister of foreign affairs of each country represented on the Council."³⁰ The rules of procedure as finally passed at the fifth session of the Council on May 17, 1920, definitely contemplated (Art. 1) "regularly accredited representatives of each Government."³¹ The Secretary-General was instructed "to request each Member who has the right of representation on the Council under par. 1 of Art. 4 of the Covenant to notify me in due course of the name and address of its representative on the Council."³² The letter adds:

In view of the variety of methods open to the various Governments in the appointment of these representatives, the Council considers it desirable that the notification shall indicate at the same time the duration of the mandate for each representative.

²⁹ *Ibid.*, p. 5.

³⁰ *Procès-verbal* of the third meeting of the second Session of the Council . . . , p. 3.

³¹ *Procès-verbal* of the fifth Session of the Council, p. 193.

³² *Ibid.*, p. 199.

On August 2, 1920, the Council adopted a report defining relations between the Council and Assembly. This ³³ came before the First Committee of the First Assembly where, on November 24, Newton W. Rowell of Canada summarized its implicit conclusions and added one to the effect that representatives on the Council have no standing except as state representatives. In his opinion "it was of vital importance for the future of the League that the states represented on the Council should be held accountable, and not the individual delegates." This idea met with no objection;³⁴ and the committee report of December 1 was adopted by the Assembly on December 6 without change on this point except extension of the rule to the Assembly, in this form:³⁵

(c) Under the Covenant, representatives sitting on the Council and the Assembly render their decisions as the representatives of their respective states, and in rendering such decisions they have no standing except as such representatives.

JURISDICTION MORE CLEARLY DEFINED

A Swiss proposal in the First Committee of the First Assembly contemplated that "the mandates of the officers of the Assembly and of committees whose mandates have not been exhausted . . . shall continue effective . . . until the opening of the following session."³⁶ Mr. Balfour, the chairman,³⁷ remarked that "this suggestion constituted so complete a change in the machinery of the League that it must be most seriously examined." M. Viviani, France, said that if the League were a parliament and the Council a government, "permanent committees would be admissible." Until that situation existed, after amendment of the Covenant and the creation of a superstate, representatives, "in the absence of formal instructions, could take no decision without previous reference to their Governments. The Council was the executive organ when the Assembly was not in session." The proposal was not accepted because, "as each committee consists of one representative from each state, it would be impossible to keep the members of a committee in Geneva after the Assembly was over."³⁸

The resolutions in committee in the First Assembly emphasized the co-ordinate authority of Assembly and Council, derived in each case from the states represented. The original language provided that ³⁹ "the Assembly has no power to reverse or modify a decision which falls within the exclusive competence of the Council." In the Assembly's plenary session of December

³³ *Procès-verbal* of the eighth Session of the Council, p. 119; discussion at pp. 11, 25: Records of the First Assembly, Meetings of Committees, I, p. 93.

³⁴ Records of the First Assembly, Meetings of Committees, I, p. 11.

³⁵ *Ibid.*; p. 95 and Plenary Meetings, p. 285. The vote is at Plenary Meetings, p. 297.

³⁶ *Ibid.*, Meetings of Committees, I, p. 99.

³⁷ *Ibid.*, p. 13.

³⁸ Report, 9(b), *ibid.*, p. 97, and Plenary Meetings, p. 284.

³⁹ *Ibid.*, Meetings of Committees, I, p. 98, and Plenary Meetings, p. 284.

6 two views were developed as to the word "exclusive." Greece wished it stricken out to make way for a provision that, during the Assembly, the Council should not deal with questions in which the two organs had common competence.⁴⁰ On the other hand, Canada insisted that the omission of the word would deprive the Assembly of its right to deal with matters within its competence, if the Council had first considered them. The debate extended into the next day when the sound conclusion was reached in language which met with no objection:⁴¹

(a) The Council and the Assembly are each invested with particular powers and duties. Neither body has jurisdiction to render a decision in a matter which by the treaties or the Covenant has been expressly committed to the other organ of the League. Either body may discuss and examine any matter which is within the competence of the League.

No friction has arisen from this rule. The Secretariat each year makes a report to the Assembly on the work of the Council and the measures taken to execute decisions of the Assembly. This avoids any implication that the Council, within its competence, is subordinate to the Assembly, while it affords free scope for debate in the Assembly concerning all Council action. The Swiss proposal has been realized in so far as it contemplated the necessity of action started by the Assembly continuing after its adjournment. Its resolutions request or recommend that the Council take action or appoint committees, of which the Preparatory Committee for the Disarmament Conference is an example. New activities are customarily initiated by the Assembly but conducted under the Council's direction.

Assembly delegates are also conference delegates at almost every meeting. That is, each Assembly may sit in one or more committees and in certain plenary sessions as an international conference. The elaboration of the Statute of the Permanent Court of International Justice and its covering Protocol of Signature in 1920, the development of the Protocol for the Pacific Settlement of International Disputes in 1924 and of the draft slavery convention in 1925 are illustrations of this feature of Assembly action, which, *pro tanto*, homologates delegates to the Assembly with delegates to international conferences. Delegates take such action in virtue of special powers distinct from their credentials to the Assembly.

Representatives on the Council inevitably possess full powers covering the items on the agenda of the meetings and consequently are authorized to sign formal agreements resulting therefrom, if occasion arises. Procedure, however, does not work out in exactly that way. International agreements to which the Council becomes a party on behalf of the League of Nations, as representing its member states, have been of two kinds. One type is the Austrian protocols of October 4, 1922, toward which the Council had the position of a mediating negotiator, the documents being signed directly by

⁴⁰ *Ibid.*, Plenary Meetings, p. 291 ff.

⁴¹ *Ibid.*, p. 320.

the interested states.⁴² The other type is unilateral, illustrated by the minorities declaration made by Albania on October 2, 1921.⁴³ Council action in such an instance is taken by an ordinary resolution. The president of the Council might act for it in case an agreement were bilateral, the Council being one party. Agreements made before the Council have usually been with states not members of the Council,⁴⁴ which are represented and vote at its meetings when matters affecting them are under consideration. The credentials of such representatives are expected to authorize their signing of agreements, when occasion arises.⁴⁵

VOTING METHODS

The Assembly elects the nonpermanent members of the Council. The Chinese delegate in the First Assembly's First Committee on November 26, 1920, made a motion for a geographical allocation of the nonpermanent seats and for their election as a matter of procedure, decisions on which are by numerical majority.⁴⁶ The Danish and Swedish Governments had previously proposed amendments to Art. 4 of the Covenant, both of which contemplated a majority vote.⁴⁷ The Chinese motion on the form of vote was accepted without discussion.⁴⁸ It was apparent that the majority vote gave the real choice of the nonpermanent Council states over to the group from which they are selected.

The voting scheme has a direct bearing on the composition of the Council, any change in which requires a unanimous decision of the Council itself but the approval of only an Assembly majority. In the business of the Council the unanimous vote is more used than in the Assembly, and the requirements are usually exceeded in favor of it. Appointments of committees and individuals, for instance, which require a majority vote, are customarily by unanimous vote.⁴⁹ In the case of disputes, states members of the Council for the occasion frequently vote on recognized matters of procedure.⁵⁰

⁴² Minutes of the 22nd Session of the Council, Official Journal, III, No. 11, Part III; the protocols are also in Treaty Series, XII, pp. 385-411.

⁴³ Official Journal, II, p. 1164; Treaty Series, IX, p. 174.

⁴⁴ The mandates are an instance of agreements to which members of the Council are parties. In the case of Great Britain and the Iraq mandate, the Council on several occasions has in resolutions indicated the agreements which would be acceptable to it. The treaties are British-Iraqi, but in each case have been subject to approval by the Council before entrance into force. The Council decisions were taken September 27, 1924, March 11 and June 9, 1926.

⁴⁵ C. L. 42. 1925. V. Cf. resolution 2 in Minute 1730, 40th session of the Council, which requests members to send Assembly delegates empowered to sign a slavery convention.

⁴⁶ Records of the First Assembly, Meetings of Committees, I, pp. 18, 40.

⁴⁷ *Ibid.*, pp. 68, 70.

⁴⁸ The resolution was voted December 11, *ibid.*, Plenary Meetings, pp. 434-35.

⁴⁹ In one case, Minute 873, Official Journal, IV, p. 237, an abstention is recorded in respect to an appointment. Nos. 8 and 9 of Rules of Procedure deal with voting methods (Official Journal, I, p. 272).

⁵⁰ Any state votes as a member of the Council during consideration of matters affecting its

The practice of the Council is rather to determine what is agreeable to those concerned, than simply to register decision. The object aimed at is to fix the common denominator of opinion or action acceptable to responsible governmental representatives acting under instructions. "In a body constituted in this way," said the Permanent Court of International Justice,⁵¹ "... observance of the rule of unanimity is naturally and even necessarily indicated. Only if the decisions of the Council have the support of the unanimous consent of the powers composing it, will they possess the degree of authority which they must have." Yet there is another side to the matter, phrased by an Assembly subcommittee:⁵²

The essential characteristic of the unanimity rule . . . is that it serves as the safeguard of the sovereignty of states. The logical result of this is that it can not apply except in cases in which the sovereignty of states is in jeopardy.

A Colombian delegate said in the Second Assembly⁵³ that "the League of Nations lived in a system of perpetual compromise between the principle of the sovereignty of states and the principle of association;" which is only saying that there is constant compromise between national and general interest.

If unanimity is exercised with a keen perception that the member state has given large hostages to the general interest by accepting the engagements of the Covenant for the sake of the national interest, particularism will not seriously hamper the Council's work.⁵⁴ If a state insists on the *liberum veto* in its national interest, it is almost certainly playing a losing game, internationally speaking; its peers are certain to appreciate the general interest more highly than a single state's special attitude. On the other hand, the value of any view will be carefully weighed. The opinions of members of the Council⁵⁵ "can all be clearly ascertained before a formal vote, and the discussion may be prolonged until an agreement is reached, which is a com-

interests, and, barring certain exceptions, its vote counts in the result. What has been regarded as the boldest action of the Council illustrates the exercise and limitation of this right. When the Council called upon Bulgaria and Greece to withdraw their troops within 60 hours behind their own frontiers, the Council developed the idea alone. The representatives of the two interested parties were then invited to agree to the decision, and finally the Council, including them, voted the resolution at a public meeting. (Official Journal, VI, p. 1699). Neither probably was anxious for the resolution, but acquiescence was cheaper than opposition, which would have blocked an obvious pacificatory move.

⁵¹ Publications of the Court, Series B, No. 12, p. 29.

⁵² Records of Second Assembly, Meetings of Committees, I, pp. 177-78.

⁵³ M. Urrutia on September 29, 1921; Records of Second Assembly, Meetings of Committees, I, p. 94.

⁵⁴ See "The League of Nations and Unanimity," by Sir John Fischer Williams, this JOURNAL, 19, p. 475, for the extent to which unanimity has been modified, especially in the Assembly.

⁵⁵ Records of the Special Assembly, p. 25.

paratively easy matter. Two years' experience has shown that unanimity does not in any way hinder the Council's activity, but that it is rather a guaranty of continued agreement between its members, which is essential for the authority of their decision." For each state to assist such procedure is both best for the general interest and invariably for the national interest as well.

Brazil's position in March shows the awkward effect of unanimity when "individual interests come into conflict with the general interest." Its insistence on obtaining a permanent seat simultaneously with Germany was calculated to secure special consideration for its claim⁵⁶ "that America should be represented more equitably and more fully on the Council." The ten American delegations at the special Assembly⁵⁷ expressed the hope that Brazil would take steps "to bring about unanimity in the Council" on the German candidacy, thus dissociating themselves from support of the American claim in connection with the other question. The Dutch delegate in the Assembly expressed an idea quite generally held when he said that "the spirit which places the welfare of the community before the *amour propre* of each of its members has not prevailed." Brazil's exercise of the veto prevented an important action at a given time, and was followed by action that was necessarily based on national judgment. At the final meeting of the fortieth session of the Council on June 10 Brazil resigned its nonpermanent seat, selecting "a time when it can not affect the work of the League" for "the next session will coincide with the ordinary session of the Assembly, which" can fill the vacant seat without delay. This interpretation was prefaced by an interpretation that, deprived of one member "either owing to resignation or owing to final severance from the League of Nations, the Council can not take any decision or any action within its competence." If the interpretation is correct, the conclusion was wrong, for the September Council session was to open before the Assembly, and until the election the Brazilian action would leave it impotent.

The president of the Council (M. Guani, Uruguay), referring to fuller American representation, said that "the Brazilian ambassador has employed certain means to attain that end. The representative of Uruguay is employing other means to attain the same end." If that is typical, the method of championing of Latin America is open to question. The Italian representative raised the query whether the Council was at liberty to accept resignation of a seat assigned by the Assembly and, though Brazil argued that resignation was unilateral, the Council did not actually pass upon the Brazilian action.⁵⁸ It may be added that Brazil continued to sit in committees in which seats are occupied by virtue of Council membership.⁵⁹ Finally Brazil

⁵⁶ Special Assembly, Verbatim Record of third plenary meeting, p. 2.

⁵⁷ *Ibid.*, p. 29.

⁵⁸ Summarized from Minutes of the 40th session of the Council, Minute No. 1758.

⁵⁹ The Permanent Military, Naval and Air Commission, for instance. The Brazilian announcement of withdrawal from the League of Nations of June 12 (C.380.M.131.1926) does not take effect until 1928, so that it does not influence the situation under discussion.

announced withdrawal from the League itself, giving the two-year notice on June 12, 1926.⁶⁰ These things are apparent: The veto only postponed the general desire to admit Germany to the League; Brazil, to be logical, on the premises selected, went farther than was originally contemplated.

PERMANENT MEMBERS

The condition that the permanent members of the Council are those states which possess "general interests" has already been indicated. In the large, the permanent members may be regarded as sitting in continuous application of the principle that any member of the League sits for the consideration of matters specially interesting it. There has been very little question⁶¹ of the principle of having some permanent members, and none of the legitimacy of the incumbents being accorded such places. France, Great Britain, Italy and Japan are permanent members by definition in Art. 4, par. 1, of the Covenant, and the United States is potentially so by the same evidence. There has never been any question but that Germany meets the same conditions, and it has been regarded that Russia would be accorded the same position. Such are the current "injunctions of political reason," to use the Brazilian phrase. It is noted that no provision for revision of permanent places exists.

Other permanent seats might be voted under Art. 4, par. 2, of the Covenant. Continuous election would have the same effect so long as it occurred. In 1921, in the First Committee of the Second Assembly, M. Edwards (Chile) proposed a "restoration of the political equilibrium" of the Assembly and Council by adding to the Council. The eight members of the Council he defined as "the great powers of Europe (among which we reckon Spain), Asia, Portuguese America and Belgium." In the Assembly were the Scandinavian entente, the Little Entente, Spanish America and many isolated countries. "By increasing by two—Spain and Brazil—the number of permanent members of the Council, and by only one the number of non-permanent members, all the great political currents of the Assembly would have a voice in the Council."⁶² In the same committee in 1923 he reverted to the matter again, then suggesting that Brazil might occupy the seat left vacant by the United States.⁶³ The contention in behalf of Spain seems to

⁶⁰ The action was forecast in a lengthy communication of June 10 (Official Journal, VII, p. 1003).

⁶¹ The president of the Council (M. Guani, Uruguay) said on June 10: "My country is absolutely opposed to the principle of permanent seats. . . . Perhaps in a future more or less distant the true ideal of justice would be to suppress altogether the permanent seats and to establish the absolute equality between the states. . . . My Government prefers that the principle of equality should dominate the future composition of the Council of the League with the exceptions already provided for in the Covenant and with the exception of Germany." (Official Journal, VII, p. 890).

⁶² Records of the Second Assembly, Meetings of Committees, I, pp. 41, 119.

⁶³ Records of the Fourth Assembly, First Committee, p. 37. "The seat which was to

have met with some acquiescence from permanent members of the Council. The desire of states to occupy permanent seats is undoubtedly affected by their estimation of their importance. The Spanish representative in the Council on June 10 stated "that his Government was unable to accept a classification which would place Spain among the second rank of powers."⁶⁴ Spain had not ratified the amendment to Art. 4 of the Covenant because through nonratification it "desired always to make it possible for it to be a member of the Council by means of successive reflections up to the moment judged opportune for the nomination of Spain as a permanent member of the Council."⁶⁵ Brazil and Poland have also put forward claims largely subjective in character.

The problem involved in determining permanent members is at once that of defining objective qualifications and of applying the definition. The habit of referring to the largest states as "powers" has unconsciously complicated the matter. A curious argument employed for Spain was that it was a neutral in the World War. Yet rating a state on the basis of its military weight is no longer an actual criterion, as shown by the attitude toward Germany, whose armament is limited. All states have heard without objection the Chinese insistence in the Assembly that rating a state on its military strength is a "wrong conception."⁶⁶ What the criteria should be, however, is another matter.

An interesting feature of permanent membership is that of the British Empire. The self-governing dominions and India being members of the League, they have separate representation in the Assembly. The seat in the Council was discussed by Sir Austen Chamberlain in reply to a parliamentary question in the House of Commons on February 17, 1926, as follows:⁶⁷

By the terms of the Covenant, a permanent seat on the Council is attributed to the British Empire, but the extent to which that representative can speak on behalf of the Dominions depends upon the circumstances of each particular case and the character of the communications which have passed between his Majesty's Government and the Dominion Governments. The Dominions have separate representation in the Assembly, and their representatives there act on the instructions of their own Governments, although frequent consultation of all the empire delegates takes place.

The British dominions sit on the Council when matters affecting them come up.⁶⁸

It would seem that the British Council seat is something of a composite

have been allotted to the United States might perhaps be given to Brazil, as being the most important state in South America."

⁶⁴ Minute 1751, 40th session of the Council.

⁶⁵ Minute 1741, 40th session of the Council, Official Journal, VII, p. 870.

⁶⁶ Record of the Special Assembly, p. 36. ⁶⁷ London Times, February 18, 1926, p. 8.

⁶⁸ For instance, India at the 21st session, New Zealand at the 24th session, Australia at the 30th session, Australia and New Zealand at the 35th session, Official Journal, III, p. 1184; IV, p. 367; VI, p. 1363.

one, the spokesman in which sometimes speaks for all, and sometimes for part, of a group. The British declaration on the Protocol for the Pacific Settlement of International Disputes made on March 12, 1925, expressly dissociated Canada and the Irish Free State from its conclusions and implied the concurrence of other dominions.⁶⁹ It might well be that the British practice would become a precedent for Council representation of definable groups, thus widening the voices speaking in the Council without proportionately adding to Council numbers.

The Permanent Court of International Justice has said:⁷⁰

It is hardly conceivable that resolutions on questions affecting the peace of the world could be adopted against the will of those among the members of the Council who, although in a minority, would, by reason of their political position, have to bear the larger share of the responsibilities and consequences ensuing therefrom.

INCREASE OF NONPERMANENT MEMBERS

The nonpermanent members, being states of limited interests, possess a common concern in the development of international justice. By their disinterested position in matters affecting larger and other states, they have been extremely useful in presenting broad principles which can be accepted on merit. While the representatives of the small states receive their instructions from their own governments only, it is interesting to note that the choice of the nonpermanent members has resulted quite as much from the qualities of their representatives as from confidence in the states by their peers.⁷¹ Czechoslovakia and Sweden are on the Council largely because their colleagues liked and had confidence in Beneš and Branting as statesmen. Not only is the choice representative in personnel, but the non-Council states expect to have their views reflected through those they have selected. This was clearly shown in the tense debate in the Assembly on March 17, 1926.⁷²

A change has taken place in the nonpermanent membership of the Council under Art. 4, par. 2, owing to the exigencies of the organ's work. On September 25, 1922, the Assembly agreed to a proposal of the Council to increase the nonpermanent members from four to six. The report to the

⁶⁹ Official Journal, VI, p. 450.

⁷⁰ Publications of the Court, Series B, No. 12, p. 29.

⁷¹ An interesting argument was put forward by Albania in the Assembly on March 17, 1926. "If," said the spokesman, "a nonpermanent member of the Council opposes the settlement of a question directly affecting the interests of the League . . . the Assembly . . . possesses full powers to take an immediate decision."

⁷² Chile, Colombia, Cuba, Dominican Republic, Guatemala, Nicaragua, Paraguay, Salvador, Uruguay and Venezuela unanimously called on Brazil to facilitate the admission of Germany. (Records, p. 29). The resolution was taken March 16 and when the Latin American states found Brazil unyielding they canceled parts of it expressing sympathy for Brazil's insistence on a permanent Council seat and asking for more Council seats for American states. (For original text see *Le Temps*, March 18, 1926).

Assembly stated "that it is essential to have in the Council representation of the secondary powers, especially for the purpose of solving questions on which the great powers have not been able to come to an agreement." Among other reasons assigned for this action was the addition of nine new states to membership in the League since its beginning. "It is very difficult to insure an equitable allocation of nonpermanent seats among the different countries which, owing to common interests, have a tendency to form themselves into groups." A practical reason was that it had become difficult to find in the Council membership disinterested reporters for the questions on the agenda. The Council letter to the Assembly minimized the importance of changing the proportion of permanent and nonpermanent, since—votes being taken unanimously—"the question of a majority does not arise as far as the Council is concerned." And it was "advisable, moreover, to provide for a future increase of permanent members," Germany, the United States and Russia being specifically mentioned. When such augmentation occurred, the principle of a larger number of permanent than nonpermanent members would be reestablished. After a short debate, the increase was passed by a vote of 44 to 1, the Netherlands apparently casting the negative vote.⁷³

ELECTING NONPERMANENT MEMBERS

The principles which must be considered and applied in some degree in determining a scheme for choosing the nonpermanent members of the Council were identified as six in number in the report accepted by the First Assembly.⁷⁴ They are:

- a. System of rotation; d. Dates of the partial renewals;
- b. Method of apportioning seats; e. Reëligibility;
- c. Duration of the mandates; f. Method of selection.

In considering the problem the First Assembly immediately encountered difficulty in interpreting the language of the Covenant, which provides for the selection of the nonpermanent members of the Council "by the Assembly from time to time in its discretion" (*librement*). A difference arose as to the duration of this discretion. Some held that the Assembly could exercise its discretion for a period of time; others that it must be exercised at the time of each election. The latter view was assumed to be the proper, though unsatisfactory, interpretation of the language.⁷⁵ Accordingly, in 1921 the Assembly decided to resolve the doubt by amendment.⁷⁶

⁷³ Letter of the French and British representatives to the President of the Council, September 15, 1922, Official Journal, III, p. 1415; discussion and vote at p. 1197; Records of the Third Assembly, Plenary Meetings, I, p. 222; report at II, p. 155.

⁷⁴ Records of the First Assembly, Meetings of Committees, I, at p. 104; Plenary Meetings, p. 414.

⁷⁵ The discussions ran through almost every phase of the problem, see report, Sec. II, *loc. cit.*, and Plenary Meetings, pp. 426, 432; Meetings of Committees, I, p. 36.

⁷⁶ Records of the Second Assembly, Plenary Meetings, p. 894. The vote was 40 to 0, with 11 abstentions. The report on the amendment is at pp. 688 and 903.

3. The committee expresses no opinion as to whether, from the legal point of view, an amendment to the Covenant is, or is not, necessary, but it is of opinion that it is prudent and desirable to adopt the following amendment which would be inserted between the second and third paragraphs of Art. 4:

"The Assembly shall fix by a two-thirds majority the rules dealing with the election of the nonpermanent members of the Council, and particularly such regulations as relate to their term of office and the conditions of reëligibility."

The amendment to Art. 4 entered into force only on July 29, 1926, Spain, a member of the Council, having then ratified it.⁷⁷ Subsequent deliberations depended much on this delay.

The First Committee in 1920 was divided on every point and the votes, by majority, were uniformly narrow.

The prevailing opinion was against a strict system of rotation, for obligatory rotation would progressively result in the latitude of choice disappearing altogether. This certainty was deemed to override the risk that the failure to guarantee to each member a seat in turn would decrease interest in the work of the Council. "Those members," said the report, "should be chosen who are best fitted to carry out, in conjunction with the permanent members, the duties entrusted to the Council; the election must always be a selection." So that "international, political, economic, social and financial relations of every sort, as well as . . . the respective situations of the various states at the time of the election" should be special considerations in the choice.⁷⁸ As the members of the League have acquired experience in coöperation and more confidence in each other, the idea that each should some time sit on the Council has disappeared from the debates. Switzerland, in fact, has renounced any claim to representation on the Council.⁷⁹

A motion that three out of the four nonpermanent members should be elected in 1920 from the European and American Continents and the fourth from the remaining parts of the world was passed in committee 13 to 12, with 2 abstentions and 15 absentees.⁸⁰ The original proposal was Chinese, and it was argued in its behalf that the apportionment was natural, equitable, designed to foster coöperation, obviate preponderance of any group, desirable and destined to enhance the prestige of the Council. Against it the arguments were that the freedom of the Assembly should not be restricted; that the groupings did not give any legal basis for representation; that

⁷⁷ For reasons see above, and Minute 1741, 40th session of the Council. The announcement was accompanied by a statement that "the present situation excludes the possibility of the presence of Spain at an election" of nonpermanent members. Spain desired to insure her own Council position.

⁷⁸ Records of the First Assembly, Meetings of Committees, I, pp. 104-5; Plenary Meetings, p. 415.

⁷⁹ Records of the Fourth Assembly, Minutes of the First Committee, p. 37.

⁸⁰ *Ibid.*, Meetings of Committees, I, pp. 40-42.

coöperation of a universal character would develop in the Assembly rather than the Council; that the spirit of the League rather than rules must be depended on to insure equity in distribution; that shifting requirements would create varying and unforeseen necessities of representation not predictable.⁸¹ The discussion of the report in the nineteenth plenary meeting rapidly reached the question of ability to lay down definite rules, a doubt resolved in 1921 by amending Art. 4. Mr. Balfour, chairman of the committee, suggested that the decisions of the report be adopted as recommendations only so as to avoid the question of competence. The item relating to geographical distribution was accordingly adopted as a recommendation, by a vote of 27 to 4 on roll call, in the following language:⁸²

The Assembly is recommended to vote for the nonpermanent members of the Council to be selected by the Assembly in 1920, so that three shall be selected from among the members of the League in Europe and the two American continents, and one selected from among the members in Asia and the remaining parts of the world.

The recommendation was reiterated in the Third Assembly. On the initiative of the Chinese at the Fourth Assembly the same resolution was introduced and at that time it was decided to be unnecessary to refer it to a committee. The Fourth, Fifth and Sixth Assemblies reiterated the same text, which may be regarded as expressing an accepted principle. It reads:⁸³

It is desirable that the Assembly, in electing the six nonpermanent members of the Council should make its choice with due consideration for the main geographical divisions of the world, the great ethnical groups, the different religious traditions, the various types of civilization and the chief sources of wealth.

In 1920 there was a tendency to fix the term of nonpermanent members of the Council at four years, but the committee decided, 14 to 13 with 15 absent or not voting, to fix the term at two years.⁸⁴ However, the Assembly did not decide the matter and voted in 1920 for members for one year only.⁸⁵ The committee was fully in favor of a system of partial renewals so as to avoid too great an overturn in Council membership; but the question was not decided by the Assembly, which elected the nonpermanent incumbents, thus following the principle without adopting it. A final point was the degree to which nonpermanent members should be reëligible, the committee feeling in its majority that, after four years' service, a member should be ineligible for

⁸¹ Report, *ibid.*, Meetings of Committees, I, p. 105; Plenary Meetings, p. 417.

⁸² *Ibid.*, Plenary Meetings, p. 435, with debate *ante*.

⁸³ Records of the Fourth Assembly, Plenary Meetings, p. 115; Records of the Fifth Assembly, Plenary Meetings, pp. 113, 131, 160; Records of the Sixth Assembly, pp. 71, 110.

⁸⁴ Records of the First Assembly, Plenary Meetings, p. 416.

⁸⁵ *Ibid.*, p. 434, with debate *ante*, p. 426 ff.

four years. But the Assembly did not pass on this either.⁸⁶ It simply gathered all these problems up and transmitted them to the future:⁸⁷

The various proposals considered by the First Committee of the Assembly on this subject shall be sent to the committee to be constituted by the Council for studying amendments to the Covenant, which shall report on them to the next Assembly.

The committee thus contemplated met in April, June and September, 1921, and its deliberations⁸⁸ came before the First Committee of the Second Assembly. The First Committee's report is dated October 4, 1921,⁸⁹ and was acted on at the thirty-third plenary meeting the following day. The conclusions were adopted unanimously:⁹⁰

1. That the nonpermanent members of the Council should, in future, be elected according to a system of rotation for a fixed period, and that the Assembly should this year renew for the year 1922 the appointment of the present members.

2. That, in the absence of any decision with regard to the number of the nonpermanent members of the Council, it is inexpedient to lay down precise rulings, in consideration of the fact that, at the election held next year, account will be taken, both as regards the determination of the entire period of office for each member, and as regards the conditions of reëligibility, of the period already spent in office as the result of previous elections.

In the Third Assembly, China, on September 9, 1922, introduced a motion requesting the Committee on Amendments to the Covenant to draw up draft rules of procedure for the election of nonpermanent members.⁹¹ This and other angles of the problem were considered by the First Committee, which after an extensive debate adopted a report which was further debated at length in a plenary meeting on September 29. The result was the passage of two resolutions and the geographical recommendation.

Resolution I dealt with the rules of procedure for the election of the nonpermanent members of the Council. In 1923 a resolution was unanimously adopted by which "the Assembly resolves to insert in its rules of procedure between rules 22 and 23 a text giving effect to the 1922 resolution."⁹² These rules provided for secret ballot, voting on a list of state

⁸⁶ The two points last mentioned were under constant reference throughout the debate of the 19th plenary meeting, *ibid.*, p. 414 ff.

⁸⁷ The proposal was made as a compromise by Mr. Balfour, *rapporteur* of the committee, following a suggestion of the Czechoslovak and Chinese representatives, in order to secure progress toward a decision, *ibid.*, p. 433, vote at 435.

⁸⁸ The committee reports are in only one edition, published as A. 24 and 24(1), 1921. Art. 4 is discussed in A. 24, pp. 10-11.

⁸⁹ Records of the Second Assembly, Plenary Meetings, pp. 688 and 903.

⁹⁰ *Ibid.*, pp. 893-4.

⁹¹ Records of the Third Assembly, Plenary Meetings, pp. 103, 110.

⁹² *Ibid.*, p. 349; Records of the Fourth Assembly, Plenary Meetings, p. 115.

names, selection by an absolute majority, provision for second ballots and for resolving a tie.

- Resolution II was adopted pending the ratification by the states of the amendment to Art. 4 of the Covenant, and was repeated by the Fourth Assembly in 1923 with reference to the Fifth Assembly in 1924. The rules thus adopted read:²³

The nonpermanent Members of the Council are elected for a period of three years, commencing on the first day of January following the date of their election.

Retiring Members are not eligible for reelection until the expiration of a period of three years.

One-third of the nonpermanent part of the Council shall be renewed each year.

If one or two of the Members now on the Council are reelected, their mandates shall terminate at the end of the first year.

If more than two Members now on the Council are reelected, lots shall be drawn to determine which one or which two of them shall not retire until the end of the second year.

If necessary, lots will be drawn to determine the order of retirement as between newly elected Members, so as to bring up to two the number of Members retiring.

If, for any reason, a seat on the Council filled by any State should become vacant during the first period of three years, the State shall be considered as having retired, with the result that, if such vacancy occurs during the first year, lots shall only be drawn for one seat, and if the vacancy occurs during the second year, lots shall again only be drawn for one seat.

If such a vacancy occurs after the expiration of the first period of three years, the Assembly shall fill it at the session following its occurrence, but the Member so elected shall only complete the current mandate.

The Fifth Assembly did not consider these rules as recommended by its predecessor, perhaps due to the preoccupation of its First Committee in 1924 with the elaboration of the Protocol for Pacific Settlement of International Disputes. The rules, therefore, were acceptable to two Assemblies, which, however, in their actual election of nonpermanent members acted independently of them.

The rules were not mentioned in the Sixth Assembly; but, following the reelection of the nonpermanent members on that occasion, a recommendation was adopted to the following effect:²⁴

The Assembly,

Noting that the nonpermanent Members of the Council at present in office have been reelected for a year,

Considers the meaning of this reelection to be that it is subject to the nonpermanent part of the Council being renewed as from the election of 1926 by application of the principle of rotation.

²³ Records of the Third Assembly, Plenary Meetings, p. 349.

²⁴ Records of the Sixth Assembly, Plenary Meetings, p. 160.

The Committee on the Composition of the Council drafted in May, 1926, a scheme of regulations for nonpermanent elections for a term of three years, one-third to be elected annually, office to be taken on election. The number would be increased from six to nine, thus making the number superior to that of the permanent members. A nonpermanent member would not be reëligible for three years after expiration of a term, unless it were decided otherwise by a two-thirds majority. However, the Assembly could, by two-thirds majority, proceed to a new election of all nonpermanent members, determining the rules for that purpose. The draft is admirably adapted not to prejudge the Assembly's right to free decision under Art. 4. These rules "will permit the Assembly to take account in a more comprehensive and equitable measure, of the principle of geographical distribution of seats."

It can be seen from the record that the Council is constructed on certain principles which were consciously accepted by the makers of the Covenant, big and little, and which have been accepted since by all other states members of the League. The principles are:

1. Big states having interests wide enough to be regarded as general are permanent members.

2. Other states not having such wide interests are members of the Council by election of the whole membership of the League, serving in a sort of representative capacity on behalf of the group of states of "limited interests."

3. In every case, "any member of the League not represented on the Council shall be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that member of the League" (Art. 4, par. 5 of the Covenant).

4. The Council is, therefore, a body designed to render decisions in the presence of the interests involved, on a basis of representation calculated to insure a large degree of world responsibility.

5. Since the Council's jurisdiction is confined to the agreements states have entered into by acceptance of the Covenant, the objective tests of its structural representation are

- a. Ability to act as an executive body, and

- b. Normal inclusion in its membership of the interests concerned, permanently, temporarily or casually.

THE ELIGIBILITY OF BRITISH SUBJECTS AS JUDGES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

BY WALTER POLLAK

The object of the present article is to attempt an interpretation of paragraph two of Article 10 of the Statute of the Permanent Court of International Justice in order to discover, if possible, the position of the British Empire and of the British Dominions in regard to the election of judges of the Permanent Court.

Article 14 of the Covenant of the League of Nations provided that: "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. . . ." The Council was not slow to carry out this provision, and already at its meeting of the 13th of February, 1920, it took the first step towards the creation of a Permanent Court of International Justice by passing a resolution inviting certain distinguished jurists to form a committee to prepare plans for such a court and to report to the Council.¹ The Advisory Committee of Jurists met for the first time at The Hague on the 16th of June, 1920,² and within six weeks the committee succeeded in drawing up and unanimously adopting a draft scheme for the establishment of the Permanent Court of International Justice. The second paragraph of Article 10 of this draft scheme was as follows: "In the event of more than one candidate of the same nationality being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected."³

The draft scheme was transmitted to the Secretary General of the League, and was submitted to the Council on the 5th of August, 1920.⁴ On the 15th of November, 1920, the First Assembly of the League of Nations met at Geneva⁵ and immediately proceeded to appoint a committee⁶ to deal with the draft Statute of the Permanent Court of International Justice which the Council had referred to it.⁷ This committee, designated the Third Committee, met for the first time on the 17th of November, 1920. It had before it the draft scheme drawn up by the Advisory Committee of Jurists and also the Council's amendments thereto.⁸ As these amendments did not, however, concern the topic now under discussion, there is no need to refer to them here.

¹ League of Nations Official Journal, 1920, p. 37.

² *Ibid.*, p. 226.

³ League of Nations, Records of First Assembly, Meetings of the Committees, Vol. I, p. 413.

⁴ League of Nations Official Journal, 1920, p. 319.

⁵ League of Nations, Records of First Assembly, p. 24 (Plenary Meetings).

⁶ *Ibid.*, pp. 48, 52.

⁷ League of Nations Official Journal, November-December, 1920, p. 18.

⁸ Records of First Assembly, Meetings of the Committees, Vol. I, pp. 277, 278, 411, *et seq.*

The Third Committee appointed a subcommittee to investigate the problem in detail and to report to the committee.⁹ Of this subcommittee, Mr. Doherty, one of the Canadian delegates, was a member. The subcommittee made a thorough examination of the draft scheme, and having concluded its work, submitted to the committee a report containing the plan for the Permanent Court of International Justice as revised by the subcommittee.¹⁰

Article 10 of the draft scheme was discussed by the subcommittee on the 25th and 27th of November, 1920. The relevant minutes are as follows:¹¹

An amendment brought forward by the Canadian Delegation related to this article. It was as follows:

The second paragraph of this article to be amended to read as follows:
"In the event of more than one candidate nominated by a particular government being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected."¹²

Mr. Doherty (Canada) explained this amendment. He said that the expression "nationality," which was used in the formula adopted at The Hague, might give rise to the false interpretation that a Canadian could not sit in the Court at the same time as a judge of the United Kingdom. He pointed out that the result of the vote of the subcommittee on Article 5 entailed the substitution of the word "group" for "government" in the text of the amendment. The Dominions had been admitted into the League of Nations on a footing of perfect equality with the other members, and were therefore entitled to exactly the same rights in respect of the League as the latter. With the assent of Mr. Doherty, the Canadian amendment was drafted by M. Politis as follows:

Au cas où le double scrutin de l'Assemblée et du Conseil se porterait sur plus d'un ressortissant du même membre de la Société, le plus âgé est seul élu.

In the event of more than one national of the same member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

On the 27th of November, 1920,¹³ the Chairman put to the vote Mr. Doherty's amendment to Article 10, as worded by M. Politis. Mr. Doherty proposed to replace the amendment by an addition to the original text of Article 10, to run as follows: "the same nationality—that is to say, belonging to the same member of the League of Nations,—being elected."

⁹ *Ibid.*, p. 282.

¹⁰ *Ibid.*, pp. 296, 526, *et seq.*

¹¹ *Ibid.*, pp. 342, 590.

¹² Mr. Doherty had proposed an amendment to Article 4 providing that the judges were to be elected by the Assembly and Council from a list of persons nominated by the governments of members of the League of Nations.

¹³ Records of First Assembly, Meetings of the Committees, Vol. I, p. 344.

M. Fernandes (Brazil) thought that it would be safer not to go further than strictly necessary. Difficult points were involved; for instance, the question whether a judge from one of the British Dominions should give up his seat in the same cases as a judge from the United Kingdom. The amendment of Mr. Doherty, as worded by M. Politis, gave him full satisfaction.

The Chairman and M. Adatci (Japan) were of the same opinion.

M. Ricci Busatti (Italy) remarked that in the *procès-verbal* of the last meeting the word "ressortissant" in M. Politis' text was translated by the word "national."

On the proposal of Sir Cecil Hurst, the English wording was reserved.

The amendment was put to the vote and adopted with this reserve.

On the 8th of December, 1920, the report of the subcommittee was submitted to and discussed by the committee. This report consisted of the revised text of the Statute of the Permanent Court of International Justice, together with some explanations. The explanation accompanying Article 10 is worth noticing.

It was as follows: ¹⁴

Sur la proposition du délégué canadien la sous-commission a modifié le deuxième paragraphe de cet article pour exprimer qu'il est essentiel pour la juste application de cette disposition, non pas que les élus soient de la même nationalité, mais qu'ils soient les ressortissants du même membre de la Société des Nations.

On the proposal of the Canadian Delegate, the subcommittee has altered the second paragraph of this article to make it clear that it is essential for the proper application of this provision, not that the persons elected should be merely of the same nationality, but that they should be subjects of the same member of the League of Nations.

The committee adopted Article 10 without amendment,¹⁵ and a few days later the Statute was adopted by the Assembly ¹⁶ without any further amendment to Article 10. It now only remained for the various governments to sign and ratify the protocol accepting the Statute of the Permanent Court of International Justice. This was soon done, among others by the British Empire, Australia, Canada, India, New Zealand and South Africa,¹⁷ and the Permanent Court of International Justice was established.

Having thus set forth the history of paragraph two of Article 10 of the Statute of the Permanent Court of International Justice, our next task is to consider the laws of the various component parts of the British Empire that deal with the question of nationality.

¹⁴ *Ibid.*, p. 528.

¹⁵ *Ibid.*, p. 304.

¹⁶ Records of First Assembly, p. 497 (Plenary Meetings).

¹⁷ League of Nations Official Journal, 1921, Vol. 2, p. 809.

The British Nationality and Status of Aliens Acts, 1914 to 1922,¹⁸ give us a definition of a natural-born British subject in the following terms:

1 The following persons shall be deemed to be natural-born British subjects, namely:

- (a) Any person born within His Majesty's dominions and allegiance, and
- (b) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfils any of the following conditions, that is to say, if either
 - (i) his father was born within His Majesty's allegiance; or
 - (ii) his father was a person to whom a certificate of naturalization had been granted: or
 - (iii) his father had become a British subject by reason of any annexation of territory: or
 - (iv) his father was at the time of that person's birth in the service of the Crown: or
 - (v) his birth was registered at a British Consulate within one year or in special circumstances with the consent of the Secretary of State, two years after its occurrence, or, in the case of a person born on or after the first day of January, 1915, who would have been a British subject if born before that date, within twelve months after the first day of August, 1922, and
- (c) Any person born on board a British ship whether in foreign territorial waters or not:

Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects.

Provided also that any person whose British nationality is conditional upon registration at a British consulate shall cease to be a British subject unless within one year after he attains the age of 21, or within such extended period as may be authorized in special cases by regulations made under this Act—

- (i) he asserts his British nationality by a declaration of retention of British nationality, registered in such manner as may be prescribed by regulations made under this Act; and
 - (ii) if he is a subject or citizen of a foreign country under the law of which he can, at the time of asserting his British nationality, divest himself of the nationality of that foreign country by making a declaration of alienage or otherwise, he divests himself of such nationality accordingly.
- (2) A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.

The above definition of a natural-born British subject has been adopted *in extenso* in Canada by the Naturalization Acts, 1914, 1920 and 1923.¹⁹

¹⁸ 4 and 5 Geo. V, c. 17; 8 and 9 Geo. V, c. 38; 12 and 13 Geo. V, c. 44.

¹⁹ 4-5 Geo. V, c. 44; 10-11 Geo. V, c. 59; 13-14 Geo. V, c. 60.

Neither in South Africa nor in India is there any statutory definition of a natural-born British subject. In Australia the definition of a natural born British subject as contained in the British Nationality and Status of Aliens Acts, 1914-1918, has been incorporated into the Nationality Act, 1920,²⁰ but the amendment of the definition of a natural-born British subject which was effected by the British Nationality and Status of Aliens Act of 1922 has not been adopted in Australia.²¹ It may happen accordingly that a person comes within the definition of a natural-born British subject as contained in the Imperial Acts, but does not come within the definition contained in the Australian Act. Would such a person be deemed a natural-born British subject in Australia? It is submitted that he would, because the Imperial Acts were meant to apply to the whole of the British Empire and to supply a uniform definition of a natural-born British subject applicable throughout the British Empire. If this reading of the Imperial Acts is correct, it follows that every person who falls within the definition of a natural-born British subject as contained in the British Nationality and Status of Aliens Acts, 1914 to 1922, is to be deemed a natural-born British subject in every part of the British Empire.

If we turn from the question of natural-born British subjects to that of naturalized British subjects, we shall find that their position in regard to the various parts of the British Empire is considerably different from that of natural-born British subjects.

Section 3 of Part II of the British Nationality and Status of Aliens Act, 1914, provides that: "A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this Act, . . . and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject."

Section 8, subsection (1), provides that "The Government of any British Possession shall have the same power to grant a certificate of naturalization as the Secretary of State has under this Act;" and subsection (2) provides that "Any certificate of naturalization granted under this section shall have the same effect as a certificate of naturalization granted by the Secretary of State under this Act."

But one must note carefully that ²² "This Part of this Act ²³ shall not, nor shall any certificate of naturalization granted thereunder, have effect within any of the Dominions specified in the First Schedule to this Act,²⁴ unless the Legislature of that Dominion adopts this Part of this Act." Canada, Australia, and Newfoundland have adopted it; South Africa has not.²⁵ It is to

²⁰ Act No. 48 of 1920.

²¹ It may, however, have been adopted since the 1924 Statutes which are the latest to which the writer had access.

²² Section 9, subsection (1).

²³ *I.e.*, Part II.

²⁴ *I.e.*, The Dominion of Canada, The Commonwealth of Australia, The Dominion of New Zealand, The Union of South Africa, Newfoundland.

²⁵ Of New Zealand the writer has no record.

be noted, however, that a certificate of naturalization granted in the United Kingdom is recognized in South Africa. The Naturalization of Aliens Act, 1910,²⁶ provides that ²⁷

Any person to whom has been granted a certificate of naturalization in the United Kingdom under . . . any law for the time being in force in the United Kingdom relating to the naturalization of aliens . . . and who has not subsequently divested himself of his status as a British subject, shall be entitled in the Union to all the rights, powers, and privileges, and be subject to all the obligations to which he would be entitled and subject if he had been granted a certificate of naturalization under this Act.

Section 8 defines the effect of a certificate of naturalization as follows:

Every person to whom a certificate of naturalization is granted under this Act shall, except as is otherwise provided by law, be entitled to all the rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the Union.

It is important to notice the proviso "in the Union." A person who becomes naturalized in one of the Dominions that has not adopted Part II of the Imperial Act does not obtain the status of a British subject in any other part of the British Empire. Section 16 of The Naturalization Act, 1870,²⁸ provided that

All laws . . . which may be duly made by the legislature of any British possession for imparting to any person the privileges . . . of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law . . .

The British Nationality and Status of Aliens Act, 1914, reënacts this provision in almost identical terms.²⁹

The question of whether a person to whom a certificate of naturalization had been granted in Australia, prior to the British Nationality and Status of Aliens Act and its adoption by the Australian Legislature, was or was not an alien in the United Kingdom, was considered and answered in the case of *The King v. Francis, ex parte Markwald* [1918] 1 K. B. 617. Markwald was born in Germany. He left Germany and went to Australia where a certificate of naturalization was granted to him in 1908. Section 8 of the Naturalization Act, 1903,³⁰ provided that: "A person to whom a certificate of naturalization is granted shall in the Commonwealth be entitled to all . . . rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth. . . ." The certificate embodied the provisions of this section. Before the certificate was issued to Markwald, he was required to take and did take the

²⁶ Act No. 4 of 1910 (South Africa).

²⁸ 33 Vict. c. 14.

³⁰ Act No. 11 of 1903 (Australia).

²⁷ Section 9.

²⁹ Section 26, subsection (2).

oath of allegiance to His Majesty. Later Markwald went to England and was charged and convicted by a police magistrate because he, being an alien, had failed to register as an alien as required by law. When the matter came up to the King's Bench it was held by all three judges that the magistrate was right. Darling, J., said that "a man by virtue of such a certificate of naturalization as was granted here and of the oath of allegiance may become the liege subject of the King in some part of his dominions yet not in all; and wherever he is not a subject he is an alien." A. T. Lawrence, J., said that

Nothing but naturalization under powers conferred by Act of Parliament of the United Kingdom can make him other than an alien in the United Kingdom. If this certificate of naturalization had purported to confer upon him the rights of a British subject within the United Kingdom it would have been *ultra vires*. It does not, of course, purport to do anything of the sort. It is limited in its application to rights and duties within the Commonwealth. And the oath of allegiance . . . does not appear to me to extend the limits of [Markwald's] naturalization.

Having failed to upset his conviction, Markwald thereupon brought an action against the Attorney-General for a declaration "that he is no alien in England, but a liege subject to His Majesty the King, and entitled to the protection of His Majesty the King in all parts of His Majesty's Kingdom and Dominions." The action was dismissed, first by Astbury, J., and then by the Court of Appeal, *The King v. Francis, ex parte Markwald* being approved.³¹

We may say then that a certificate of naturalization granted by a Dominion that has not adopted Part II of the British Nationality and Status of Aliens Act, 1914, or any certificate granted by a Dominion prior to its adoption of Part II of the Imperial Act, gives the grantee the status of a British subject only within the limits of that Dominion and not elsewhere in the British Empire. Similarly, a certificate of naturalization granted in the United Kingdom does not confer on the grantee the status of a British subject in a Dominion which has not adopted Part II of the Imperial Act, unless such a Dominion has provided by statute for the recognition of a certificate of naturalization granted in the United Kingdom, as is the case, as we have seen, in South Africa.

Having now dealt with the question of natural-born British subjects and with that of naturalized British subjects and their position in the various parts of the British Empire, it remains to consider the question of Dominion nationality.

Let us first turn our attention to Canada. In the Immigration Act of 1910,³² the following provisions occur:

- (d) "Domicile" means the place in which a person has his present home, or in which he resides, or to which he returns as his place of present abode, and not for a mere special or temporary purpose.

³¹ [1920] 1 Ch. 348.

³² 9-10 Edw. VII, c. 27, section 2 (Canada).

Canadian domicile is acquired for the purposes of this Act by a person having his domicile for at least three years in Canada after having landed therein . . . Canadian domicile is lost, for the purposes of this Act, by a person voluntarily residing out of Canada, not for a mere special or temporary purpose, but with the present intention of making his permanent home out of Canada unless and until something which is unexpected, or the happening of which is uncertain, shall occur to induce him to return to Canada;

- (e) "Alien" means a person who is not a British subject;
- (f) "Canadian citizen" means—
 - (i) A person born in Canada who has not become an alien;
 - (ii) A British subject who has Canadian domicile; or;
 - (iii) A person naturalized under the laws of Canada who has not subsequently become an alien or lost Canadian domicile:

In 1921 an Act to define Canadian nationals and to provide for the renunciation of Canadian nationality ²³ was passed. Section one is as follows:

The following persons are Canadian nationals, viz:

- (a) Any British subject who is a Canadian citizen within the meaning of the Immigration Act . . . ;
- (b) The wife of any such citizen;
- (c) Any person born out of Canada, whose father was a Canadian national at the time of that person's birth . . . ;

Section 2 is in these terms:

- (a) Any person who by reason of his having been born in Canada is a Canadian national, but who at his birth or during his minority became under the law of the United Kingdom or of any self-governing Dominion of the British Empire, a national also of that Kingdom or Dominion, and is still such a national, and
- (b) Any person who though born out of Canada is a Canadian national: may, if of full age and not under disability, make a declaration, renouncing his Canadian nationality . . . whereupon the declarant shall cease to be a Canadian national . . .

There are no statutes creating or defining Australian or South African or Indian nationality or citizenship. The case of the Irish Free State presents some difficulty. The Constitution of the Irish Free State ²⁴ contains the following provisions:

1. The Irish Free State . . . is a co-equal member of the Community of Nations forming the British Commonwealth of Nations.

3. Every person . . . domiciled in the area of the jurisdiction of the Irish Free State . . . at the time of the coming into operation of this Constitution who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State . . . for no less than seven years, is a citizen of the Irish Free State . . . and shall within the limits of the

²³ 11-12 Geo. V, c. 4. (Canada).

²⁴ 13 Geo. V, c. 1.

jurisdiction of the Irish Free State . . . enjoy the privileges and be subject to the obligations of such citizenship: Provided that any such person being a citizen of another state may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State . . . shall be determined by law.³⁵

Having thus set forth the laws dealing with the position of natural-born British subjects and those concerning naturalized British subjects, and also the laws creating Canadian nationality and citizenship of the Irish Free State, and having examined the history of the second paragraph of Article 10 of the Statute of the Permanent Court of International Justice, we are, therefore, now in a position to attempt an interpretation of that paragraph in the light of these various laws.

"Whether a person is a national of a country must be determined by the municipal law of that country," said Russell, J., in *Stoeck v. The Public Trustee*,³⁶ and it is submitted that this statement is correct. Whether a person is or is not a national of a member of the League must, therefore, be determined by the municipal law of that member, and for this reason it was necessary to set forth the various laws of the various parts of the British Empire.

The question which we must now attempt to answer is whether, under the provisions of paragraph two of Article 10 of the Statute of the Permanent Court of International Justice, a Canadian national or a citizen of the Irish Free State, and a British subject who is not a Canadian national or a citizen of the Irish Free State, as the case may be, can both be elected at the same time as judges of the Permanent Court. The British Empire, Canada, the Irish Free State, Australia, South Africa, New Zealand, and India are members of the League.

Now what does the term British Empire mean? Does it include all the territory subject to His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, or only so much of it as is left after the subtraction of the self-governing Dominions and India, who are members of the League? In other words, are the "British Empire" and "The British Commonwealth of Nations," mentioned in the Irish Free State Constitution, one and the same thing, or is the former only a part of the latter? If so, one may say that while the British Empire, Canada, the Irish Free State, Australia, South Africa, New Zealand, and India are members of the League, the British Commonwealth of Nations as a whole is not a member.

If this latter point of view is correct, one may put the question of nationality in this way. A person born in Canada is a national of Canada and also a British subject, i.e., a national of the British Commonwealth of Nations,

³⁵ The writer has not been able to find any such law in the materials at his disposal.

³⁶ [1921] 2 Ch. 67, 82.

though not a national of the British Empire. A person born in England is a national of the British Commonwealth of Nations and also of the British Empire, but not a national of Canada. Therefore, these two persons are both nationals of the British Commonwealth of Nations, which, however, is not a member of the League, and consequently they do not fall within the provisions of the second paragraph of Article 10. Similarly one may say that a person born in the Irish Free State and a person born in England, though both nationals of the British Commonwealth of Nations, are not both nationals either of the British Empire or of the Irish Free State, and therefore are not within the scope of paragraph two of Article 10.

But even assuming that the British Empire and the British Commonwealth of Nations are not one and the same thing, there are many cases in which a Canadian national or a citizen of the Irish Free State may be a national of the British Empire as well as of the British Commonwealth of Nations. Thus a person born in England who emigrates to and becomes domiciled in Canada becomes thereby a Canadian national, yet he has not ceased to be a national both of the British Empire and of the British Commonwealth of Nations. If, therefore, he were elected a judge of the Permanent Court of International Justice at the same time as another person born in England who had remained in England, the second paragraph of Article 10 would be applicable. Another possibility is that a person may be born in England of a father who is a Canadian national. In this case, too, he would be both a Canadian national and a national of the British Empire, as well as a national of the British Commonwealth of Nations.

There are many other possibilities in regard to Canadian nationality, but we need not go into them, and we pass now to citizenship of the Irish Free State. Here again, if a person is born in England and then emigrates to Ireland and is domiciled in the Irish Free State at the time of the coming into force of the Irish Free State Constitution, he becomes a national of the Irish Free State, and yet he has not ceased to be a national of the British Empire as well as a national of the British Commonwealth of Nations. Accordingly, if such a person were elected a judge of the Permanent Court of International Justice at the same time as a person born and domiciled in England, the elder only would be regarded as elected. Another possibility is as follows: A is born in Canada and then emigrates to Ireland and is domiciled in the Irish Free State at the coming into force of the Constitution. Here A is a Canadian national and also a citizen of the Irish Free State, in addition to being a national of the British Commonwealth of Nations, though he is not a national of the British Empire. If A were elected a judge of the Permanent Court at the same time as B, born in Australia of a father who is a Canadian national, the elder only would be regarded as elected, since A and B are both nationals of the same member of the League, *viz.*, Canada.

The above are but a very few of the numerous possibilities that exist in regard to nationals of various parts of the British Commonwealth of Nations.

We may conclude, therefore, that, even assuming the British Commonwealth of Nations to be something different from the British Empire and to include the latter as merely one of its constituent parts, the cases are far from few in which various nationals of the British Commonwealth of Nations will also be nationals of the same member of the League, whether that member be the British Empire, Canada, the Irish Free State, or some other Dominion. On the other hand, there will be numberless cases in which various nationals of the British Commonwealth of Nations will not be nationals of the same member of the League, and therefore will not fall within the scope of paragraph two of Article 10 of the Statute of the Permanent Court of International Justice.

We must now consider whether the distinction drawn above between the British Empire and the British Commonwealth of Nations is a valid one. This is one of the battle grounds of British constitutional law, but it would seem that in a legal, as distinguished from a political sense, the "British Empire" and the "British Commonwealth of Nations" are merely synonyms for one and the same thing. The term "British Commonwealth of Nations" was, it would appear, unknown in law prior to the Irish Free State Constitution Act, though it had, of course, gained currency in politics somewhat earlier. It is submitted that in spite of the reference in this Act to "the Community of Nations forming the British Commonwealth of Nations," in law there is but one entity, *viz.*, the British Empire. Every person born in any part of that empire is a British subject, *i.e.*, a national of the British Empire. A, born in Canada, is a Canadian national, but he is also a national of the British Empire. B, born in England, is a national of the British Empire. Consequently A and B are both nationals of the same member of the League, *viz.*, the British Empire, and, therefore, come within the scope of the second paragraph of Article 10 of the Statute of the Permanent Court. It will be remembered that in the explanation accompanying Article 10 in the report of the subcommittee it was said that "it is essential for the proper application of this provision, not that the persons elected should be merely of the same nationality, but that they should be subjects of the same member of the League of Nations." Now A and B are clearly of the same nationality, and they are both also, it is submitted, subjects of the same member of the League of Nations, *viz.*, the British Empire. Consequently, only the elder of the two could take his seat on the bench of the Permanent Court. It is submitted that one may lay down as a general rule that there can be only one natural-born British subject on the bench of the Permanent Court of International Justice at any given time.

With regard to naturalized British subjects, the position is more difficult. Thus A, who is naturalized in South Africa, is a British subject in South Africa, but not elsewhere in the British Empire.²⁷ Can we say that A is a national of the British Empire? It is submitted that we cannot. It follows,

²⁷ Cf. Markwald's Case, *supra*.

therefore, that A and B (who is born in England) are not both nationals of the same member of the League, *viz.*, the British Empire, and that if both A and B were elected as judges of the Permanent Court they would not come within the provisions of the second paragraph of Article 10. The same result would be reached if A had become naturalized in Australia prior to Australia's adoption of the British Nationality and Status of Aliens Act in 1920, or in Canada prior to 1914, the year in which Canada adopted the Imperial Act. But if, on the other hand, A had become naturalized in Australia after 1920, or in Canada after 1914, he would have become a national of the British Empire. Hence, if both A and B (who is born in England) were elected as judges of the Permanent Court, the elder only would take his seat.

We may then lay down as a general rule that naturalized British subjects are in exactly the same position with reference to paragraph two of Article 10 as natural-born British subjects, except that if their certificate of naturalization was issued in a Dominion prior to its adoption of the British Nationality and Status of Aliens Act they will not be nationals of the British Empire (though they may be, as in Canada, nationals of the Dominion in which they were naturalized), and, therefore, may be elected as judges of the Permanent Court of International Justice at the same time as nationals of the British Empire (who are not also nationals of the Dominion in question).

In regard to citizenship of the Irish Free State, it would appear that a person born in a foreign country and not a British subject might nevertheless be a citizen of the Irish Free State, if he was domiciled in the Irish Free State at the time of the coming into force of the Constitution and had been resident there for seven years. Hence A, who is a citizen of the Irish Free State, but who is not a British subject, *i.e.*, not a national of the British Empire, and B (who is born in England) are not both nationals of the same member of the League and, therefore, are outside of the scope of paragraph two of Article 10 of the Statute of the Permanent Court of International Justice.

In conclusion, one must note that the Statute of the Permanent Court of International Justice does not contain any provision for an authoritative interpretation of paragraph two of Article 10. If, for example, a Canadian national and a British subject born in England were both to be elected by the Assembly and the Council, there is, under the Statute, no body that could give an authoritative opinion as to whether they could both take their seats. It is suggested that should this or a similar situation arise, it be left to the remaining judges of the Court to answer the question, and that they should not altogether leave out of consideration, in formulating their reply, such points as this study has attempted to put forward.³⁸

³⁸ Since this article was written the British Nationality in the Union and Naturalization and Status of Aliens Act 1926 (Act No. 18 of 1926, South Africa) has been passed. This Act adopts the definition of a natural-born British subject contained in the Imperial Acts. It also adopts Part 2 of the Imperial Act of 1914. Hence a certificate of naturalization granted in South Africa after July 1, 1926, has now the same effect as a certificate of naturalization granted in the United Kingdom.

EDITORIAL COMMENT

THE NATIONALITY CONVENTION ADOPTED BY THE LEAGUE OF NATIONS COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

Declared Mr. Hughes, in the course of a presidential address on the development of international law delivered before the American Society of International Law on April 23, 1925: "One thing stands out clearly—that we should have a friendly hospitality for every suggestion intended to be helpful." Such an intention must be imputed to Messrs. Rundstein, Schücking, and de Magalhaes, the experts who have submitted the fruits of their careful labors, embracing a preliminary draft of a convention on nationality, to the Committee of Experts of the League of Nations for the Progressive Codification of International Law, and which have, during the present year, been submitted to the Council and Members of the League and to other governments including that of the United States.¹ The Committee of Experts, through its distinguished chairman, Dr. Hammarskjöld, has sought the replies of interested governments. A concrete proposal is thus submitted for discussion by those most deeply interested in the problem.

The authors of the convention would doubtless be the last to claim the achievement of a great work. Their modesty, their conservatism, their full appreciation of national prejudices, their zeal to point out what they believe to offer feasible bases of general agreement, and their obvious desire to promote international justice, must inspire respect in every quarter. They have sought to find a safe path through a field of sloughs and pitfalls. Their distinctive service consists in arousing governments to consider what can be or ought to be the solution of common difficulties. Congratulations are, therefore, due them, despite the issue to be taken with some of their conclusions, for their labor is bearing the best fruit of scientific endeavor.

It may not be deemed unreasonable to examine the convention as a proposal addressed to the United States, and to consider the several provisions in the light of American theories and commitments and constitutional pronouncements.

The one overshadowing problem with respect to nationality which today vexes and baffles governments such as our own arises from the fact that in a variety of situations more than one state regards as its own national the same

¹"The report comprises a statement presented by M. Rundstein and approved by M. de Magalhaes (including a preliminary draft of a convention), a supplementary note by M. Rundstein, observations by M. Schücking and a reply by M. Rundstein, and, finally, the text of the preliminary draft of a convention as amended by M. Rundstein in consequence of the discussions which took place in the Committee of Experts." All printed in Special Supplement to this JOURNAL for July, 1926, pp. 21-61.

individual at the same time. This dual claim finds its origin in conflicting assertions as to nationality by right of birth, one state relying upon the fact of birth within its territory under the *jus soli*, and another relying upon the fact of the father's nationality, invoking the *jus sanguinis*. What prolongs and aggravates the controversy is the reluctance of some states to heed the fact that when a child has attained his majority the opposing claims are not of equal merit, or to accept the principle that the superior of these should thereafter be recognized as the basis of a single, unopposed nationality. The controversy is also accentuated by the unwillingness of certain states to acknowledge that it lies within the power of the adult national, even though permanently residing abroad, to divest himself of the nationality of his sovereign without its consent and simultaneously to assume the single nationality of another state in which he resides. Thus, in practice, it is the tenacity with which states seek to retain the connection of nationality as between themselves and adult persons in the face of superior equities in favor of opposing states, which is accountable for the existing confusion. By reason of the lack of any general endeavor to agree to terminate claims which, however sound in origin, have become inequitable when applied to the individual who has attained his majority, controversies continue to fester and justice remains perverted. Yet upon such an endeavor would seem to depend the solution of the problem.²

Other devices offer less hope of practical achievement. It is not to be anticipated, for example, that states will generally agree, at least in the near future, to limit the basis of claims by right of birth, as by abandoning reliance upon either the *jus sanguinis* or the *jus soli*, and to confine such claims to those founded upon one theory rather than the other. Both the habits of states reflected in constitutional and legislative pronouncements, and the absence of numerous and serious difficulties in the handling of actual cases, justify the opinion that the attempt to restrict states in claiming persons as their nationals by right of birth, at least during the period of minority, is neither wise nor feasible.³

²"For the present, it is believed that the most feasible measure will be the adoption of a multilateral convention providing for the termination of the status of dual nationality at the time when the persons concerned attain the age of majority, or, perhaps, one year thereafter." R. W. Flournoy, Jr., Proceedings, American Society of International Law, Nineteenth Annual Meeting, 1925, p. 77.

³In view of the provisions of the Fourteenth Amendment to the Constitution of the United States that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and in view also of the assertions made by the Act of Congress of February 2, 1855, with respect to children born outside of the United States whose fathers were at the time of their birth citizens thereof, our own country is hardly in a position to impute arbitrariness to states which invoke either or both theories, or to advocate the adoption of a plan which deprives a state of the right to do so.

Diplomatic controversies arising from conflicting claims respecting the nationality of a child during his minority are relatively infrequent. In such cases the United States respects

When a child attains its majority, the claims with respect to his nationality asserted by opposing states can rarely, in American opinion, possess equal merit. It is highly desirable that thereafter he be deemed to possess a single nationality, entitled to general respect, and that it be acknowledged that the doctrine of dual nationality has ceased to be applicable to him. A common sense of that desirability is bound ultimately to influence the trend of the development of the law. States may even find it possible to register their appreciation of it through appropriate agreements. If, however, they are unable at the moment to find an acceptable formula, it is unlikely that they will proceed in the opposite direction and give general approval to the theory that the doctrine of dual nationality is fairly applicable to adult persons. It is highly improbable that the United States would accept any arrangement which purported to do so.

The draft convention from the League Committee of Experts declares in Article I

The high contracting parties undertake not to afford diplomatic protection to and not to intervene on behalf of their nationals if the latter are simultaneously considered as its nationals from the moment of their birth by the law of the state on which the claim would be made.

No distinction is here made between adult and minor persons who invoke the interposition of their governments. Moreover, the obligation seems to be imposed upon a prospective claimant state to respect, as a deterrent of its own interposition, the assertion by another state that the individual concerned is its national, even though he was born within the territory of the former state and there continued to reside after attaining his majority and up to the very time when he invoked its aid. As it stands, the article gives sinister heed to the doctrine of dual nationality. It opposes a barrier against interposition which leaves no room for the ascertaining and termination of the least equitable of the conflicting claims to the nationality of the individual concerned.

Again, Article V declares that

A person possessing two nationalities may be regarded as its national by each of the states whose nationality he has. In relation to third states, his nationality is to be determined by the law in force at his place of domicile if he is domiciled in one of his two countries.

If he is not domiciled in either of his two countries, his nationality is determined in accordance with the law in force in that one of these two states in which he was last domiciled.

the equities of the state claiming the child as its own by right of birth under the *jus sanguinis* or the *jus soli* so long as he continues to reside within its territory. Moreover, it is inclined to the opinion that during the period of minority changes of residence or domicile effected by the parents should not serve to deprive the child of the inchoate right to take appropriate steps, upon attaining his majority, to clothe himself with the single nationality of his choice.

In the first paragraph respect is again bred for the continued application of the doctrine of dual nationality to adult persons, and is thus in sharp conflict with the theory which it is believed that the United States and other states should uphold. The second sentence of the same paragraph is designed to cover a situation which is not often productive of diplomatic controversy. It may be doubted whether conventional arrangement to provide for it is necessary or desirable. The second paragraph (as well as the sentence next preceding it) is unfortunate in failing to provide that the domicile in the third state should be that possessed by the individual at the time of his attaining his majority or shortly thereafter.

Article IV of the draft convention declares that

A child born outside the state of which its parents are nationals has the nationality of the state where it was born if the state of origin does not give the parent's nationality to such child.

This article would serve to deprive a state of the right, under certain conditions, to invoke the *jus soli* as a legitimate basis of a claim to an individual as a national by right of birth. Apart from constitutional difficulties which would preclude a country such as the United States from accepting such an arrangement, the article would not, for reasons given above, seem to embody a proposal calculated to win general approval.⁴ The effort is likely to be futile which essays to bind states generally to give up claims to children by right of birth based on either the *jus soli* or the *jus sanguinis*.

The distinguished authors of the convention would not assert that the articles quoted reflect an attempt to go to the root of the difficulties inherent in the main problem noted above, or that they point to a feasible mode of removing them.⁵ An expert of the Department of State has, however, sought to do that very thing. His conclusions deserve attention. Mr. Richard W. Flournoy, Jr., proposes that the dual claim to the nationality of an individual be terminated when he becomes an adult, by according him the single nationality of the state within whose territory he is then domiciled.⁶ As a rule for inclusion in a model statute or an international convention he suggests the following:

‘An objection of the same general character, although of a possibly less practical significance, might be raised with respect to Article III, which provides that “A child of parents who are unknown or whose nationality cannot be ascertained acquires the nationality of the state in which it was born or found when it cannot claim another nationality in right of birth, proof of such other nationality being admissible under the law in force at the place where it was found or born.” These provisions appear to limit the free application of the *jus soli*.

‘M. Rundstein’s report manifests a frank disclaimer of such a design.

‘See “Suggestions concerning an International Code on the Law of Nationality,” Yale Law Journal, June, 1926, Vol. XXXV, 939; also address by the same writer before the American Society of International Law, April, 1925, Proceedings, Nineteenth Annual Meeting, 69. The writer acknowledges his indebtedness to Mr. Flournoy for numerous valuable suggestions set forth in these papers, of which free use is here made.

A person who is born a national of one country under *jus soli* and a national of another country under *jus sanguinis*, if he is domiciled in either of the two countries when he reaches the age of 22 years shall thereafter be regarded as having lost the nationality of the other. If, at the time when he reaches the age of 22 years, he is domiciled in a third country, he shall thereafter be regarded as having the nationality of that one of the two countries claiming his nationality in which he was last domiciled.

Here is revealed what is or should be made the decisive factor in establishing the superior equity of a state deriving its rights from the *jus soli* or the *jus sanguinis*, namely the possession and retention by the individual concerned of an actual and permanent residence within its territory when or shortly after he has become an adult. The form of the proposal may be fairly open to discussion or criticism. It is worth considering whether actual and continued residence within the territory of a claimant state is preferable to domicile therein as a test of the equities of such a state.⁷ A formula is doubtless to be found which will give adequate expression to the principle which underlies Mr. Flournoy's proposal. That proposal is believed to be so responsive to the common need of states, and so applicable to conditions of daily recurrence, that a government such as our own might well consider the submission of it at the appropriate time as the basis of a counter-proposal to certain of the articles above quoted.

Article VI of the League Convention is as follows:

Naturalization may not be conferred upon a foreigner without his having shown the will to be naturalized or at least without his being allowed to refuse naturalization.

Naturalization acquired without the applicant being released from his allegiance by the state of origin does not give to the state according such naturalization the right to give diplomatic protection to, and to intervene on behalf of, the person naturalized as against the state whose subject he originally was.

It should be noted that the Committee of Experts declares that it does not feel that the question raised in Article VI is among those which can be regarded as at present capable of being treated by way of international regulation, and appears to exclude the article from the convention in which it is embraced. Such exclusion is doubtless wise.

The second paragraph is sharply at variance with principles to which the United States appears to be committed with respect to naturalization and to the propriety of interposition on behalf of naturalized citizens.⁸ As is

⁷ In Anglo-American jurisprudence that term has reference to a conclusion of law derived from certain facts, of which an important one is the state of mind of the individual concerned. It might well be urged that the fact of actual residence should, regardless of the design of that individual, suffice to produce the termination of an adverse claim.

⁸ See Act of July 27, 1868, 15 Stat. 223, as embodied in Rev. Stats. Sections 1999, 2000, 2001. See in this connection, "Naturalization and Loss of Nationality," by Green H.

now well understood, the United States denies the duality of the nationality of the individual who in pursuance of its laws has acquired and retained American citizenship.⁹ It is unnecessary to comment on the provisions of Article VII, which concern the legal effect of a "release from allegiance" (permit of expatriation) referred to in Article VI.¹⁰

Might not, however, renewed consideration and discussion of some aspects of the problem of expatriation and naturalization still be desirable in the course of an effort to produce a fitting convention on nationality? Possibly a fresh statement respecting what the United States is or might be prepared to accept as the limits of the right of expatriation would prove to be a gesture distinctly encouraging to some foreign offices, which may take it for granted that, for example, the United States denies the right of a foreign state to prevent in times of peace the emigration of its own nationals from its own territory, or that it contends that an individual possesses the right to leave the territory of the state of which he is a national against its will, as well as after having left it to divest himself, under certain conditions, of the nationality with which he was clothed.¹¹ A state possesses the right to restrict the emigration of its own nationals. It is not believed that the United States can well deny the existence of that right, or that it is in fact disposed to do so.¹² It is concerned rather with the legal effect of the conduct of an individual who, after he has entered and continued to reside within American territory, seeks to be clothed with, and is in fact granted, American

Hackworth, *Proceedings, American Society of International Law, Nineteenth Annual Meeting, 1925*, p. 59.

⁹"The doctrine embodied in the Act of 1868 is that naturalization invests the individual with a new and single allegiance, and by consequence absolves him from the obligations of the old. The position of governments and of publicists who deny the American contention is that naturalization merely adds a new allegiance to the old, so that the individual becomes subject to a dual allegiance, and may be held to all the obligations of his original citizenship if he returns to his native country. The doctrine of dual allegiance is, in a word, the precise test, the acceptance of which distinguishes those who reject the doctrine of voluntary expatriation from those who support it." (John Bassett Moore, *Principles of American Diplomacy*, 1918, p. 294.)

¹⁰The article is as follows: "A release from allegiance (permit of expatriation) shall produce loss of the original nationality only at the moment when naturalization is actually obtained in one of the contracting states. Such release shall become null and void if the naturalization is not actually granted within a period to be determined."

¹¹See the views of Attorney General Black, concerning the case of Christian Ernst, 9 *Opinions Attys. Gen.*, 356, Moore, *Digest*, III, 573.

¹²Declared Secretary Bayard in the course of a communication to Mr. Lothrop, Minister to Russia, Feb. 18, 1887: "The Department is far from questioning the right of His Imperial Majesty to refuse to permit his subjects to emigrate. This is an incident of territorial sovereignty recognized by the law of nations, but can only be exercised within the territory of Russia. . . . His Imperial Majesty may 'prevent' Russians from coming to the United States, but when they have come, and have acquired American citizenship they are entitled to the privileges conferred by the article (10 of the treaty of commerce of Dec. 18, 1832)." (For. Rel. 1887, 948, Moore, *Digest*, III, 633.)

naturalization. In the judgment of the writer, the United States should no longer deem it desirable to incorporate in treaties of naturalization provisions designed to restrict a contracting state from punishing its nationals for emigrating in disobedience to its commands. After long and harrowing experiences with naturalized American citizens who return to reside within the territories of their respective countries of origin, and after having witnessed the insufficiency of its own legislation relating to the expatriation of them, the United States may be ready to enter into a general arrangement making appropriate provision for the termination of the nationality acquired by the naturalization of persons who resume permanent residence within the territories of states of origin.

With Article VI of the proposed convention excluded from consideration, it is believed that the United States might well consider the wisdom of making known at the appropriate time some constructive proposal which it might deem appropriate for general acceptance.¹³

Certain other articles of the convention deserve attention. Article II provides that

The children of persons who enjoy diplomatic privileges and immunities, of consuls who are members of the regular consular service, and, in general, of all persons who exercise official duties in relation to a foreign government shall be considered to have been born in the country of which their father is a national. Nevertheless, they shall have the option of claiming the benefit of the law of the country in which they were born, subject to the conditions laid down by the law of the country of origin.

It may be greatly doubted whether the United States would deem it desirable to agree that children born within its territory and within the broad limits established by this article, other than children of diplomatic officers accredited to itself, should not be claimed as its nationals under the *jus soli*. Whether it could constitutionally so agree, and by treaty cause such children born within the continental United States to be deemed not to have been born "within the jurisdiction thereof" within the meaning of the Fourteenth Amendment, when no rule or principle of international law forbade or denied that jurisdiction, raises a question on which no opinion is expressed. Attention is merely called to the problem.¹⁴

¹³ Lack of space forbids the discussion of the form which it is believed such a proposal might well assume. Mr. R. W. Flournoy, Jr., has made interesting suggestions in his paper in the Yale Law Journal for June, 1926, Vol. XXXV, 939, 943-946.

¹⁴ It may be observed in this connection that the withholding by a state of a claim to a child as a national who was born within its territory to a foreign father accredited as a diplomatic officer to itself does not necessarily involve recourse to a fiction such as one to the effect that the child is to be deemed to have been born in the territory of the state of which his father is a national. It is believed that the withholding of the claim is to be explained on simpler grounds. It is due to the consensus of opinion that the diplomatic character of the father cuts off the right of the state within whose territory the birth occurred to invoke the

Articles VIII, IX, and X of the League Convention pertain to marriage or the dissolution thereof when a woman marries a foreigner. Article VIII declares that

A woman who has married a foreigner and who recovers her nationality of origin after the dissolution of her marriage loses through such recovery of the original nationality the nationality which she acquired by marriage.

Such a provision is reasonable, even though it does not purport to indicate what circumstances subsequent to the dissolution of the marriage shall serve to produce a recovery of the nationality of origin.

Article IX declares that

A married woman loses her original nationality in virtue of marriage only if at the moment of marriage she is regarded by the law of the state to which her husband belongs as having acquired the latter's nationality.

Where a change in the husband's nationality occurs during the marriage the wife loses her husband's nationality only if the law of the state whose subject her husband has become regards her as having acquired the latter's nationality.

It is believed that the first paragraph if generally accepted might serve a useful purpose. It is apparently not designed to indicate generally what should be the effect of marriage upon the nationality of the wife. It merely specifies a condition (and a reasonable one) under which the fact of marriage shall not serve to divest her of her nationality of origin. Nor does the second paragraph of the article appear objectionable. Acceptance of the article would not seemingly interfere with, or preclude the submission of constructive proposals covering the broad and difficult problem as to the effect of marriage upon the nationality of the woman.

Article X provides that

A woman who does not acquire through marriage the nationality of her husband and who, at the same time, is regarded by the law of her country of origin as having lost her nationality through marriage, shall nevertheless be entitled to a passport from the state of which her husband is a national on the same footing as her husband.

If states were to agree to the first paragraph of Article IX and harmonized their domestic laws therewith, it is not apparent how, as among the contracting parties, the situation would arise where a woman would be deemed by her state of origin to have lost her nationality of origin through marriage in case she did not acquire through marriage her husband's nationality. Standing by itself, however, Article X is believed to embody a sensible pro-

jus soli. The law of nations denies to that state that privilege by depriving it of jurisdiction for purposes of nationality over one who was in fact born within and remains within its territory.

posal the feasibility of which would depend upon its acceptance by a large number of states.¹⁶

Article XI declares that

An illegitimate child does not lose its nationality of origin in consequence of the change in its civil status (legitimation, recognition) unless at that moment it is considered by the law of the state to which the father or the mother, as the case may be, belongs as having acquired the nationality of the parent in question.

No objections to this article are apparent. The wisdom of incorporating it in a general convention would, however, seem to depend upon the importance to be attached to the provisions contained therein. Like comment might be made with respect to Article XII which provides that "An adopted child who does not by the fact of adoption acquire the nationality of the person adopting it, retains its original nationality."

Article XIII declares that

As between the contracting parties, nationality shall be proved by a certificate issued by the competent authority and confirmed by the central authority of the state. The certificate shall show the legal grounds on which the claim to the nationality attested by the certificate is based. The contracting parties undertake to communicate to each other a list of the authorities competent to issue and to confirm certificates of nationality.

Whether it is feasible for states to agree to making proof of nationality by the processes contemplated in Article XIII is a matter of policy rather than of law, and one on which opinions may well differ. It is believed, however, that the United States should endeavor to determine whether the advantages accruing to it from such an arrangement would equalize or outweigh the burdens involved in submitting the requisite certificates.

If the United States is not inclined to accept the proposed convention as it stands, its reluctance may be due to a belief that the plan offers no feasible solution of the larger problems of nationality, that it encourages the application of the doctrine of dual nationality to adult persons, that it curtails the right to invoke the *jus soli* by provisions which could not be accepted without rewriting the Fourteenth Amendment to the Constitution, and that the unobjectionable articles relate to matters of relatively minor importance respecting which general agreement is not indispensable. Nevertheless, the convention and the data accompanying it, especially by reason of the spirit in which they are proffered, challenge both American and foreign legal advisers to produce something better. Those familiar with the problems of foreign offices respecting nationality are aware of the imperative need of general agreement where none exists today. The preparation of the

¹⁶ Cf. Instruction to American Diplomatic and Consular Officers, of April 12, 1924, concerning the "Mention of Alien Wives in Husbands' American Passports."

proposed convention and the submission of it to interested governments will not have been in vain if they are moved thereby to declare at the appropriate time how far they are willing to go and what they are prepared to offer for what they conceive to be the requirements of international justice, and in particular, for the sake of gaining recognition of the singleness of nationality of the adult person whom more than one state claimed as a national at the time of his birth.

CHARLES CHENEY HYDE.

DIPLOMATIC PRIVILEGES AND IMMUNITIES

In the whole range of the international rules of conduct governing the relations of states, there is probably no matter more ripe for codification than the privileges and immunities of diplomats. If we could go back beyond the dawn of history, the inviolability of envoys would no doubt be found generally to have been respected, for among the surviving savage tribes of the uttermost and most widely separated regions of the earth the sanctity of envoys seems to be well recognized. Evidently a rule so generally observed and so potent to restrain rival populaces from doing harm to one another's representatives must be consonant with practical needs.

Unless envoys were free to enter into discussions for the prevention or termination of hostilities, agreements to those ends could not be reached, and wars of utter extermination or enslavement would be the only alternative. International agreements, the fruit of diplomatic negotiations, are then a means to conserve human energy, to help to secure and preserve the peace, which means in the end to help to develop a greater measure of the coöperation essential to the progress of each state. It is evident then that those states or political communities that respected envoys and facilitated the discharge of their mutually helpful mission would, in the struggle for national survival, have a distinct advantage over the communities that did not accord to envoys adequate protection and immunity in order to enable them to fulfil their important functions.

When the institution of chivalry prevailed throughout Europe, the rights of envoys were watched over by the Colleges of Heralds. The universal character of chivalry gave to their rules a superior status such as is held today by what we now call the rules of international law relative to diplomatic privileges and immunities. The rules of heraldry tried by actual practice, and the accumulation of precedents derived from the experience of so many states down through the centuries, have supplied us with a somewhat disjointed set of rules, but these rules may well be coördinated and formulated in the articles of a code. Already this has been attempted with more or less success, notably by the Institute of International Law at the session held in Cambridge, England, in 1895, and more recently by the American Institute of International Law through its committee of jurists meeting in Havana in

1925. We must not forget the no less important individual attempts at codification, such as those of Bluntschli and of Field, contained in their comprehensive outlines of the whole subject of international law. Individual attempts such as these will usually be found to constitute the basis of the subsequent conference codes. For after all, a conference of jurists cannot do much more than put the seal of its approval upon what it considers to be the most practical of the rules proposed for its consideration and to smooth out some of the inconsistencies.

In this situation of affairs it was a foregone conclusion that the Committee of Experts appointed by the League of Nations would decide that the matter of diplomatic privileges and immunities was one of those ripe for codification, and place it accordingly on the agenda for the consideration of the conference later to be called for the purpose of formulating a general agreement in regard to the rules of international law.

Following the appropriate procedure, the Committee of Experts, in accord with the results of the thorough and scholarly investigation and report of the subcommittee, consisting of M. Diena and M. Mastny, recorded their opinion that the whole question of diplomatic immunities and privileges was suitable for treaty regulation, and will so report to the Council. The subcommittee appointed to consider this question, after mature consideration, felt that it would be premature to formulate definite provisions, and the Committee of Experts has therefore merely made public the results of the subcommittee's investigations as contained in their report.

In order to fulfil the mandate of the Assembly of the League of Nations and to obtain and examine the opinions of the governments of the states, whether members of the League or not, the committee has transmitted the report and the outline of the "particular questions falling within the general subject of diplomatic privileges and immunities which the Committee considers might advantageously be dealt with in a general convention."¹

In the statement accompanying the questionnaire or outline the Committee of Experts has placed these privileges and immunities upon the proper rational foundation in that "the basis to be adopted in examining and answering the various questions raised" therein should, according to the indication, be "the material [practical] considerations which make the existence of diplomatic privileges and immunities useful and desirable." The committee, applying this criterion, further states that it does "not consider that the conception of extraterritoriality, whether regarded as a fiction or given a literal interpretation, furnishes a satisfactory basis for practical conclusions. In its opinion, the one solid basis for dealing with the subject is the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the State which he represents and the respect properly due to secular traditions."

¹ For this outline, see Special Supplement to the JOURNAL, July, 1926, Vol. 20, pp. 149-151.

The report of the committee ought, and in all probability will, secure strong support from the governments to which it is referred, and also from the scientific bodies that are coöperating in the effort to assist the League to secure the most scientific codification possible of the various matters ultimately to be referred to the conference called for the purpose.

One or two minor points of criticism may perhaps be made of this admirable report. In regard to ceremonial rights, the view adopted seems to have been that expressed by M. Mastny in his letter to M. Diena that this "matter relates, not to a right, but to etiquette prescribed by usage in the country where the diplomatic agent resides." Nevertheless, it must be admitted that anything which involves the indication of respect towards another state in the person of its representative is not an ordinary matter of social etiquette. In times of international stress a misunderstanding as to the requisite ceremonial is likely to be misinterpreted and considered as an intentional affront. So understood, it may lead directly to war or cause bad blood which may subsequently engender further unfriendly acts. It becomes then a matter of real importance to formulate the legal requirements of international ceremonial procedure. It will be remembered that when the Wilson Administration demanded that Huerta salute the American flag, the question as to whether the salute should be returned gun for gun was not a trivial matter, and the difference in regard to this ceremony might well have led to a war which neither of the parties really desired or intended. While it is true that these matters no longer occupy the attention which they formerly did, they are still properly to be regarded as an important part of international law.

It is encouraging to note that the subcommittee report rejects the wornout fiction of extritoriality as the basis of diplomatic immunities, and adopts instead the viewpoint that these immunities are to be explained and defined by their purpose of facilitating the discharge of the diplomatic mission.

Notwithstanding all this careful preliminary preparation and the accumulation of precedents, it is to be feared that a rational codification may still be difficult to attain, because the states of the world are not yet agreed—nor apparently are they ready to agree—upon certain fundamental and preliminary questions, such as the nature of sovereignty and the equality of states. M. Mastny touches upon this tender spot in that portion of his letter which relates to the right of asylum in the diplomatic residence. As he truly says "the question still remains without any doubt exceedingly difficult when we are dealing with political refugees in countries which have not yet attained that degree of civilization which we are justified in expecting in normal international life." But will the less developed states be willing to accept the express formulation of that inferiority of status which is essential for rational codification of any kind? Will they not rather insist that the conference stultify itself by repeating *ad nauseam* the paradox of absolute sovereignty and independence, which is itself the negation and repudiation of all international law?

M. Mastny in his letter has injected somewhat unnecessarily the matter of the arbitration of disputes in regard to diplomatic immunities. This is really a separate question, namely, that of the settlement of differences in regard to the interpretation of the rules of international law. Nevertheless it would seem that diplomatic immunities might first be made the object of a general treaty of obligatory arbitration. For important though they be, in that they relate to the question of national dignity, these immunities do not withal involve any great economic interests such as arouse the animosities of the states. Such economic interests, especially those in regard to which the future development and exploitation is somewhat uncertain, can with difficulty be subject to codification by states whose prime consideration seems still to be competition rather than coöperation. This very situation makes it important to take the first step toward codification in regard to a matter like diplomatic immunities, which is not likely to interfere with national designs of aggrandizement.

When the Conference for the Codification of International Law finally assembles, we may expect it to devote its early attention to the matter of diplomatic immunities. The First Hague Conference gave us an outline codification of the adjective law of arbitration. May the forthcoming conference be equally happy in formulating peace-preserving rules to protect the agents of peaceful international intercourse in their peace-intending mission. In this way, more than one unnecessary war may perhaps be avoided in the years to come.

ELLERY C. STOWELL.

RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORIES TO
THE PERSON OR PROPERTY OF FOREIGNERS

The subcommittee of the Committee of Experts of the League of Nations which reported on the international responsibility of states¹ consisted of M. Guerrero, of Salvador, reporter, and M. Wang Chung Hui of China. As the committee states, the report of the subcommittee is based upon one theory of the principles of state responsibility; it is for that reason that the implication or hope that the report may be accepted by all governments as the basis for a convention is likely to be disappointed, though many of the proposed rules merit general acceptance. It is highly desirable that there may be agreement among states on a subject matter which daily occupies their Foreign Offices and which more than most others permits of fairly adequate legal regulation, substantive and procedural.

Before legal regulation is possible, however, there must be some measure of accord on the underlying political theory. The theory suggested by the subcommittee, in the report now under discussion, starts from a major postulate that the foreigner must accept the legal conditions which he finds

¹ Printed in Special Supplement to this JOURNAL, July, 1926, pp. 177-203.

in the country of residence, and that neither he nor his country can justifiably complain if he is accorded, like nationals, the benefit or application of those conditions. The content of those conditions may not be internationally reviewed. Once admit the major premise, and the proposed rules, presently to be discussed, follow more or less naturally by a process of deductive reasoning.

This argument of assimilation and legal equality has been the Latin-American thesis for many years. It is embodied in constitutions, in statutes, and to some extent in treaties, and has been promoted by Calvo, Drago, Torres-Caccedo, Seijas and others. The writer has indicated his general concurrence in the aspiration of the weaker Latin-American states, his belief that they have often been the victims of the aggressive policies of strong states constituting themselves plaintiff, judge and sheriff at one and the same time, and his disbelief in the opinion entertained in certain Foreign Offices that weak states trade on their weakness to defy the strong. It is the strong and not the weak that most need the curb of law and the cultivation of that self-restraint which is supposed to be the distinguishing mark of civilization.

The following criticism of the report of the subcommittee of the Committee of Experts will therefore not be deemed unsympathetic to the aspiration expressed in the rules proposed. They cannot, however, be entirely endorsed without overlooking some of the facts of legal life in some of the countries of the world and a long continued practice of international courts and Foreign Office procedure establishing what may be called rules of international law. Not that any law is necessarily immutable. Far from it. But before long-established substantive rules should be radically changed, it ought to be shown that the social and other conditions out of which they arose justify the change, or that the underlying political theory is erroneous. This, unfortunately, cannot, it is believed, be shown with respect to the conditions and theories out of which arose the existing rules of international responsibility for injury to aliens.

The report of the subcommittee begins with a short disquisition on the origin of international law and its superiority to national law. It indulges in a fair proportion of the customary legal metaphysics about the "sum total of the will of all nations," the "collective will," the "free consent of states," the "sovereignty" of states and other terms and phrases which becloud clarity of thought. The assertion that the "binding character of international law is founded on the free consent of states" is hardly supportable. States are bound by international law without their consent and in spite of refusal of consent. Witness the numerous decisions and declarations to the effect that no state can by unilateral act defeat or escape its international obligations, *e.g.*, the Russian effort to abolish the system of private property, with respect to foreigners, the attempt of certain Latin-American states to define by municipal legislation the term "denial of justice." It is

not possible to say categorically how great must be the degree of concurrence in a rule before it may be deemed to have acquired validity as a rule of international law, or how great the degree of disavowal before an existing rule may be deemed to have lost its character as such. But a professed necessity for proving consent of a particular state to a particular rule of customary law would render international law no legal system at all. A new state must, whether it will or not, accept the prevailing rules governing international intercourse, and to the extent that these rules have validity, its so-called "sovereignty" is to that extent limited. Otherwise, the admitted superiority of international law to municipal law, accepted in the report, would be a meaningless maxim.

Yet there was a reason for the report's supposed requirement of unanimous consent, even to a general rule arising out of custom. If the states of Latin-America do not agree to the European definition of denial of justice or to the professed European conditions precedent to diplomatic interposition, the existing practice and law, which reflect European views, are necessarily not to be deemed international law. The way is therefore impliedly open to the establishment of conventional rules in a field not now covered by universally accepted international law.

The premise overlooks the fact, already mentioned, that provable unanimity is not required in general or at a particular occasion to establish a generally accepted rule as binding, even on dissenters, and the additional fact that the local law in a particular community, before foreigners are deemed conclusively bound by it, must meet the standard of civilized justice or international due process of law which custom has developed in international intercourse. The content of the municipal law, which the report deems unreviewable, is therefore at the crux of the legal relations now under discussion. Existing international law maintains—and the report (p. 3) implicitly approves the doctrine—that if the local law falls below the international standard (of due process), the international and not the local rule shall prevail. The benefit of the international rule, however, accrues to foreigners only, and therein lies a source of friction. The machinery of enforcement—by the state of the injured foreigner, without a preliminary judicial decree or judgment—is exceedingly crude, and should be changed in the interests of all parties concerned. But the fact that the prevailing theory adopts a postulate according to which the foreigner is bound by the local law only on condition that the local rule meets the international standard, whereas the report dispenses with any such condition, represents the most noteworthy feature of the report and the principal basis for criticism from the point of view of existing law and practice.

The report makes a considerable point of the issue whether individuals are the subjects of international law or are bound by it. The report concludes that they cannot be. But when one examines the law of contraband, which places the individual under definite duties and liabilities, when one

notices the convention establishing the Central American Court of Justice and the proposed prize court giving individuals the privilege of suing in the international forum, the answer given by the report, even if it be deemed important, is open to grave doubt. International law and treaties accord rights for the benefit of individuals and impose duties restraining individuals. Possibly the rule advocated in the report (p. 4) to the effect that the individual foreigner can invoke only the state's domestic responsibility and that only a foreign state can invoke its international responsibility, though true, may explain the importance attributed to the theory, for it would perhaps support the validity of the Calvo clause in Latin-American statutes and contracts, by which the alien agrees not to invoke the diplomatic protection of his home government. (See award of the United States-Mexican General Claims Commission, 1926, in case of North American Dredging Company of Texas *v.* Mexico discussed in this JOURNAL, Vol. 20, p. 538, and printed in Judicial Decisions herein, *post.*)

The report (p. 5) denominates certain rights commonly enjoyed by aliens, such as the right to life, the right to liberty and the right to own property, as transcending in source, authority, and security any national grant. Though using metaphysical phrases, such as "wherever a man goes he takes his rights with him" and that "they belong to the man as a human being" and "are not, accordingly, subordinate to the will of the state," what is meant is that these "rights" are of so elementary a character that any state that should deny them would fall below the international standard of civilized justice or due process of law and would thereby legitimately lay itself open to diplomatic interposition on behalf of the injured alien. The report declares that the enjoyment of these rights involves no guaranty against occasional infringement, but merely an assurance that adequate domestic legal machinery for safeguarding them will be afforded. Yet the foreigner, the report adds, in line with its major postulate, cannot claim a treatment more favorable than is accorded nationals. Here is the major point of difference with the prevailing theory, law and practice. If the local administration of justice breaks down, or if it provides for measures not accepted as "due process," such as holding arrested persons *incommunicado*, executive or legislative confiscations, etc., international law will demand a treatment for foreigners possibly more favorable than nationals obtain. This has its element of injustice, perhaps, for those who maintain that a foreigner should share the lot of those among whom he resides, whatever it may be. It has, however, compensatory value in exerting an important influence in raising to the international standard the level of administration for everybody. The principal objection lies not in the rule itself, but in its unilateral executive enforcement by strong states, acting as their own judges, and in the fact that weak or disturbed states are often held to a degree of responsibility measured not by their capacity to maintain due process of law but by the principle of insurance. This awakens resentments which are un-

healthy for the international order, and of course, belies any such maxim as the equality of states, on which the present report (p. 5) lays much stress. The fact is that for some purposes the theoretical equality is conceded, whereas for others it is not. Witness the Covenant of the League of Nations.

Founded on the theory of equality and sovereignty, the report rejects in principle the legitimacy of diplomatic protection. It maintains that the only legal protector of the alien is the state of residence; any interposition by another state would be "trespassing on the sovereignty" of the state of residence, though it later concedes that in a number of cases international responsibility is incurred. This may possibly be reconciled by the presumption, not expressed in the report, that responsibility would be invoked before some judicial forum and never by intervention or perhaps even diplomatic interposition. The report is not altogether clear on these matters.

The means of affording protection to foreigners, according to the report, is also to be left to the state of residence exclusively. Yet it concedes that failure to adopt methods which should have been adopted, or the inadequacy of the methods adopted, would entail responsibility. But the ineffectiveness of the methods adopted would seem, according to the report, to afford no ground for international redress. Foreign states are likely to demand more than the adoption of rules; they also ask their effective enforcement, certainly within the range of capacity, and at least *bona fide* effort to enforce.

The report adds that the unlawful act or omission of duty must be traceable to the state itself. As a principle this will not be denied. Differences will arise in determining what constitutes unlawfulness, violation of international law or omission of duty, and in this respect the report endeavors, as we shall see, to establish a legislative definition of international duty and "denial of justice" which the United States and European countries have heretofore declined to accept as conclusive when enacted by Latin-American countries. The suggestion that the officer guilty of the unlawful act or omission shall have been acting within the scope of his employment or duty will hardly be denied as proper; but this and the further suggestion that he must be "defending the rights of the State" (p. 8) raise the difficult question of *ultra vires*, which is treacherous ground in the administrative law of most countries, and which would require clarification before most states would conclude a treaty on the subject.

Territorially responsibility is limited to territory over which the state exercises "sovereignty." "Jurisdiction" might have been a better word, for the report recognizes that occupied territory is not in a position to be defended by or to create responsibility for the ousted state or government. Central federal governments must assume responsibility (p. 6) for the acts of component parts of the federation, and no exception is made for obligations contracted by autonomous states of a federation. Probably an exception for contracts of the latter kind should have been incorporated, for this is in accord with the general Latin-American thesis which the report maintains.

In dealing with specific types of cases, the report (p. 7) first considers "political crimes committed against foreigners." Here it adopts practically the standard of the special Committee of Jurists, 1924, reporting on the Greek-Italian incident which led to Corfu. Responsibility is incurred, they said, "if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal. The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon a State a corresponding duty of special vigilance on his behalf." The quarrel will not be with the principle. But such words as "reasonable measures," "circumstances," "corresponding duty," "special vigilance," open the field to unlimited debate. The important point is that in the event of an incident, the offended state whose political agents have been injured should not be deemed warranted in determining these debatable questions by gunboats, but that the issues are eminently of a kind requiring judicial examination and construction. To this end, the report (p. 13) recommends in all such cases a commission of inquiry and arbitration, measures which no self-respecting state should be willing to decline. Fortunately the subcommittee had no occasion to approve the extraordinary conclusion of the Corfu committee that a warship could shoot down people in a foreign city without committing an act of war.

In dealing with the responsibility for acts of officials, the report lays down a narrow test of official duty and a broad *ultra vires* rule which may be difficult to accept. When is an official "defending the rights of the state"? If an official acts within the general scope of his employment, and breaches with respect to aliens the international duty of a state, measured by conformity to local law, international law or treaty, there should be *prima facie* state responsibility if the act is one of a higher official. This common distinction between higher and minor officials, found in many systems of administrative law and in the decisions of arbitral tribunals, the report does not make. It would hold the state merely to the duty of permitting judicial recourse against the wrong-doing officer, though in fact many states hold the state municipally responsible on the doctrine of *respondeat superior*. Possibly the reporter would not deny the benefit of such a rule to an injured alien. But to make responsibility for acts of higher officials dependent upon a judicial denial of justice in the pursuit of judicial remedies against them personally, accompanied by an extreme *ultra vires* doctrine which would almost deny the possibility of a state tort unless "commanded" by the state, is to narrow the scope of responsibility beyond what European nations would probably be willing to accept.

The rule proposed in the report would make practically no difference between an act committed by an official and one committed by a private individual. In either event, state responsibility is predicated upon failure to prevent, after opportunity, an unlawful act, failure to punish for an act.

already committed, or failure to permit judicial recourse. As to private individuals, the rule, as far as it goes, is acceptable; as to public officials, certainly in the higher ranks, it may not be. Perhaps the divergence in the points of view of the "exploiting" and "exploited" states in these matters will prove too wide to bridge by convention, though there is no legitimate reason why this field of action should not be divorced from politics and be regarded as strictly legal.

One of the major chapters of the report (p. 9) is devoted to responsibility for judicial acts. Here the report adopts the view that a state has fully complied with its international duties if it establishes independent courts for the administration of justice. No matter what the decision, even if erroneous and though it misinterpret the law, and though it be "unjust" or "manifestly unjust," foreigners have, according to the proposals of the report, no ground to complain or seek an appeal to the diplomatic or international forum. To do so, is to infringe the "sovereignty" of the state. Only if the state provides no courts, or if it refuses foreigners access to the courts on the same terms with nationals (*cautio judicatum solvi* excepted?), or if the court refuses to proceed with the case or render a decision, is a "denial of justice" established, entailing international responsibility. The mere rendering of a decision, regardless of its character, refutes the possibility of a "denial of justice." Delay is not equivalent to a denial of justice.

This is the traditional Latin-American thesis, which European countries and the United States have in principle heretofore refused to accept. As these latter countries more or less demand acceptance for such a doctrine in respect of their own courts, perhaps it is not too much to ask that they concede its application to the countries of Latin-America. As a matter of fact, the principle is conceded in effect to those countries in which the administration of justice invites complete confidence, and no mere "error" or even "unjust" decision will invite interposition. As the weaker countries gradually strengthen the administration of justice, the application of the principle is not likely to be denied them. But it seems unlikely that a mere argument based on the "equality of states" and "sovereignty" will persuade the stronger states to bind themselves to such a definition of "denial of justice." The difficulty here again arises, not so much in a disagreement on the principle, as in its practical application to particular cases, for arbitrariness, discrimination and gross injustice cannot be brought within a definition or a formula. If states would agree to submit unsettled issues of this type to international adjudication and not seek to settle them by political measures, a striking advance will have been made.

With respect to damages caused to foreigners in case of riot and civil war, the rules proposed in the report (p. 11) follow closely those suggested with respect to damage by individuals. They approximate the prevailing general rules and ought to command support. Unless the state has failed, after opportunity, to prevent the riot or failed to punish or endeavor to punish the

offenders and to afford opportunity for judicial redress, there should be no international responsibility. With respect to civil war, considered a case of *force majeure*, the state should not be responsible (p. 12) for its own acts in suppressing the rebellion or for those of insurgents beyond its control. The report draws an analogy to losses occurring through strikes. It makes no allowance for negligence in suppressing rebellion or the unlawful acts of rebels, a factor in several recent claims conventions, possibly on the ground that such negligence on the part of constituent authorities can rarely, if ever, be inferred. The many cases where responsibility for revolutions has been accepted by certain countries are regarded as exceptions founded on compulsion or other political considerations.

For loss of property sustained by foreigners through the action of the state as a result of requisition, expropriation, confiscation, spoliation or [on] any other arbitrary proceedings "whether in peace, in war or in revolution" the state is deemed internationally responsible (p. 13) and obliged to make compensation. "A state of war or revolution would in no way justify the violation of these rights." If revolutionists commit these acts, the state's responsibility is measured by its failure to perform the duty of providing to foreigners "facilities for prosecuting the offenders and recovering possession of their property." In this connection, it seems almost inconceivable that a highly integrated industrial world and its legal and economic advisers should have tolerated such a demoralizing provision as Article 297 of the Treaty of Versailles confiscating the private property of enemy or ex-enemy nationals. No amount of verbal legerdemain can mitigate its shortsightedness or its dangers as a precedent to all foreigners and foreign investors. Faith in the growing prevalence of law over force and in the security of acquisitions which law is designed to promote, is seriously shaken and impaired by this confiscatory measure, which may charitably be characterized as a regrettable mistake. The sooner it is corrected, the less effective will be its threat to orderly international relations.

The second question covered by the report deals with the possibilities of framing a convention whereby disputed facts giving rise to claims might be definitively established, "and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement have been exhausted."

The report proceeds from the assumption, often well-founded, that disputed facts give rise to many claims. Instead of leaving such facts in doubt, with each party drawing its own conclusions on inadequate or biased data, and then acting, sometimes violently, on these conclusions, the report recommends the official adoption of international commissions of inquiry along the lines of the commission provided for at the First Hague Conference. Nothing seems more reasonable than the proposal that doubts and disputes on matters of fact, which could be established by an impartial investigating body, should never be permitted to create international hostility. This

thought underlies the Bryan treaties, on the basic hypothesis, expressed in the treaties, that if no move looking to hostility were made by either party pending the report of the investigating commission, the healing effect of time and deliberation would have cured the disposition to violence. The same ideas are embodied in the present report. The inadequacy of all such treaties is that they contemplate only particular incidents, and not continuing acts claimed to be lawful by one party and unlawful by the other, where the facts are not in dispute. Yet they serve an important, even if limited function, and should be encouraged. The "cooling" period which the investigation affords doubtless provides an interregnum of great psychological value. The present report proposes that the Permanent Court of International Justice act as intermediary between the states in dispute in arranging for the commission of inquiry, whose function is to be limited to the statement of a conclusion on the facts. It contemplates that the parties would agree to leave to the decision of the Permanent Court any dispute not definitely closed by the report of the commission of inquiry. The states would agree to abstain from all coercive measures until these peaceful means of settlement had been exhausted (p. 16). Here the report makes the same mistake, I believe, that was made in the Porter Proposition at the Second Hague Conference. It sanctions the use of force to collect a certain type of claim, only delaying the authorization to use force until certain measures have been adopted without success. This goes further than both law and customary practice had theretofore sanctioned. Armed forces should be by agreement absolutely excluded in the collection of pecuniary claims of any character. That would be an advance toward peace, which presumably the Committee of Experts is designed to promote. Instead of prohibiting force in a field in which its use is now very exceptional only, it actually sanctions the use of force in cases where it is not usually employed. This is hardly a useful contribution.

The report, however learned it is in many respects, may, it is submitted, be deemed to involve even a greater oversight than the one just mentioned. Inasmuch as it proposed to indicate the outlines of a legal code for settling so-called pecuniary claims, mainly in tort, there seems no reason why it should have limited its procedural proposals to the determination of disputed issues of fact. The major objection to the present practice, notably from the Latin-American point of view, is the absence of a peaceful legal procedure for determining issues of law. The present system contemplates the frequent use of political coercion of all types to enforce claims essentially legal in character. Here lay the great opportunity of the subcommittee and of the other international jurists on the committee. The whole field of pecuniary claims, more strictly legal in its nature than many of the other departments of international law, should not only on its substantive, but on its procedural side, be divorced from politics and brought within a legal framework. No pecuniary claim should become the source of coercive political action. Every claim

should, if not easily settled diplomatically, be submitted by convention, as automatically as possible, to an international court. If this were done, all parties would benefit and such tribunals as the Permanent Court of International Justice would probably never lack a full docket. International law would thus extend its beneficent regulatory power to a field in which politics now unfortunately often reigns supreme. A claimant, having a perfectly legal claim, is now dependent for relief primarily upon the political strength or influence of his nation, on its political relations with the country complained against and on the disposition and willingness of the Foreign Office to exert diplomatic efforts in his behalf. His claim becomes the plaything of politics and of their accidents. The government of the injured citizen is subjected to political pressure to espouse what may be a poor claim, often acts on insufficient evidence, and in prosecuting a claim is led to invoke the support of a whole people on behalf of a single citizen or corporation, a primitive and medieval form of collective revenge which survives in practically no other branch of public law. A people should not be involved in political entanglements arising out of an alleged legal injury to a citizen, if it can possibly be avoided. The defendant nation should not be in the position of having to yield a legal case to political arguments or of availing itself of political strength to resist a legal claim. The cause of peace and normal international relations should not be impaired and hampered by the present easy conversion of a legal into a political issue. An agreement to submit legal pecuniary claims to a legal, *i.e.*, judicial, method of settlement would be one of the greatest boons imaginable not only to the parties and peoples in interest but to a world still delicately balanced between the Scylla of law and the Charybdis of anarchy. In recent years, the forces of lawlessness have made immeasurable gains. Here, in the field of state responsibility for injuries to foreigners, lies a practical opportunity to counteract these demoralizing and disintegrating forces by lifting a most important field of international relations from the arena of politics to the realm of law.

EDWIN M. BORCHARD.

PROCEDURE OF INTERNATIONAL CONFERENCES AND PROCEDURE FOR THE
CONCLUSION AND DRAFTING OF TREATIES

At its second session in January, 1926, the Committee of Experts for the Progressive Codification of International Law decided to submit a questionnaire on the subject of procedure of international conferences and procedure for the conclusion and drafting of treaties to various governments, communicating at the same time a report presented by M. Mastny, and observations on it by M. Rundstein.¹ The subject comprises two separate topics and it is not clear why they were joined together. The committee

¹Printed in Special Supplement to this JOURNAL, July, 1926, pp. 204-221.

states that "there is no question of attempting to reach by way of international agreement a body of rules which would be binding obligatorily upon the various states." This policy would seem to be necessary in dealing with the procedure of international conferences, but it is not so clearly required in dealing with the procedure for the conclusion and drafting of treaties. The committee sets itself only the modest task of placing at the disposal of states concerned rules which could be modified in each concrete case but whose existence might save discussion, doubt and delay.

Any one who has read Oppenheim's brilliant prophecy, *Die Zukunft des Völkerrechts*,² must agree that the sound development of international law requires a system of continuous conferences, and every possible aid should be sought for making conferences effective when they meet. It requires but slight experience with international conferences to appreciate the difficulties which they always encounter both in organization and in the despatch of business. What M. Mastny calls "the technique of organization and procedure" has an important place in the development of method, and with the rapidly-increasing amount of international legislation in the modern world, much attention must be given to it. A national legislative body soon accumulates parliamentary precedents and traditions, but many international conferences lack the permanence which such a process requires. Often their personnel is new, and frequently they meet but for a single session. There is no body of international parliamentary law to guide them. In recent years, the conferences held under the auspices of the League of Nations have had elaborate *règlements*,³ the early drafts of which have been carefully elaborated by the Secretariat of the League of Nations, and these *règlements* now have many common provisions. A collection of these *règlements* might serve as a source of suggestion and guidance to future conferences. But it seems to be very debatable whether it is possible to go further than to place before the bureau of a conference more than such a collection, whether, indeed, the subject is one which lends itself to any conventional regulation, facultative or otherwise. Most conferences will prefer to shape their organization and procedure to meet conditions which cannot be foreseen, and perhaps the people actually charged with management of the conference, now very frequently the Secretariat of the League of Nations, are better qualified in this regard than a group of legal experts. There always remains the fact that, whatever rules be framed for a conference, they will be more often honored in the breach than in the observance, for representa-

²Published at Leipzig in 1911. Republished in 1921 by the Carnegie Endowment for International Peace, under the title, "The Future of International Law."

³See, for example, the *règlement* of the Assembly, League of Nations Document C, 356 (1) M, 158 (1), 1923 V; that of the Council, Document 20, 31, 39 A; that of the First Conference on the Opium Traffic, Document C, 684 M, 244, 1924, XI, page 126; and that of the Conference on the Suppression of Obscene Publications, Document C, 734 M, 299, 1923, IV, page 6.

lives at international conferences are frequently vigorous personalities more given to achieving the substance than to following the form.⁴

The subcommittee's report envisages three types of codification with respect to the procedure of conferences: (1) regulation containing rules common to all types of conferences; (2) regulation applicable to a certain type of conference; (3) a convention containing certain general principles which should be observed. It sets forth objections which are deemed to make the first two types impracticable, concluding as to the second type that "the character of diplomatic and technical conferences is so different as to discourage attempts at such codification." It sets forth a long list of points to be considered in connection with the third type of codification, but the list seems to be of very doubtful utility. The composition of delegations at a conference, for example, is surely not a proper subject for any kind of international legislation, nor can "preparatory procedure" easily be regulated in advance. The modified list is more restricted than that originally submitted by the subcommittee, but it is hardly a questionnaire and it will not be surprising if some governments have a difficulty in pronouncing their opinions on it.

As to the conclusion and drafting of treaties, other considerations would seem to apply. Many diplomatic manuals may be needed for the guidance of conferences, but it seems very doubtful whether the preparation of any such manual should be attempted by a committee on codification, and certainly there are serious objections to its being embodied in an international convention. The suggestion that a useful manual might be "prepared and published by the League of Nations" is worthy of consideration, especially in view of the common provisions to be found in the many treaties recently emanating from Geneva.

The *rapporteur* will find nothing but hospitality for his suggestion that there now prevails an "anarchy as regards terminology" of treaties. But is it an anarchy which legislation could dispel? Political reasons often demand the coinage of a new name for an instrument—the word "covenant" was not in general use prior to the Peace Conference at Paris. Moreover, it is an anarchy which does little harm beyond the shock to an aesthetic sense of form. The *rapporteur's* suggestion that some "concession to the modern spirit" be made in revising the inherited official formulas of treaties will also be welcomed, though it is to be recognized that a twelfth century formula whose exact sense is enshrouded in a maze of history may afford escape from political and legal difficulties which no one would care to bare—was, for example, in the treaties sometimes made by the British Empire; and the subcommittee properly recognizes that revision of such formulas should be left to national constitutional practice.

The report draws attention to the difficulties which arise in treaty-making

⁴ A close perusal of the records of the Assembly of the League of Nations will at once suggest the slight degree to which the Assembly feels itself bound to follow its own *règlements*.

because of constitutional limitations prevailing in different countries, and it contains the suggestion that each government should notify other governments of its constitutional provisions as to treaties and their interpretation. The *rapporteur's* view that "legal relations between states would greatly gain both in security and clearness" if this suggestion were followed will probably not be widely shared, for it presupposes that ignorance now prevails as to such constitutional limitations. A complete collection of constitutions, published in various languages, might be serviceable, but this again is hardly a task for a codification committee. The "list of matters susceptible of regulation" contains numerous topics, some of which would seem to be of less interest to the legislator than to the publicist.

The committee has not adopted the subcommittee's view that the subject referred to it—the formulation of rules to be recommended for the procedure of international conferences, and the conclusion and drafting of treaties—should be placed on the "list of subjects of international law the regulation of which by international agreement would seem to be desirable and realizable." The whole matter has not been placed before the governments in such a form as would induce them to express very definite views. It is to be hoped that the committee will give the subject extended further consideration before recommending to the Council any attempt at codification in this field.

MANLEY O. HUDSON.

THE QUESTIONNAIRE ON PIRACY¹

The so-called questionnaire on piracy, like the other questionnaires communicated by the Committee of Experts, has been submitted for transmission to the various governments in the hope that replies may be elicited which will indicate official opinion as to the ripeness of the subject for codification. Like certain of the other so-called questionnaires, this one consists of a subcommittee's report and some draft provisions. It is a little surprising that the committee should have thought the document worth communicating to governments in its present stage, and perhaps more surprising that the committee should consider the statement of principles and solutions in the document sufficient to indicate "the questions to be resolved for the purpose of regulating the matter by international agreement."² A good beginning has been made, but much remains to be done. In its present immature stage, the questionnaire seems unlikely to elicit anything very useful in the way of replies.

From the rather superfluous observation that "authors of treaties [*sic*] on international law often differ as to what really constitutes this international crime," the report proceeds in the second paragraph with a wholly insufficient attempt at definition running as follows:

¹ See this JOURNAL, Vol. 20, Supplement, Special Number, p. 222.

² *Ibid.*

According to international law, piracy consists in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property or acts of violence against persons. The pirate attacks merchant ships of any and every nation without making any distinction except in so far as will enable him to escape punishment for his misdeeds. He is a sea-robber, pillaging by force of arms, stealing or destroying the property of others and committing outrages of all kinds upon individuals.¹

One is tempted to ask what the subcommittee means by "sailing the seas for private ends," by "outrages of all kinds upon individuals," or by others of the phrases used. But this would be captious. The passage quoted is typical of the whole document. It is evident that the document presents nothing more mature than the tentative draft of a subcommittee's report. So regarded, it comprises much that is of interest and value for students, but little that is ripe for consideration by governments.

The statement of principles and solutions in the report indicates quite inadequately "the questions to be resolved for the purpose of regulating the matter by international agreement." For example, the report lays it down dogmatically that piracy may be committed only on the high seas; but it is not at all clear in truth that the question of place can be resolved so simply. The report disapproves subjective tests of piratical acts, but it goes on to add that acts committed "from purely political motives" cannot be considered piratical. The report takes the position that when suspicion of piracy proves unfounded the captain of the vessel searched is "entitled to reparation or compensation according to circumstances," but it may well be doubted whether such a solution is supported either by reason or authority. The suggestion that pirates may be pursued and taken in foreign territorial waters when the territorial state is not "in a position to continue the pursuit successfully," the pirates if captured to be turned over to the territorial state for trial, indicates at best a possible but rather precarious compromise. There seems no justification for leaving warship commanders the right to try pirates at the present day. Common law countries, at least, will be reluctant to leave the effect of piratical seizures upon property rights to be determined by the law of the state which captures the pirate and recovers the property.

Draft provisions on piracy sufficient to elicit helpful replies from governments, while they may be frankly tentative and imperfect, should be systematically organized and formulated with enough exactness of expression to provide an immediate basis for discussion. They should deal at least with the definition of piracy in international law, the objects for which it is committed, the nature of piratical acts, the place where they may be committed, the jurisdiction to search, seize, arrest, and punish for international piracy, and the effect of such piratical seizures upon property rights.

¹ *Ibid.*, p. 223.

Influenced no doubt by the Assembly Resolution of September 22, 1924, and by a desire to make a full report of its efforts to date, the Committee of Experts has communicated in the so-called questionnaire a report with draft provisions which hardly measure up to the suggested standard. Whether the course taken was expedient or not remains to be demonstrated. Possibly it would have been as well to communicate only the subject and a brief commentary giving reasons for its inclusion in the list. In any event, the outlook is encouraging. The subject of piracy is probably as ripe for codification in the orthodox sense as any subject in international law. A preliminary examination has been made and followed by the submission of a so-called questionnaire of the nature of a preliminary report. Unless replies received are positively discouraging, and this seems unlikely, there is no apparent reason why the subject should not be reported to the Council as "sufficiently ripe," nor why the real labor of investigation should not be initiated in the not too distant future according to such procedure as the Committee of Experts may conclude to recommend.

EDWIN D. DICKINSON.

EXPLOITATION OF THE PRODUCTS OF THE SEA

The League of Nations Committee of Experts for the Progressive Codification of International Law have included in their "provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment" the following subject: "Whether it is possible to establish by way of international agreement rules regarding the exploitation of the products of the sea."

This question has been submitted, as Questionnaire No. 7, to the members of the League and to certain other governments, accompanied by a report by Mr. José Leon Suárez, the Argentine member of the committee, indicating the problems presented and the conclusions reached, and emphasizing the urgent need of international action.¹

This report declares that the limited and local fisheries regulations, which hitherto have been adopted by international agreements among a few of the nations, are wholly inadequate for the protection of sea products from extermination, because they have been intended mainly to establish police measures, and to secure reciprocity and commerce regardless of biological interests. The great importance of considering biological interests is, according to the report, because "biological solidarity is even closer among the denizens of the ocean than among land animals, and the disappearance of certain species would destroy the balance in the struggle for existence and would bring about the extinction of other species also." The question presented is, therefore, fundamentally biological rather than political or commercial, and, quoting again from the report:

¹ Printed in Special Supplement to this JOURNAL, July, 1926, pp. 230-241.

This urgent necessity for international regulation of the exploitation of the biological wealth of the sea is a new phenomenon to jurists but is familiar to all those who are brought into contact with the creatures of the deep, either in the pursuit of gain or in the interests of science. The marine species of use to man will become extinct unless their exploitation is subjected to international regulation.

The report cites, as an illustration of the imperative necessity of international regulation, the destructive consequences of unrestricted whale hunting. The report continues:

The source of wealth which is most immediately threatened with total extinction is the whale, because its bulk prevents concealment, because its slowness of reproduction makes the replacement of casualties impossible, and because the species, being concentrated in the South Polar region after having been exterminated in the north, is attacked in these waters by fishers from every part of the world and is being exterminated with alarming rapidity. The average number of whales killed in the Antarctic every year is not less than 1,500 and sometimes as many as 2,000. No other method than international regulation can be conceived to prevent the annihilation of whales, the total remaining number of which may tentatively be put at 10,000 or 12,000 at the most.

With the report is submitted a chart of marine wealth which shows the geographical distribution of some of the most important species which should be preserved for the use of humanity and indicating especially those of particular importance to Great Britain, Norway, the Netherlands, Germany, Belgium and Denmark, and of some concern to Spain, Portugal, France and the United States, all of which are in need of protection by international regulations.

The conclusion reached by the report is that the needed protection can only be secured by "an international agreement on an economic and biological and not on a political or commercial basis."

To accomplish this object, the report recommends that all the maritime Powers hold a conference, including experts in applied marine zoölogy, persons engaged in marine industries, and jurists, and that in the general technical programme of the conference be included:

- (a) General and local principles for the organization of a more rational and uniform control of the exploitation of the aquatic fauna in all its aspects;
- (b) Creation of reserved zones, organization of their exploitation in rotation, close periods and fixed ages at which killing is permitted;
- (c) Determination of the most effective method of supervising the execution of the measures adopted and maintaining the control.

This subject comes distinctly within the scope of the legislative, rather than the declarative, process of codification of international law, because it is not at present covered by any generally accepted principles or rules of the law of nations.

CHANDLER P. ANDERSON.

REPORT ON EXTRADITION BY THE COMMITTEE OF EXPERTS OF THE LEAGUE OF NATIONS

The possibility of regulating the extradition of criminals by general conventions was one of the questions considered at the very first session of the League of Nations Committee for the Progressive Codification of International Law. The subject was entrusted for study and report to Professor Brierly of Oxford as *rapporteur*, and M. de Visscher of Ghent, two well known and very competent authorities.

Extradition is a subject matter well advanced for codification, both in doctrine and practice, not so much because there is any wide body of customary international law applicable to it, but because, with rare exceptions, extradition is carried out in modern times under provisions already contained in treaties. A great majority of such treaties are bilateral. A certain few, such as the treaty signed between the States of Central America in 1923, are multilateral. An extradition treaty was signed in 1902, but not ratified, between the United States and eleven other countries of the Western Hemisphere. The problem is now whether regulation by a general convention making practice uniform between a large group of states is possible and desirable.

As a result of the report of Mr. Brierly, and of observations submitted by M. de Visscher,¹ the committee has concluded that certain questions connected with extradition are susceptible of being dealt with by way of a general international convention. These questions are as follows (Publications of the League of Nations, V. Legal, 1926. V. 8):

1. The question whether and in what conditions a third state ought to allow a person who is being extradited to be transported across its territory.
2. The question which of two states both seeking extradition of the same person from a third state ought to have priority over the other.
3. The questions which arise as to the extent of the restrictions on the right of trying an extradited person for an offence other than that for which he was extradited, and on a state's right to extradite to a third state a person who has been delivered to it by way of extradition.
4. The questions as to the right of adjourning extradition when the person in question has been charged and convicted, in the country where he is, for another crime.
5. The question of confirming the generally recognized rule by which the expenses of extradition should be entirely borne by the claimant state.

The questions, though important, are nevertheless connected mainly with the *procedure* of extradition. The enumeration of extraditable crimes is omitted entirely. The reasons advanced by Professor Brierly for this omission are, (a) because the needs of states differ, neighboring states requiring a wider list of crimes than those whose boundaries do not abut;

¹ Printed in Special Supplement to this JOURNAL, July, 1926, pp. 243-251.

(b) because a uniform list of extradition crimes is hardly possible without uniformity of criminal law, which does not exist. As to the former reason, one would be inclined to say that codification might very well adopt a *minimum* list of extraditable crimes, acceptable in most cases, leaving other states free to extend the list according to their special needs. As to the latter reason, the same objection of the lack of uniformity of criminal law might be urged against bilateral treaties. A sufficiently common conception exists of the more important crimes to permit of a large number of extradition treaties between nations of divergent systems of law. An examination of the extradition treaties of the United States passed over a given period will not show any great diversity in the list of extraditable crimes. The later treaties tend to extend the list, but the line of cleavage cannot fairly be ascribed to any divergence in the definition of crimes.

We venture to say that there is a much greater divergence in the penalties prescribed in different countries for the same offence than in the definition of offences; yet both Mr. Brierly and M. de Visscher prefer the adoption of a principle by which extradition is to be granted for any act punishable with a certain prescribed severity. This is the method adopted in the treaty of Central American States, but it would scarcely be found acceptable except among a group of states that regarded the same crime as being dangerous to society in equal measure. Furthermore, the most modern tendency of criminology is to allow the environment of the criminal and the circumstances of the crime to play a much more important rôle than hitherto in the determination of the penalty. In short, the penalty will be found to be too closely associated with the ideas of social progress in each particular country to permit of its adoption as a test in a general international convention.

The committee has omitted the definition of "political crimes" from the list of subjects suitable for inclusion in a general convention because of the difficulty of achieving agreement. Nearly all extradition treaties exclude such crimes from the category of extraditable offences. Attempts at a definition of "political crimes" have been made but none has secured general acceptance. Mr. Brierly doubts whether any of them has been satisfactory. Many otherwise extraditable crimes are thus excepted from the scope of the treaties merely by proving a political motive; yet the Institute of International Law at its Oxford session in 1880 agreed that the state requested to grant extradition has the sovereign right of determining whether the act is political. This right, as M. de Visscher aptly observes, "which necessarily implies the right of appreciating the motives involved, has not infrequently created difficulties between states." Particularly is this true of countries like Switzerland, which over a long period has steadily accorded the right of asylum to political refugees.

Another subject upon which there is a wide difference of practice is with regard to the extraditability of nationals of the state of asylum. A majority of countries decline to extradite their own nationals. Great Britain and the

United States, regarding criminal jurisdiction as territorial, make no distinction on principle, though under many of the treaties they are not obliged to extradite their nationals because of the lack of reciprocity.

Mr. Brierly remarks that the theory that a country should try its own nationals for crimes wherever committed, fails (a) because of the impossibility of securing the relevant evidence from abroad; and (b) because it applies even to an escape after conviction, which would mean practical immunity on the general principles of justice that a person may not be tried again for the same offence. The *rapporteur* then adds:

If, on the other hand, the refusal to surrender a national arises from a lack of confidence that justice will be rendered to him in the foreign State, that would seem to be a reason which would justify the refusal of extradition to that State altogether, but could not justify the practice of differentiating between nationals and other persons.

The *rapporteur* therefore recommends the insertion of an optional clause under which those states which are prepared to surrender their own nationals would agree to do so, either on terms of reciprocity or some other satisfactory terms. The vital point is emphasized by M. de Visscher's observations that even if nationals are not to be extradited, they must not go unpunished. "Extradite or punish," was a phrase frequently used in this regard by the late Louis Renault, the distinguished legal adviser of the French Foreign Office. France has followed this advice at least to the extent of inserting a clause in her extradition treaties that nationals should be considered subject to extradition unless the contrary was otherwise provided. Belgium has gone still farther in the Law of 1878 (Article 8), which provides that persons who have committed extradition offences abroad are to be prosecuted in their own country either on complaint of the injured party or on official notification received by the authorities of the country where the offence was committed. "Might not the attempt be made," says M. de Visscher, "to establish in a general convention a formula imposing the above obligation on all States which were unwilling to accept the extradition of their nationals whether for the reason that they adhere to the rule of nonextraditability of nationals, or for the reason that they only allow extradition of nationals as a measure to be taken at their own option?" With this we may also couple two other correlated suggestions of M. de Visscher:

(a) To establish in a general convention the rule that extradition may always legitimately be refused when the acts on which the request is founded were committed in the territory of the State requested to extradite (predominant jurisdiction founded on the principle of territoriality);

(b) and on the contrary to stipulate that, when acts on which the demand for extradition is based were committed in the territory of the State requesting extradition, extradition may not be refused on the mere ground of concurrent jurisdiction, unless the said acts have already, in the State requested to extradite, been made the subject either

of a final judgment or of a prosecution already commenced (this is, for example, the principle contained in the Swiss Federal Law of January 22nd, 1892).

The result of the report cannot be said to be very encouraging to those who look for immediate results, but perhaps the same is true of any field of codification where there is no uniformity of practice. The report is in itself an approach to the task of codification for the very reasons that it has analyzed the principal problems resulting from divergent practice.

The extradition of criminals plays a very important rôle in the administration of criminal justice generally. The rising tide of crime proceeds very largely in proportion to the advance in the facilities for rapid transportation. Automobiles and aircraft have now been added to all the other mechanical means which have made the territories of all states relatively smaller and escape to foreign soil easier. The increase in the number of states due to the World War has magnified the problem. Self-interest ought therefore to dictate the need for improving the technique of extradition. In this, as in so many other matters, the nations of the world are interdependent, for in large measure it is upon all other nations that each must rely for maintaining the majesty of the law.

ARTHUR K. KUHN.

EXTRATERRITORIAL CRIMES

The League of Nations Committee on the Codification of International Law adopted in January last a report on the criminal competence of states in respect of offences committed outside their territory,¹ and found that "international regulation of these questions by way of a general convention, although desirable would encounter grave political and other obstacles."

The reasons for this negative report of the committee are presumably those outlined in the report of the subcommittee, consisting of Mr. Brierly and M. DeVisscher. The subcommittee, for the reasons given by them, gave little attention to crimes committed by nationals anywhere abroad, or by non-nationals outside the territory of any state, and centered their discussion on crimes committed by non-nationals within the territory of another state. An analysis of their report may be stated as follows:

(1) Crimes of nationals abroad.

Eliminated since "no good purpose would be served by suggesting that a principle so well established should be embodied in a convention."

(2) Crimes of non-nationals abroad, committed—

(a) Outside the territory of any state.

Eliminated because "no single principle underlies the cases in which a State may assume jurisdiction over non-

¹ Printed in Special Supplement to this JOURNAL, July, 1926, pp. 252-259.

nationals . . . ,” such as crimes on national vessels, piracy, and liquor treaties.

(b) Within the territory of another state.

Found impracticable since the “possibility of a conventional regulation of the whole matter will depend, not on the merits of this or that case in which a non-territorial jurisdiction is at present claimed, but on the prior and more fundamental question whether the territorial basis is to admit of any exception at all. It is clear that the crux of the problem lies in the divergence of view between those States which do and those which do not allow the legitimacy of such exceptions, and that we have to ask ourselves whether the Committee would be justified in hoping for a possible reconciliation between these two groups of States. . . . Your Sub-Committee is not qualified to express any opinion as to the likelihood of a compromise on such lines as we have suggested being found acceptable to either group of States.”

The policy of the Assembly appears to be to obtain a list of the “most desirable and realizable” subjects for regulation by international agreements. In view of this policy, the report of the committee on the subject of extra-territorial crimes is probably warranted, especially since codification appears to be under way on the subject of extradition, which is closely connected with the present subject. International agreements on extradition may tend to reduce some of the difficulties involved in the question of extra-territorial crimes committed by non-nationals within the territory of another State. This question, as the subcommittee points out, is the most difficult branch of the general subject.

The main trouble, as the subcommittee states, is due to the divergent practice of states under (2-a). Apparently most, if not all, of the states allow some exceptions to the strict territorial rule, and the question is to determine the extent to which exceptions should go. Once the principle of exception is allowed, it is difficult to fix the limit beyond which exceptions may not be pressed by interested states in new cases. At the present time every state is regarded as the judge of what exceptions it will advocate, but, on the other hand, the application of its judgment is tempered by the interests of other states who may object that the exceptions claimed are invasions of their sovereign territorial rights.

While the theory of sovereignty is in some quarters regarded as obsolete, or nearly so, yet it is a curious fact that the intercourse of states is largely a matter of give and take in respect of the exercise of the rights of sovereignty. On a strict basis of territorial sovereignty, a state might claim the right to punish any person within its borders who has committed an offense

abroad which it believes to be committed against the state, but the exercise of this sovereign right is held in check by the possibility that other states might claim reciprocity in this respect. As a result, a balance is struck in practice which operates as a *modus vivendi*. The right to punish nationals is admitted by practically all states. The right to punish non-nationals is still contested except as to a few cases. Such conflicts of sovereign rights are as a rule appropriate matters for agreements between states covering particular classes of cases, and such agreements as they multiply through the years will no doubt point the way to a rule of practice which may in the end be adopted in a general international convention.

In this connection it is interesting to refer to Pitt Cobbett's summary of the disadvantages of the extraterritorial principle. He says:

Nevertheless the system under which a criminal jurisdiction is claimed or exercised by a State over offenses committed outside its territory is, for the most part, and saving certain necessary exceptions,¹ at bottom a bad one. It tends to obstruct or impede the course of justice by making the prosecution of crime difficult and expensive, owing to need of transporting witnesses and proofs to another country than that in which the crime is committed. By disassociating punishment from the locality of the offense, it also tends to diminish its deterrent effect. Nor is it commonly necessary; for the reason that the escape of the offender to another country can generally be met by a proper system of extradition. It is also anomalous, for the reason that whilst it rests in some measure itself on a territorial basis—*viz.*, the presence of the offender within the territory—it is really subversive of the territorial principle. Finally, as was pointed out in *Cutting's Case*, it is a system which, when applied to offenses committed by foreigners in foreign territory, is open to grave abuses.²

L. H. WOOLSEY.

LEGAL STATUS OF GOVERNMENT SHIPS EMPLOYED IN COMMERCE

Among the questions placed at the outset by the Committee of Experts for the Progressive Codification of International Law on its provisional list of subjects concerning which international regulation seemed desirable and realizable at present was "The legal status of government ships employed in commerce." At the same time a subcommittee composed of M. de Magalhaes and Professor Brierly was appointed to inquire further into the subject and report whether in its opinion the problems which have recently arisen in consequence of the immunities hitherto enjoyed by such ships are capable of solution by means of international conventions. The conclusions of the subcommittee are embodied in a report which sets out the reasons in support

¹ "As where the offense is committed in territory not occupied by a civilized Power, or where the act done outside the territory depends for its character on some act previously done within the territory, or where the offense affects the safety or public order [or public credit] of the state exercising jurisdiction."

² Pitt Cobbett's *Leading Cases on Int. Law*, 4th ed. by Bellot, pp. 235-6.

of its view that the question is one the regulation of which by international agreement is both desirable and practicable.¹ The full committee approved the conclusion of the subcommittee, but refrained from expressing an opinion on the merits of the particular solutions proposed by the subcommittee, for the reason that its own task was merely that of preparing a list of subjects upon which international agreement seemed to it to be desirable and realizable, and not that of proposing the form or content which the agreements ought to take. The subcommittee did not consider it necessary to discuss the anomalies of the present situation resulting from the immunities enjoyed by government-owned or operated vessels engaged in the business of ordinary commerce carrying, or to advance reasons why it ought to be altered. It contented itself with simply affirming what everybody now admits, that the problem to which the existing situation has given rise "insistently calls for solution," and that therefore it may be assumed "with certainty that the states are prepared to accept a decision on this subject in the immediate future."

The necessity of agreement being assumed, the problem narrows itself down largely to a matter of detail: What classes of public vessels, if any, shall continue to enjoy immunities? What shall be the terminology employed for describing both them and other vessels not entitled to such immunities? What shall be the nature and extent of the immunities recognized in the one case and the liabilities established in the other? What vessels, if any, shall be exempt from seizure or attachment for the execution of judgments against them? What courts shall have jurisdiction of actions brought against non-exempt public vessels? etc.

The subcommittee in its report deals with some of these matters, although, strictly speaking, they lie outside its province, which, as stated above, was to report whether in its opinion the regulation of the question by international agreement was desirable and practicable at the present time. It pointed out that the solution of the problem had already been greatly facilitated by the discussions, criticisms and proposals of learned jurists, experts on maritime law, admiralty courts and, most important of all perhaps, the International Maritime Committee, notably at its recent conferences at Gothenburg and Genoa. The subcommittee in its report analyzed and discussed the draft conventions of the two latter conferences which were, in a sense, made the basis of its own conclusions. The former convention virtually proposes to abolish the immunity from both arrest and liability to suit, of all sea-going vessels owned or operated by sovereign states, of cargoes owned by them and of cargoes and passengers carried on such ships. States owning or operating such vessels and cargoes were declared to be subject, in respect of claims arising out of the ownership or operation of them, to the same rules of liability, and to the same obligations as those applicable to private vessels, persons or cargoes. This was the general principle pro-

¹ Printed in Special Supplement to this JOURNAL, July, 1928, pp. 260-278.

posed: the abolition of all distinctions between the liability of the state and the liability of private ship- and cargo-owners, and the placing of both on the same footing in respect to their responsibility for the satisfaction of maritime claims against them.

The general principle thus laid down was, however, qualified by several exceptions. In the first place, it will be noted from the above statement, that the liability of state-owned and operated vessels is limited to claims arising out of the operation of such vessels, and does not include those which may have their origin in other sources. The preliminary draft of the London Conference of the International Maritime Committee (1922) did not contain this restriction, but it was added at the Gothenburg Conference (1923) upon demand of the French *Association de droit maritime*, which pointed out that as the draft was originally phrased, anyone who had a claim against the state, whatever the origin of the claim, might enforce it by a suit against a state-owned ship, if there were one. It was the idea of the French *association* that the liability of state-owned ships should be limited, not only to maritime creditors, but apparently that each such ship should be liable only for the particular claims arising out of its ownership or operation. In short, a claimant against a particular ship or cargo should be allowed no right to enforce his claim against other ships or cargoes owned or operated by the state.

As to the courts which should have jurisdiction of actions for the enforcement of such liability, the general rule was laid down that any tribunal which was competent to entertain a damage suit against a privately-owned ship or cargo should be equally competent to hear a similar suit against a state-owned ship or cargo. But here again the general principle of equality of status was qualified by an exception introduced in the case of warships, other state-owned or operated vessels employed only in "governmental non-commercial work" and state-owned cargoes carried only for the purpose of "governmental non-commercial work," on ships owned or operated by the state. Actions for the enforcement of liability arising in connection with all such vessels could be brought only in the competent tribunals of the state owning or operating the ship in respect of which the claim arose, whereas actions against other vessels or cargoes not falling within these classes might be brought in the courts of other countries than those to which the ship belonged, as damage, salvage and other suits against privately-owned vessels are often brought.

The phraseology employed in the Gothenburg draft to describe the particular classes of vessels against which suits could be brought only in the courts of the state which owned or operated them was the subject of considerable criticism by various representatives at the conference, notably by Sir Graham Bower and Sir Norman Hill, who pointed out that the expression "ships of war" is more or less indefinite. It might mean only "fighting ships," but it might also include, as was contended during the World War,

merchant vessels armed for defensive purposes; it might also include oil carriers and auxiliary naval vessels generally. The term "ship" should therefore be defined by the convention, otherwise the court would be obliged to do so, and their interpretations would doubtless be and perhaps conflicting. On the other hand, it was replied that at least definitions or enumerations are usually inadequate, sometimes contradictory, and in this case it was unnecessary, since the expression "ships of the draft convention was followed by the supplementary expression 'other vessels owned or operated by the state and employed only in non-commercial work'—two categories which together would embrace all vessels which it was desired to bring within the exception. What was evidently intended to be included in the category of "other vessels owned or operated by the state and employed only in non-commercial work" was such vessels as revenue cutters, sanitary, police, and patrol state yachts, and ships employed in connection with piloting, light-hauling, cable laying, dredging, etc.; in short, all state-owned or ships employed in other services than that of ordinary carriers of cargo.

The matter of phraseology was threshed over again at the Conference of the International Maritime Committee, and a slight rewording was adopted, but it is doubtful whether it constitutes an improvement on the Gothenburg draft. It is almost inevitable that, in any language is employed, differences of interpretation will arise among the courts of the different countries in which suits will be brought against vessels. In order to meet this situation, M. Bischoff proposed at the London Conference that the Permanent Court of International Justice should have jurisdiction to render the final decision in such cases, so as to insure a uniform rule of interpretation. The proposal was renewed at the Gothenburg Conference, but no action was taken on it through fear that insisting on it might jeopardize the adoption of the convention. Professor Bisschop in his report endorses the proposal at least to the extent of making reference to the Permanent Court optional in such cases. It is worth noting in connection that the draft conventions of neither the Gothenburg nor the London Conferences lays down a rule by which the courts shall be guided in determining the nature of the service in which a vessel is engaged—whether it is commercial or non-commercial. In the absence of such a rule, will the court be bound by the municipal law of the state to which the vessel belongs, or must it base its decision upon the law of the country in which the case is tried (the *lex fori*)? There is a difference of opinion on this point among the authorities, although the preponderance of opinion is in favor of the latter principle.

A question which has been much discussed by the authorities on international law is whether state-owned or operated vessels against which suits are brought, shall be liable to arrest and attachment, as privately owned vessels are. Professor Matsunami, in his book, *Immunity of State Ships*, 1

VI), points out that the question of the liability of a state ship for damages and its liability to arrest are two separate and distinct things, which are often confused. The arrest of the ship, he maintains, is not an essential part of the procedure for obtaining damages. The important thing for the individual who has a claim against the state, arising in connection with the ownership or operation by it of a ship, is to get satisfaction for the damage which he has sustained, and the notion that a judgment against the state is worthless unless the creditor has the right to seize the ship, is a fallacy. The right of attachment which is allowed in the case of a suit against a privately-owned ship is based on the principle that the private owner may be insolvent and, therefore, unable to pay the amount of the judgment, or he may refuse to pay it, in which case the seizure of the vessel may be a necessary remedy. In the case of judgments against the state, however, the situation is entirely otherwise. The state is not likely to be insolvent, and the presumption that it would refuse to pay a judgment recovered against it in pursuance of an international convention to which it is a party, is not admissible. Professor Matsunami, while advocating the complete abolition of the immunity of state-owned or operated ships so far as their liability to suits for damages is concerned, favors their immunity from arrest as a means of enforcing judgments against them. Other high authorities on the subject, among them Sir Norman Hill, judge of the Probate, Divorce and Admiralty Division of the English High Court of Justice, adopt the contrary view and maintain that all state-owned or operated ships, without exception, should be liable to arrest equally with privately-owned ships, for the enforcement of judgments recovered against them. Considerations of simple justice and equality, they argue, require that no distinction, either as to their liability and the procedure for enforcing it, should be made between public and private vessels. The great preponderance of opinion is, however, against this extreme view. Clearly, there are important reasons of public policy why ships engaged wholly or mainly in the public service of the state, and especially war vessels, should not be subject to arrest and attachment at the instance of a private suitor; otherwise the performance of some of the essential public services of the state may be seriously interfered with. But manifestly these considerations do not apply in the case of state-owned ships employed as ordinary carriers of commerce. In any case, as stated above, it is not likely that the remedy of attachment will ever be necessary to insure the enforcement of judgments against the state.

The Gothenburg draft convention contained no pronouncement on this matter, but at the Genoa Conference an amendment was adopted which declares that warships, state yachts, patrol ships, hospital ships and other vessels belonging to a government, or operated by it, and employed exclusively in other than commercial work, shall not be liable to attachment, and the same immunity is accorded cargoes transported for governmental and non-commercial purposes on board ships belonging to or operated by the state.

This leaves only state vessels which are employed as ordinary common carriers liable to attachment. They are, therefore, on a footing of equality with privately-owned ships in respect to their liability to seizure for the execution of judgments against them, and there would seem to be no good reason why they should be otherwise.

On the principle that in time of war the immunity of public vessels from interference ought to be larger than in time of peace, the Genoa draft convention provides that ships belonging to a belligerent state or managed by it—apparently including even those which are employed as ordinary commerce carriers—and cargoes belonging to such state or borne on such ships, shall not be liable to attachment, seizure or detention by a foreign court of justice. But, by the express terms of the convention, suits may be brought during the war against such ships or cargoes in the courts of the state which owns or manages them. Whether they may be subjected to attachment or seizure will, presumably, be determined by the state itself.

Finally, as to the application of the proposed convention, the Gothenburg draft declared that its provisions should "be applied in all cases where the claimant is a citizen of one of the contracting parties," subject to the provision that nothing in the convention should prevent any of the contracting states from determining by its own legislation the rights of its own citizens before its own courts. This means that only citizens of a state which is a party to the convention can invoke its benefits in claiming damages for injuries committed by the ships of a foreign state, and that the liability of a state to its own citizens may be determined by it without regard to the rules of the convention.

At the Genoa Conference of the International Maritime Committee a new article was added to the Gothenburg draft, which declares that the convention shall not be binding on a belligerent state in respect to claims arising during the period of belligerency. The effect of this restriction is to limit to peace times the liabilities and obligations of states in respect to claims arising out of the operation of ships belonging to them or under their control, as those liabilities and obligations are fixed by the convention. In this respect it is analogous to the International Air Convention of 1919, which is binding on the parties only in time of peace.

Such, in summary form, are the proposals of the International Maritime Committee and which, in the main, are approved by the subcommittee of the Committee on Progressive Codification, although, as stated in the beginning of this note, the committee itself declined to pronounce in favor of or against them, since that did not seem necessary in determining whether the regulation of the subject by international agreement was desirable and practicable. The committee, however, in its report adverted to the work of the conferences at Gothenburg and Genoa and called attention to a draft convention which has been submitted to the Government of Belgium with a request that the Belgian Government call a diplomatic conference to prepare a conven-

tion for adoption and signature by the various states. It added that, in case the Belgian Government should comply with the request, it might seem superfluous for the committee to transmit the subject to the various governments in accordance with the resolution of the assembly providing for the appointment of the committee. In these circumstances the committee decided to transmit the report of the subcommittee to the Council of the League, with an expression of opinion that the subject is one which it is desirable and at present practicable to regulate by international agreement, either in the manner proposed by the International Maritime Committee, or in such other manner as the Council may deem appropriate.

As to the general principle, namely, the abolition of the distinction between the liability of the state and that of private individuals in respect to claims arising out of the ownership or operation of ships, there is now virtual unanimity of opinion among text writers, jurists and experts on maritime law and usage. A few, like the learned Professor Rippert, of Paris, would make an exception only in the case of warships, which he thinks should be exempt from damage suits.¹ But the vast majority of present-day authorities are opposed to any exceptions whatever, although most of them favor relieving state vessels which are employed in services of a distinctly public character, as contradistinguished from that of ordinary trade, from liability to seizure and attachment. The now generally accepted view is thus stated by Mr. Justice Hill of the English Admiralty Court: "If sovereign states engage in trade and own trading ships of their own, or use trading ships of private persons, they should submit to the ordinary jurisdiction of their own and foreign courts, and permit those courts to exercise that jurisdiction by the ordinary methods of writ and arrest."² As stated above, he goes even to the length of maintaining that warships and other public vessels should be placed on the same footing with vessels engaged in ordinary commerce, both in respect to their responsibility for damages and their liability to seizure and attachment in execution of judgments against them. Judge Loder, member of the Permanent Court of International Justice, also maintains that when a state goes into the business of manufacturing or shipping, it should answer before the courts for the damages which individuals sustain in consequence of its acts. M. André Weiss, likewise a judge of the Permanent Court of International Justice, in his lectures before the Academy of International Law in 1924³ vigorously defended the same thesis, and so does Dr. Matsunami in his work cited above. The same view has recently been expressed by numerous other authorities.⁴

¹ See his article in the *Revue Internationale du Droit Maritime*, Vol. 34 (1922), pp. 22-23.

² Note on Immunity of Sovereign States in Respect of Proceedings against Maritime Property.

³ *Recueil des Cours*, 1924, t. I, pp. 531 ff.

⁴ The opinions of some of them are cited in my article "Immunities of State-Owned Ships Employed in Commerce," *British Year Book of International Law*, 1925, p. 128 ff.

The admiralty courts, in many cases which have recently come before them, while sometimes upholding the old doctrine of immunity, have not hesitated to express their regret at being obliged by the doctrine of *stare decisis* to support a theory which must be condemned upon every principle of justice and public policy. A few, like Judge Mack of the United States District Court for the Southern District of New York, have repudiated the ancient doctrine of immunity and laid down the principle that a foreign vessel employed as an ordinary merchant ship in time of peace should be immune neither from damage suits nor from arrest or attachment (*The Pesaro*, 1921, 277 Fed. Rep. 473).

As I write these lines, the Supreme Court of the United States has overruled this decision of Judge Mack, and affirmed the principle that a foreign state-owned vessel, employed as an ordinary commerce carrier, is entitled to the same immunity as a warship or other public vessel, and is not therefore liable to seizure or attachment.⁵ The court relied upon the doctrine enunciated by Chief Justice Marshall in the case of the *Exchange* (which related only to the status of warships), and held that the principle laid down by him was equally applicable to a state-owned vessel engaged in the carrying trade, when, as in the present case, the purpose of the service was to increase the revenue of the state and the advancement of the economic welfare of the country owning the ship. The *Pesaro* must therefore be regarded as a public vessel and accordingly entitled to the immunities heretofore recognized as belonging to such vessels. The effect of this decision is virtually to sweep away the now generally recognized, and, it is believed, perfectly natural distinction between state vessels operated for distinctly public purposes and those operated as ordinary commerce carriers, since if a ship operated in the latter capacity must be regarded as a public vessel because it earns revenue and increases the economic power of the state, it is hard to conceive any vessel operated by the state as being other than a public vessel. The principle of this decision is contrary to the now almost universal opinion of jurists, it is contrary to the conclusions of the International Maritime Committee, of the subcommittee of the Committee on Codification, and of the expressed opinions of two judges of the Permanent Court of International Justice. It is a reaffirmation of the ancient doctrine of immunity which grew up in an age when the operation of merchant vessels by the state was unknown, and when all state-owned or operated ships were in a real sense public vessels, and when there was some excuse for the immunities which were accorded them. Today, when conditions are wholly different and when thousands of state-owned vessels are engaged in the ordinary carrying trade in competition with privately owned vessels, a judicial pronouncement by the highest court of one of the great Powers, which affirms that such vessels must still be regarded as public vessels and entitled

⁵ *Berizzi Bros. Co. v. The Steamship Pesaro* [June 7, 1926]. Printed in *Judicial Decisions* in this JOURNAL, *post*.

to special immunities which their private competitors do not enjoy, only serves to accentuate the necessity of an international agreement which will remove the anomalous and unjust inequality which, in the opinion of the Supreme Court of the United States, is still the law of the United States, if not the law of nations.

J. W. GARNER.

JAPANESE DRAFT CODE OF INTERNATIONAL LAW

Inspired no doubt by the invitation of the League of Nations Committee of Experts for the Progressive Codification of International Law, the Japanese branch of the International Law Association, jointly with the International Law Association of Japan, has prepared and adopted a series of nine projects as parts of a Draft Code of International Law. They are entitled as follows:

- I. Principles concerning the acquisition and loss of nationality.
- II. Rules concerning responsibility of a state in relation to the life, person and property of aliens.
- III. Rules concerning the jurisdiction of offences committed abroad and concerning extradition.
- IV. Rules concerning the extent of littoral waters and of powers exercised therein by the littoral state.
- V. Rules concerning the status of men-of-war and other public vessels.
- VI. Rules concerning the privileges and immunities of diplomatic agents.
- VII. Rules concerning the functions and privileges of consuls.
- VIII. Rules concerning the treatment of aliens, their admission and expulsion by a state.
- IX. Principles for the equitable treatment of commerce.

Seven of these are upon the first tentative list of subjects adopted by the Geneva Commission as more or less suitable for codification. Two others, one as to the status of ships of war, the other as to the admission and treatment of aliens, are added, the latter of extreme interest. Taken as a whole, these draft projects exhibit the great difficulties of such undertakings, and direct attention to the wisdom of the procedure adopted by the Geneva Commission in laying the foundation for ultimate formulation by preliminary studies, questionnaires, and reports. To some extent the drafts represent the law as it is, or, in other words, they are statements by a group of experts of the positions which an international court might reasonably take, were cases involving the legal propositions actually before it. Others express what it is conceived the law ought to be, not necessarily as regards so-called "gaps" in the law, but as changing fairly definite rules of law as recognized in state practice.

It would be scarcely less than human if national proclivities, if not national policies, failed to make their impression, and to that extent adoption by

general consent of such draft rules is unlikely. This is best illustrated by the Draft Convention concerning the admission and treatment of aliens, wherein it is proposed that a state be forbidden "without reasonable cause" to refuse the admission of aliens to its territory, but more particularly (Article X) "in all that relates to the admission of aliens, their treatment, expulsion, and any other matter provided in these rules, no state shall have the right to establish any discrimination either directly or indirectly on the sole ground that an alien is of a certain nationality or belongs to a certain race." The same situation confronts Article VI of the draft rules on nationality: "A state shall not make any discrimination between individuals on the ground of race, nationality or religion in the matter of naturalization or other mode of the acquisition of nationality."

Space does not permit a detailed examination of these projects, which deserve wide circulation and study. They are an additional indication of the thoughtful attention which the problem of codification is receiving in all parts of the world.

J. S. REEVES.

SOME RECENT CASES ON THE STATUS OF MANDATED AREAS

Recent decisions from Palestine serve to illustrate the legal distinction between territories under mandate and colonies.

The Urtas Springs case aroused considerable popular interest in Palestine in the fall of 1925 because the Palestine Supreme Court's decision¹ encouraged the Arabs to believe that the British courts were prepared to give them the full protection of the mandate against Zionist encroachments. This decision, though reversed with respect to the immediate subject matter, on appeal to the Judicial Committee of the Privy Council² was sustained with respect to the legal character of the mandate.

During the drought in May, 1925, the District Governor of Jerusalem diverted water from Urtas Springs, some distance out of Jerusalem, to Solomon's Pond, within the walls, in order to supply Jerusalem with necessary water, or, as the Arabs contended, to assist Zionist immigrants to build houses. This was done under authority of the Urtas Springs Ordinance, issued by the High Commissioner on May 25, in pursuance of the Palestine (Amendment) Order in Council of May, 1923. The ordinance authorized the taking of water from Urtas Springs, leaving enough for drinking and domestic purposes and for watering animals and irrigating permanent plantations. A procedure of arbitration was provided for determining the amount of water necessary for these purposes, but there was no provision for compensation in case this amount fell short, though compensation was

¹ *Murra v. The District Governor of Jerusalem*, June 25, 1925. Not reported, but opinion seen in manuscript.

² *Jerusalem-Jaffa District Governor v. Murra*, L. R. (1926), A. C. 321.

provided for losses to annual crops or for inability to plant them, because of the diversion authorized.

The inhabitants of Urtas sought to restrain the diversion on the ground that the ordinance was void because it violated Article 2 of the mandate, which made the mandatory responsible "for safeguarding the civil and religious rights of all the inhabitants of Palestine irrespective of race and religion." The Palestine Order in Council of 1922 and the amendment of 1923, to which the court and the administration immediately owed their authority, specifically required that "no ordinance should be promulgated which should be in any way repugnant to or inconsistent with the provisions of the mandate." Pursuant to this instruction and to "the general rule that the validity of laws made by a legislature which is not sovereign, but the creature of some instrument of government, may be questioned by the local courts on the ground that they are repugnant to some provision to be found in that instrument," the court brought the ordinance to the test of the mandate.

This reasoning, highly suggestive of Chief Justice Marshall's argument in *Marbury v. Madison*,³ was reached with "great reluctance." "The mandate," said Corrie, J., "is an instrument of diplomacy in the language of diplomacy. It lays down for the guidance of the mandatory certain general principles of government expressed in part in Article 21 in the form of definite instructions; elsewhere, as in Article 3, in the form of broad and somewhat vague declarations of policy. That the courts should be required to determine whether any given legislative or executive act is or is not inconsistent with articles of this character is most unfortunate. Nevertheless, such I hold is the effect of the Order in Council." With this, Haycraft, C. J., agreed: "The mandate is a political and not a legal document and likely to contain expressions of good intention which are more easy to write than to read. We are, however, bound to read them and give them a practical value."

Comparing the ordinance with the provision of the mandate cited, the court found that it failed to "safeguard the civil rights of all the inhabitants because it is a recognized principle of sound legislation that when private property is taken for public purposes, the persons damaged by such taking should be adequately compensated," which was not done here in all cases.

On appeal, the Judicial Committee of the Privy Council agreed that by the terms of the Order in Council "it was the right and duty of the court to examine the terms of the mandate and to consider whether the ordinance was in any way repugnant to those terms," but on the issue of such repugnancy they differed. "Their Lordships agree that in such a case, and in the absence of exceptional circumstances, justice requires that fair provision shall be made for compensation, but this depends, not upon any civil right, but (as the Chief Justice said) upon principles of sound legislation; and it

³ 1 Cranch, 137 (1803).

cannot be the duty of the Court to examine (at the instance of any litigant) the legislative and administrative acts of the Administration, and to consider in every case whether they are in accordance with the view held by the Court as to the requirements of natural justice."

This conclusion greatly narrows the conception of "civil rights" and leaves the interpretation of the mandate in most cases to the legislative and administrative authorities, thus rendering the principle of judicial cognizance of the mandate of little practical value. It is undoubtedly in accordance with the conception of judicial functions usual in British courts, though not in American courts. Although the latter do not often invalidate legislation on the ground that it is contrary to "natural justice,"⁴ they do not hesitate to bring it to the test of constitutional phrases like "due process of law" and "equal protection of the laws," which are as vague as the clause of the mandate here in question.

In another case decided by the Supreme Court of Palestine soon after the Urtas Springs case, the court adopted practically the view subsequently taken by the Judicial committee.⁵ The word Palestine was printed on the postage stamps in three official languages, English, Arabic and Hebrew, but after the Hebrew text appeared the letters "E. I.," signifying "Eretz Israel" or the Land of Israel. This aroused intense feeling among the Arabs, who saw a veiled recognition of the most extreme Zionist aspirations, and an effort was made to enjoin the use of these initials on the ground of incompatibility with the mandate provision that any "statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew, and any statement or inscription in Hebrew shall be repeated in Arabic." The Supreme Court, however, refused to grant the injunction on the ground that the form of the word Palestine in each language was a matter of administrative discretion.

From these cases it appears that the Palestine Order in Council recognizes the mandate as a limitation enforceable by the courts upon the mandatory's legislative power, but that, in accord with British traditions, the courts will presume that the government in performing political and administrative acts has correctly interpreted the rather vague terms of that instrument. In other words, fulfillment of the mandate in most respects is entrusted to the political rather than the judicial arm of the mandatory. The present writer is inclined to believe that responsibility to the local judiciary as well as to the home political authorities and to the Council of the League of Na-

⁴ American courts have sometimes intimated that natural law might be a ground for declaring statutes void: *Terrett v. Taylor*, 9 Cranch, 43; *Downes v. Bidwell*, 182 U. S. 244, 288; as indeed did English courts in some seventeenth century cases: *Day v. Savadge*, Hobart 85, 87; *Dr. Bonham's Case*, 8 Rep. 114 a, 4 Rep. 234; Thayer, *Cases on Constitutional Law*, Vol. I, p. 48, *et seq.*; Wright, *The Enforcement of International Law through Municipal Law in the United States*, p. 224.

⁵ The writer has not seen the text of this opinion, but was informed of its substance while in Jerusalem.

tions would give better assurance of administration in the spirit of the mandates. That the mandates are intended to be documents susceptible of judicial interpretation is indicated by the provision found in all of them that "any dispute whatever arising between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice." This article in the Palestine mandate has already been applied in the *Mavrommatis Palestine Concessions case*,⁶ and according to the principle of that case it would appear that, if any of the injured inhabitants of Urtas had been nationals of another member of the League, that state, failing to receive satisfaction by negotiation, could have required the Permanent Court of International Justice to interpret Article 2 of the mandate and decide whether the Urtas Springs Ordinance did or did not conform to it. It may be noted that the Judicial Committee appears to have had some doubt of the major grounds for its decision, because it thought it advisable to buttress it by an elaborate argument showing that the ordinance did in fact make all the provision for compensation that justice required.

Another case⁷ before the Palestine Supreme Court applied the decision of the League of Nations Council that inhabitants of mandated territory are not to be regarded as nationals of the mandatory Power. Italy sought the extradition of certain ex-Ottoman subjects, resident in Palestine, under the Anglo-Italian treaty of 1873. The latter petitioned for a writ of *habeas corpus* on the ground, among others, that they were exempt from extradition under the treaty provision exempting "subjects of the United Kingdom," and that even if they could not come under this designation, the treaty, which by the terms of the mandate was extended to Palestine, must be construed to extend the exemption to "Palestinian nationals." The court refused the petition, with the assertion

to hold that the petitioners are British subjects would involve holding that the crown, having accepted the responsibility of governing Palestine as a mandatory, has thereby acquired sovereignty, a view for which no authority has been cited. As regards the alternative plea; it may be doubted whether a "Palestinian citizen" has at present any existence.⁸ But it is unnecessary to consider that question, as I hold that in applying the Anglo-Italian treaty to Palestine, Article 3 of the Treaty is to be taken to exempt from extradition only British subjects, which the petitioners are not.

Exception may be taken to the latter part of this opinion. The principle of trusteeship for "the well being and development" of the inhabitants of mandated territories announced in Article 22 of the Covenant indicates that

⁶ Publications of the Permanent Court of International Justice, Series A, Nos. 2, 5.

⁷ *Re Ezra Goralskvih*, 1925, not reported, but opinion seen in manuscript.

⁸ An ordinance of Palestinian citizenship has since been promulgated.

the provisions of the mandates should be construed for the benefit of the inhabitants.⁹ Thus it would appear that when Great Britain and Italy, as members of the League, approved Article 10 of the Palestine Mandate applying "extradition treaties in force between the mandatory and other foreign powers to Palestine," they intended to give the inhabitants of Palestine whatever benefits the treaty gave to British subjects. The contrary view taken by the court would seem to withhold from the inhabitants of mandated territories the benefits of trade, civil rights, or other treaties of the mandatory which might be extended to mandated territory. Thus the object aimed at by the Mandates Commission in urging extension of such treaties to mandated territory would be defeated.¹⁰ The principle of trusteeship seems to require that, whenever a treaty is extended to mandated territory¹¹ the inhabitants of that territory be assimilated to nationals of the mandatory with respect to the benefits as well as the burdens of the treaty. The part of the court's decision denying the mandatory's sovereignty over the inhabitants and territory of all mandated areas reiterates the now established law on that subject.¹²

QUINCY WRIGHT.

⁹ This was emphasized by the Chairman of the Mandates Commission, 3rd session, Minutes, pp. 203, 205, 207.

¹⁰ Permanent Mandates Commission, 3rd session, Minutes, p. 310, 6th session, pp. 100, 116, 169, 172.

¹¹ The application of a treaty to mandated territory, or the making of a treaty in regard to such territory, is likely to place permanent burdens on the territory or its inhabitants, or to confer upon the other contracting party privileges in the mandated territory not enjoyed by members of the League of Nations generally. Such effects are in danger of violating the terms of the mandate assuring administration for the benefit of the inhabitants, and equal economic opportunity for members of the League. In view of the fact that subsequent discovery of such violations by the Mandates Commission or the League Council could not in the case of a treaty be remedied by action of the mandatory Power alone as it could in the case of legislation, it would seem desirable that the Council's consent be given before any treaty is made applicable to mandated territory, unless such application has been expressly provided for in the mandate itself. See references, *supra*, note 10, and Wright, Michigan Law Review, May, 1925, pp. 30-31.

¹² Wright, this JOURNAL, Vol. 17, p. 695, Vol. 18, p. 306.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16, 1926—AUGUST 15, 1926
(With references to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *C. A. P.*, Collection of Advisory Opinions of Permanent Court of International Justice; *C. J.*, Collection of Judgments of the Permanent Court of International Justice; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Cur. Hist.*, Current History (New York Times); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *G. B. Treaty Series*, Great Britain, Treaty series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty Series; *Nation* (N. Y.); *N. Y. Times*, New York Times; *P. A. U.*, Pan American Union Bulletin; *Press notice*; U. S. State Dept. press notice; *Rev. int. de la Croix-Rouge*, Revue internationale de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

November, 1925.

- 30 GREAT BRITAIN—GREECE. Signed treaty regarding damage caused by British troops in Greece. Text: *G. B. Treaty Series*, no. 13 (1926), *Cmd.* 2668.

December, 1925

- 14-20 GREAT BRITAIN—ITALY. Exchanged notes respecting Lake Tsana and economic spheres of interest in Abyssinia. Text: *G. B. Treaty Series*, no. 16 (1926), *Cmd.* 2680.

January, 1926

- 2 CZECHOSLOVAKIA—SWEDEN. Signed treaty of conciliation and arbitration. *U. S. Daily*, July 22, 1926, p. 2.
- 6-12 SIAM—STRAITS SETTLEMENTS. Signed additional articles amending agreement for exchange of postal parcels, signed at Singapore Nov. 7 and 15, 1921. *U. S. Daily*, July 22, 1926, p. 2.
- 9 NETHERLANDS—NORWAY. Signed at Oslo a convention of reciprocity regarding indemnity to sailors and industrial workers in case of accident. *U. S. Daily*, July 22, 1926, p. 2.
- 16 FRANCE—LUXEMBURG. Signed arrangement at Paris regarding reciprocal reduction of taxes and duties. *U. S. Daily*, July 22, 1926, p. 2.
- 18 ESTHONIA—GREAT BRITAIN. Signed treaty of commerce and navigation at Reval. Text: *G. B. Treaty Series*, no. 19 (1926), *Cmd.* 2709.

February, 1926

- 2 BELGIUM—GREAT BRITAIN. Exchanged notes regarding accession of Belgian Congo to Anglo-Belgian civil procedure convention of June 21, 1922. *U. S. Daily*, July 22, 1926, p. 2.

March, 1926

- 13 DENMARK—SIAM. Exchanged ratifications of treaty of friendship, commerce and navigation based on most-favored-nation principle, signed Sept. 1, 1925. *Commerce Reports*, June 28, 1926, p. 812.

- 22 ARGENTINA—AUSTRIA. Signed convention on reciprocity in payment of labor accident compensation. *P. A. U.*, July, 1926, p. 720.
- 22 DENMARK—TURKEY. Exchanged notes constituting a provisional commercial agreement. *U. S. Daily*, July 22, 1926, p. 2.

April, 1926

- 9 NORWAY—SOVIET UNION. Signed declaration concerning mutual recognition of tonnage certificates. *U. S. Daily*, July 22, 1926, p. 2.
- 11 CZECHOSLOVAKIA—TURKEY. Provisional commercial agreement arranged by exchange of notes, replacing the agreement of Aug. 6, 1925. *Commerce Reports*, Aug. 30, 1926, p. 563.
- 12 DENMARK—GERMANY. Exchanged notes constituting an agreement regarding admission free of duty of removal lorries. *U. S. Daily*, July 22, 1926, p. 2.
- 14 FRANCE—ICELAND. Agreement regarding system of certificates of origin and consular invoices arranged by exchange of notes. *U. S. Daily*, July 22, 1926, p. 2.
- 20 FINLAND—HUNGARY. Exchanged ratifications of convention of commerce and navigation signed at Helsingfors May 29, 1925. *U. S. Daily*, July 22, 1926, p. 2.
- 20 INSTITUTE FOR UNIFICATION OF PRIVATE LAW. League of Nations Council confirmed acceptance of conditions under which Italian Government offered to found and maintain the Institute at Rome. Statutes of Institute: *L. N. O. J.*, June, 1926, p. 812.
- 21 CZECHOSLOVAKIA—POLAND. Supplementary commercial treaty signed, effective May 1. *Commerce Reports*, July 26, 1926, p. 244.
- 22 PERSIA—TURKEY. Signed treaty of friendship and security at Teheran. Text: *B. of Int. News, Spec. Suppl.*, July 12, 1926. *European Econ. and Pol. Survey*, July 15, 1926.
- 26 to May 1 INTERNATIONAL ECONOMIC CONFERENCE. Preparatory committee, organized under auspices of League of Nations, held sessions in Geneva. *L. N. O. J.*, June, 1926, p. 816.
- 30 LATVIA—UNITED STATES. Ratification of provisional commercial agreement of Feb. 1, 1926, notified to the Government of the United States. *U. S. Treaty Series*, no. 740.

May, 1926

- 4 BELGIUM—SWEDEN. Signed arbitration treaty. *C. S. Monitor*, May 5, 1926, p. 1.
- 4 ESTHONIA—NETHERLANDS. Exchanged ratifications of most-favored-nation commercial treaty signed July 22, 1924. *Commerce Reports*, June 21, 1926, p. 746.
- 5 BELGIUM—FRANCE—GREAT BRITAIN. Tariff arrangement relative to aerial navigation signed at Paris. Text: *J. O.*, June 27, 1926, p. 7106.
- 5 GERMANY—LITHUANIA. Exchanged ratifications of limited most-favored-nation treaty, signed June 1, 1923. *Commerce Reports*, June 28, 1926, p. 812.
- 10-12 INTER-GOVERNMENTAL CONFERENCE. Convened at Geneva to examine suggestions for creation and administration of a fund to assist migration of Russian and Armenian refugees and improvement of systems of refugee identity certificates. *I. L. O. B.*, July 30, 1926, p. 121.
- 10 to June 12 INTERNATIONAL HEALTH CONFERENCE. Held at Paris, with 57 nations represented, to revise sanitary convention signed in Paris Jan. 17, 1912. *N. Y. Times*, June 12, 1926, p. 4.
- 10-18 LEAGUE OF NATIONS COUNCIL. Committee on the composition of the Council adopted report to be made to the Council. Text: *G. B. Misc. Series*, no. 6 (1926), Cmd. 2865. *L. N. M. S.*, May, 1926, p. 117.

- 11 ESTHONIA—GREAT BRITAIN. Exchanged ratifications of extradition convention signed at London Nov. 18, 1925. Text: *G. B. Treaty Series*, no. 18 (1926), *Cmd.* 2708.
- 12-18 PASSPORT CONFERENCE. Second conference, convened by Council of the League, met at Geneva, with 38 states represented, and adopted a series of recommendations. *L. N. M. S.*, May, 1926, p. 123.
- 17-22 DOUBLE TAXATION CONFERENCE. Experts appointed by Council of League of Nations to study questions of double taxation and tax evasion met at Geneva. *L. N. O. J.*, May, 1926, p. 123.
- 20 GERMANY—NETHERLANDS. Arbitration and conciliation treaty signed at the Hague. Text: *U. S. Daily*, Sept. 7, 1926, p. 2.
- 20 GREAT BRITAIN—NETHERLANDS. Signed agreement for reciprocal exemption from income taxes in certain cases. Text: *G. B. Treaty Series*, no. 14 (1926), *Cmd.* 2669.
- 20 GREAT BRITAIN—PORTUGAL. Signed agreement in regard to tonnage measurement of merchant ships. Text: *G. B. Treaty Series*, no. 15 (1926), *Cmd.* 2670.
- 24 HOLLAND, SIR THOMAS ERSKINE. Professor of International Law at Oxford, died at the age of 90. *Times*, May 25, 1926, p. 19.
- 25 GERMANY—PORTUGAL. Exchanged ratifications of commercial agreement signed March 20, 1926. *Commerce Reports*, June 28, 1926, p. 812.
- 25 GREAT BRITAIN—ITALY. Money order convention signed at London March 4, 1872, denounced by Great Britain. *U. S. Daily*, July 22, 1926, p. 2.
- 25 GREAT BRITAIN—PARAGUAY. Exchanged notes concerning termination of commercial treaty of Sept. 16, 1884. *U. S. Daily*, July 22, 1926, p. 2.
- 25 INTERNATIONAL PARLIAMENTARY COMMERCIAL CONFERENCE. Twelfth assembly opened in London with 200 delegates representing 40 countries, and German representatives attending for first time since the war. *Times*, May 26, 1926, p. 9.
- 25 PERMANENT COURT OF INTERNATIONAL JUSTICE. Rendered judgment in cases of certain German interests in Polish Upper Silesia, and declared tenth (extraordinary) session of the court closed. *L. N. M. S.*, May, 1926, p. 106.
- 25 to June 5 RED CROSS. Second Pan American Red Cross conference held in Washington. *N. Y. Times*, May 26, 1926, p. 1. *P. A. U.*, Sept., 1926, p. 860.
- 26 DISARMAMENT CONFERENCE. Preparatory commission made report to Council on work of its first session, held at Geneva, May 18-26, 1926. Text: *G. B. Misc. Series*, no. 7 (1926), *Cmd.* 2681. *L. N. M. S.*, May, 1926, p. 110. On July 5 the Commission adjourned and assembled again on Aug. 2. *Cur. Hist.*, Sept., 1926, 24: 943.
- 26 to June 24 INTERNATIONAL LABOR CONFERENCE. Eighth ordinary session held at Geneva, May 26 to June 5. The ninth, devoted to maritime questions, from June 7 to 24. Draft conventions and recommendations: *I. L. O. B.*, July 30, 1926, suppl.
- 27 FRANCE—SAAR TERRITORY. Convention signed at Sarrebruck concerning administration of workmen's provident funds. Text: *J. O.*, June 20, 1926, p. 6771.
- 28 FRANCE—HAITI. Commercial treaty of 1907 abrogated, effective July 27, 1926. *Commerce Reports*, June 28, 1926, p. 812.
- 28 FRANCE—LUXEMBURG. Agreement for administration of convention of assistance, signed Jan. 4, 1923, arranged by exchange of notes. *J. O.*, May 7, 1926, p. 5235.
- 30 FRANCE—TURKEY. Agreement on Syria and the Lebanon signed at Angora on May 30, 1926, promulgated in France on Aug. 22. Text: *J. O.*, Aug. 27, 1926, p. 9706.

- 31 ESTHONIA—SWEDEN. Exchanged ratifications of commercial treaty signed Oct. 14, 1925. *Commerce Reports*, July 19, 1926, p. 181.

June, 1926

- 1 GERMANY—SPAIN. Most-favored-nation commercial treaty signed May 7, 1926, came into force. *Commerce Reports*, June 14, 1926, p. 691.
- 2 DENMARK—GERMANY. Signed treaty of arbitration in Berlin. *B. of Int. News*, June 14, 1926.
- 3 GERMANY—GUATEMALA. Most-favored-nation commercial treaty signed at Guatemala City on Oct. 4, 1924, came into force. *Commerce Reports*, Aug. 2, 1926, p. 304.
- 5 GERMANY—HONDURAS. Most-favored-nation treaty signed at Guatemala City on March 4, 1926, came into force. *Commerce Reports*, July 12, 1926, p. 116.
- 5 MOSUL AGREEMENT. Treaty regarding settlement of frontier between Turkey and Iraq signed at Angora on behalf of Great Britain, Iraq and Turkey. Text of treaty, notes, and annexes concerning payment of oil royalties: *G. B. Turkey*, no. 1 (1926), *Cmd.* 2679. *U. S. Daily*, June 17, 1926, p. 16.
- 7 OIL POLLUTION CONFERENCE. Opened in Washington on June 1 with representatives from Belgium, British Empire, Denmark, France, Germany, Italy, Japan, Netherlands, Norway, Spain and Sweden: *Press notice*, June 8, 1926. Closed on June 16 after adopting report to governments represented. *U. S. Daily*, June 17, 1926, p. 3. This JOURNAL, July, 1926, 20: 555. *Cmd.* 2702.
- 7-10 LEAGUE OF NATIONS COUNCIL. Held 40th session at Geneva to consider question of composition of the Council, termination of work on Austrian and Hungarian reconstruction, preparations for World Economic Conference, settlement of refugees, etc. *L. N. M. S.*, June, 1926, p. 123.
- 8-25 LEAGUE OF NATIONS PERMANENT MANDATES COMMISSION. Held 9th session at Geneva to consider annual reports on mandates, the situation in Syria and Lebanon, petitions, etc. *L. N. M. S.*, June, 1926, p. 145.
- 9 AUSTRIA—CZECHOSLOVAKIA. Arbitration treaty signed March 5, 1926, came into force in Austria. *U. S. Daily*, July 13, 1926, p. 2.
- 12 BRAZIL AND THE LEAGUE. Government of Brazil notified the League of Nations of her resignation from membership in the League. *Times*, June 15, 1926, p. 16. *L. N. M. S.*, June, 1926, p. 135. *Europe*, July 10, 1926, p. 958.
- 14 LITTLE ENTENTE ALLIANCE. Convention signed at Bucharest, extending defensive alliance between Rumania, Serbia and Czechoslovakia for a further period of 3 years. *Times*, June 15, 1926, p. 15.
- 14 TACNA—ARICA. On June 14, General Lassiter issued statement outlining reasons for voting to abandon the plebiscite as a means of settling the dispute between Chile and Peru. Text: *Cur. Hist.* Aug., 1926, 24: 709. *U. S. Daily*, June 18-19, p. 7. Chile's official reply to Lassiter's statement issued on June 21, in form of cablegram to all Chilean representatives abroad. Text: *U. S. Daily*, June 22, 1926, p. 1. On June 22, Señor Augustin Edwards' reply for Chile to Lassiter's statement was made public. Text: *U. S. Daily*, June 24, 1926, p. 11. On June 24, cabled statement from Foreign Office of Peru, replying to Chile's circular telegram, was made public. Text: *U. S. Daily*, June 25, 1926, p. 1.
- 15 INTERNATIONAL JURIDICAL UNION. Met in Paris to consider questions relating to Covenant of the League, the United States and the Permanent Court of International Justice, and the codification of international law. *Temps*, June 23, 1926, p. 6.

- 15 to July 23 PERMANENT COURT OF INTERNATIONAL JUSTICE. Eleventh (ordinary) session opened on June 15 to consider request of League of Nations Council for advisory opinion concerning competence of International Labor Organization to propose labor legislation which, in order to protect certain classes of workers, also regulates the same work when performed by the employer himself. *L. N. M. S.*, June, 1926, p. 129. On July 23, at a public hearing, court replied to the question in affirmative. It continued to sit in private to finish revision of Rules of Court published on March 29, 1922. *L. N. M. S.*, July, 1926, p. 157.
- 15 REPARATION COMMISSION. Agent General for Reparation Payments issued report for the second annuity year, to June 1, 1926. *Cur. Hist.*, Sept., 1926, 24: 963.
- 18 CUBA—UNITED STATES. Exchanged ratifications of additional extradition treaty, signed Jan. 14, 1926. *U. S. Treaty Series*, no. 737. Supplement to this JOURNAL, p. 135.
- 18 CUBA—UNITED STATES. Exchanged ratifications of convention for prevention of smuggling of intoxicating liquors, signed March 4, 1926. *U. S. Treaty Series*, no. 738. Supplement to this JOURNAL, p. 136.
- 18 CUBA—UNITED STATES. Exchanged ratifications of convention to suppress smuggling, signed March 11, 1926. *U. S. Treaty Series*, no. 739. Supplement to this JOURNAL, p. 141.
- 18 GREAT BRITAIN—SERBIA. Signed most-favored-nation commercial agreement at Belgrade. *Commerce Reports*, Aug. 9, 1926, p. 369. Text: *G. B. Treaty Series*, no. 25 (1926).
- 18-25 PAN AMERICAN CONGRESS CENTENARY. Delegates from the 21 American Republics assembled in Panama to commemorate the first Pan American Congress, called by Simon Bolivar, June 22, 1826. *Cur. Hist.*, Aug., 1926, 24: 786.
- 19 ABYSSINIA. Addressed note of protest to League of Nations against British-Italian agreement concerning British concession for conservation of waters of Lake Tsana and Italian concession for railway through Abyssinia. *L. N. M. S.*, July, 1926, p. 172.
- 22 WORLD MIGRATION. Congress, organized by International Federation of Trade Unions and the Labour and Socialist International opened in London to discuss subject of world migration. *Times*, June 23, 1926, p. 13.
- 24 ESTHONIA—GREAT BRITAIN. Exchanged notes regarding tonnage measurement of merchant ships. *G. B. Treaty Series*, no. 17 (1926), *Cmd.* 2693.
- 24 GREAT BRITAIN—ITALY. Exchanged notes for reciprocal recognition of proof marks on firearms. Text: *G. B. Treaty Series*, no. 21 (1926), *Cmd.* 2728.
- 24 HAGUE PEACE CONFERENCE. H. J. Res. 221, providing for the calling of a third peace conference at The Hague, passed the House of Representatives. *U. S. Daily*, June 25, 1926, p. 1.
- 26 FINLAND—GERMANY. Signed most-favored-nation commercial treaty. *Commerce Reports*, July 19, 1926, p. 181.
- 28 GERMANY—LATVIA. Signed most-favored-nation commercial treaty, which includes settlement of war claims. *Commerce Reports*, July 12, 1926, p. 116.
- 30 FINANCIAL RECONSTRUCTION. On June 9 and 10, financial stability having been assured, the League of Nations Council ended control of Commissioners-General over Austrian and Hungarian finances, appointments of both to end on June 30. *L. N. M. S.*, June, 1926, p. 138. *Times*, July 9, 1926, p. 15.
- 30 MEXICO—UNITED STATES. Exchanged ratifications of supplementary extradition convention, signed Dec. 23, 1925. *U. S. Treaty Series*, no. 741. Supplement to this JOURNAL, p. 192.

July, 1926

- 7 MEXICO—SPAIN. Exchanged ratifications of claims convention, signed Nov. 28, 1925. Chilean ambassador at Washington selected as umpire. *Cur. Hist.*, Sept., 1926, 24: 950.
- 8 FRANCE—PORTUGAL. Agreement for mutual recognition of tonnage certificates, signed at Paris, June 17, 1926, promulgated in Paris. Text: *J. O.*, July 24, 1926, p. 8123.
- 8 GREAT BRITAIN—UNITED STATES. Exchanged ratifications of three treaties signed in London, Feb. 10, 1925, concerning rights in the Cameroons, East Africa and Togoland. *U. S. Treaty Series*, no. 743, 744, 745. Supplement to this JOURNAL, pp. 166, 169, 174.
- 8 HAITI—UNITED STATES. Reciprocal most-favored-nation agreement arranged by exchange of notes, effective Oct. 1. *U. S. Treaty Series*, no. 746.
- 10 LITHUANIA—UNITED STATES. Ratification of agreement for most-favored-nation treatment in customs matters, signed Dec. 23, 1925, notified to the Government of the United States by Lithuania. *U. S. Treaty Series*, no. 742.
- 12 FRANCE—GREAT BRITAIN. French war debt agreement signed in Paris. *Times*, July 13-14, 1926, p. 14. Text: *Europe*, July 17, 1926, p. 969. *Cmd.* 2692.
- 13 FRANCE—SPAIN. Agreement on Moroccan affairs signed in Paris settling questions growing out of recent Riffian war. (1) New delimitation of zones, (2) Continuation of joint naval vigilance in enforcing international regulations in the region of Morocco, (3) Joint action in preserving peace on the frontier among the native tribes. *Cur. Hist.*, Sept., 1926, 24: 961. *Times*, July 14, 1926, p. 14.
- 16 GREAT BRITAIN—GREECE. Treaty of commerce and navigation signed in London, replacing treaty of commerce and navigation of 1886, commercial agreement of 1890, and declarations of 1904 and 1905. *Commerce Reports*, Aug. 16, 1926, p. 437.
- 16 NORWAY—SIAM. Treaty of friendship, commerce and navigation signed. *Commerce Reports*, Sept. 6, 1926, p. 626.
- 17 FRANCE—SIAM. Treaty of friendship, commerce and navigation, with protocols, signed at Paris Feb. 14, 1925, promulgated in France. Text: *J. O.*, July 31, 1926, p. 8570.
- 17 SPANISH INSTITUTE OF INTERNATIONAL LAW. Organization announced at Madrid to study Hispano-American law. List of founders: *N. Y. Times*, July 18, 1926, II: 8.
- 19 DENMARK—GERMANY. Commercial agreement arranged by exchange of notes on March 20, 1926, came into force. *Commerce Reports*, Aug. 23, 1926, p. 499.
- 20 GREECE—SOVIET UNION. Customs agreement signed at Athens June 23, 1926, came into force. *Commerce Reports*, Sept. 6, 1926, p. 626. *U. S. Daily*, Aug. 31, 1926, p. 2.
- 23 GREAT BRITAIN—HUNGARY. Most-favored-nation commercial treaty signed in London. *U. S. Daily*, Aug. 31, 1926, p. 2. *Commerce Reports*, Sept. 6, 1926, p. 626.
- 27 FRANCE—HAITI. Commercial *modus vivendi* signed at Port-au-Prince. *Commerce Reports*, Aug. 16, 1926, p. 437.
- 28 PANAMA—UNITED STATES. Signed two treaties in Washington. (1) General treaty defining relations between the two countries, to replace so-called Taft agreement, made up of executive orders issued in 1904, 1905 and 1911. (2) General claims convention providing for arbitral commission, with umpire appointed by President of Administrative Council of the Permanent Court of Arbitration at The Hague. *U. S. Daily*, July 29 and Aug. 4, 1926, p. 2.

- 29 INSTITUTE OF POLITICS. Sixth session opened in Williamstown, Mass. *N. Y. Times*, July 30, 1926, p. 4.
- 31 ALBANIA. Boundary settlement concerning Albano-Greek and Albano-Serb frontiers signed in Paris by representatives of Albania, France, Great Britain, Italy, Japan, Greece and Serbia. *Cur. Hist.*, Sept., 1926, 24: 971.

August, 1926

- 1 GERMANY—SWEDEN. Commercial treaty signed at Berlin on May 14, came into force. *Commerce Reports*, July 26, 1926, p. 244.
- 1 PAN ASIATIC CONFERENCE. 51 delegates from Japan, India, the Philippines, Siam and Korea met at Nagasaki. *Times*, Aug. 2, 1926, p. 7.
- 3 CUBA—MEXICO. Signing of wireless telegraph treaty announced. *U. S. Daily*, Aug. 4, 1926, p. 2.
- 5 FRANCE—GERMANY. Signed temporary commercial treaty at Paris to replace *modus vivendi*. *U. S. Daily*, Aug. 9, 1926, p. 2. Promulgated in France on Aug. 9. *J. O.*, Aug. 12, 1926, p. 9172. Text: *Europe*, Aug. 28, 1926, p. 1224.
- 5-11 INTERNATIONAL LAW ASSOCIATION. Held 34th conference in Vienna. Approved resolution for establishment of a permanent international criminal court. *Times*, Aug. 6 and 9, 1926, pp. 11 and 9. *C. S. Monitor*, Aug. 11, 1926, p. 3.
- 6 FRANCE—GERMANY. Agreement regulating trade in the Saar Territory signed at Paris. *U. S. Daily*, Aug. 9, 1926, p. 2.
- 7 ITALY—SPAIN. Treaty of friendship and arbitration signed in Madrid. *N. Y. Times*, Aug. 10, 1926, p. 6. *Times*, Aug. 10, 1926, p. 12.
- 14 AUSTRIA—HUNGARY. Supplementary commercial treaty, signed April 9, 1926, came into force following exchange of ratifications. *Commerce Reports*, Aug. 30, 1926, p. 563.
- 14 FRANCE—SPAIN. Modification of commercial convention of July 8, 1922, agreed to by exchange of notes. Text: *J. O.*, Aug. 21, 1926, p. 9515. *Times*, Aug. 17, 1926, p. 10.

INTERNATIONAL CONVENTIONS

AIR NAVIGATION TARIFF AGREEMENT. Paris, May 5, 1926.

Signatures: Belgium, France, Great Britain. May 5, 1926. *U. S. Daily*, Aug. 3, 1926, p. 4.

ARMS TRAFFIC. Geneva, June 17, 1925.

Signatures:

Bulgaria. Mar. 12, 1926.

Sweden. Mar. 8, 1926.

Venezuela. Mar. 10, 1926. *L. N. O. J.*, May, 1926, p. 647.

Netherlands. April 29, 1926. *L. N. O. J.*, June, 1926, p. 732.

ARMS TRAFFIC. Declaration Regarding Ifni. Geneva, June 17, 1925.

Signatures:

Bulgaria. Mar. 12, 1926. *L. N. O. J.*, May, 1926, p. 648.

Netherlands. April 29, 1926.

Venezuela. April 23, 1926. *L. N. O. J.*, June, 1926, p. 732.

ARMS TRAFFIC. Final Act. Geneva, June 17, 1925.

Signatures:

Bulgaria. Mar. 12, 1926.

Venezuela. Mar. 10, 1926. *L. N. O. J.*, May, 1926, p. 648.

ARMS TRAFFIC. Protocol of Signature. Geneva, June 17, 1925.

Signatures:

Bulgaria. Mar. 12, 1926.

Venezuela. Mar. 10, 1926. *L. N. O. J.*, May, 1926, p. 647.

ARMS TRAFFIC. Protocol on Chemical Warfare. Geneva, June 17, 1925.

Signatures:

Bulgaria. Mar. 12, 1926. *L. N. O. J.*, May, 1926, p. 648.

Venezuela. April 23, 1926. *L. N. O. J.*, June, 1926, p. 732.

CUSTOMS REGULATIONS IN AIR TRAFFIC. Paris, May 5, 1926.

Signatures: Belgium, France, Great Britain. *G. B. Treaty Series*, no. 12 (1926), *Cmd.* 2664.

ELECTRIC POWER TRANSMISSION. Geneva, Dec. 9, 1923.

Ratification: Denmark. April 27, 1926. *L. N. O. J.*, June, 1926, p. 731.

EMPLOYMENT (FINDING) FOR SEAMEN. Genoa, July 10, 1920.

Ratification: Latvia. May 21, 1926. *I. L. O. B.*, July 30, 1926, p. 137.

EMPLOYMENT OF CHILDREN AT SEA. Genoa, July 9, 1920.

Ratifications:

Canada. Mar. 31, 1926. *L. N. O. J.*, May, 1926, p. 649.

Latvia. May 21, 1926. *I. L. O. B.*, July 30, 1926, p. 137.

EMPLOYMENT OF CHILDREN IN INDUSTRY. Washington, Nov. 28, 1919.

Ratification: Latvia. May 21, 1926. *I. L. O. B.*, July 30, 1926, p. 137.

EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.

Ratification: Canada. March 31, 1926. *L. N. O. J.*, May, 1926, p. 649.

EPIDEMIC OFFICE. Paris, Jan. 25, 1924.

Ratifications deposited:

France. June 11, 1926.

Portugal. June 17, 1926. *J. O.*, June 23, 1926, p. 6890.

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GERMAN PEACE TREATY. Versailles, June 28, 1919. Amendment to Art. 393, Oct. 18–Nov. 3, 1922.

Ratification: Esthonia. April 12, 1926. *L. N. O. J.*, May, 1926, p. 649.

Ratification deposited: China. June 3, 1926. *I. L. O. B.*, July 30, 1926, p. 125.

HYDRAULIC POWER. Geneva, Dec. 9, 1923.

Ratification: Denmark. April 27, 1926. *L. N. O. J.*, June, 1926, p. 731.

LEAGUE OF NATIONS CONVENTANT. Protocols of Amendments. Oct. 3–5, 1921.

Signatures:

Canada. Mar. 11, 1926.

Union of South Africa. Mar. 8, 1926. *L. N. O. J.*, May, 1926, p. 648.

Ratification: Denmark. Mar. 28, 1926. *L. N. O. J.*, May, 1926, p. 648.

LOCARNO TREATY OF MUTUAL GUARANTEE. London, Dec. 1, 1925.

Ratification: France. June 15, 1926. *J. O.*, June 26, 1926, p. 7042.

MARITIME MORTGAGES. Brussels, April 10, 1926.

Signatures: B. I. I. I., July, 1926, p. 177.

MARITIME PORTS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.

Ratification: Denmark. April 27, 1926. *L. N. O. J.*, June, 1926, p. 731.

MATERNITY CONVENTION. Washington, Nov. 28, 1919.

Ratification: Latvia. May 21, 1926. *I. L. O. B.* July 30, 1926, p. 137.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.

Ratification: Canada. March 31, 1926. *L. N. O. J.*, May, 1926, p. 649.

NIGHT WORK OF YOUNG PERSONS. Washington, Nov. 28, 1919.

Ratification: Latvia. May 21, 1926. *I. L. O. B.*, July 30, 1926, p. 137.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.

Adhesion: San Marino. April 21, 1926. *L. N. O. J.*, June, 1926, p. 731.

OPIUM AGREEMENT. Protocol. Final Act. Geneva, Feb. 11, 1925.

Ratification deposited: France. April 30, 1926. *J. O.*, July 14, 1926, p. 7771.

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Adhesion: San Marino. April 21, 1926. *L. N. O. J.*, June, 1926, p. 731.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause. Geneva, Dec. 16, 1920.

Signatures:

Sweden (renewed). Mar. 8, 1926.

Switzerland (renewed). Mar. 1, 1926. *L. N. O. J.*, May, 1926, p. 648.

Ratifications:

Belgium. Mar. 10, 1926.

Denmark (renewed). Mar. 28, 1926. *L. N. O. J.*, May, 1926, p. 648.

RAILWAYS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.

Ratification: Denmark. April 27, 1926. *L. N. O. J.*, June, 1926, p. 731.

UNIVERSAL POSTAL UNION. Revision. Madrid, Nov. 30, 1920.

Ratification: Guatemala. *Commerce Reports*, June 14, 1926, p. 691.

WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision. Sèvres, Oct. 6, 1921.

Ratification deposited: Portugal. June 17, 1926. *J. O.*, July 12-13, 1926, p. 7706.

WHITE PHOSPHORUS IN MATCHES. Berne, Sept. 26, 1906.

Adhesions:

Belgium. Dec. 8, 1922.

Esthonia. Feb. 2, 1923.

Palestine. Sept. 17, 1925.

Irish Free State. April 15, 1926. *J. O.*, June 10, 1926, p. 6402.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

MIXED CLAIMS COMMISSION—UNITED STATES AND GERMANY*

OPINION IN THE TANKER CASES

UNITED STATES OF AMERICA ON BEHALF OF STANDARD OIL COMPANY OF NEW YORK (Docket No. 5323), SUN OIL COMPANY (Docket No. 5434), PIERCE OIL CORPORATION (Docket No. 5469), v. GERMANY

April 21, 1926

Under the terms of the Treaty of Berlin, American nationals who had an interest in property destroyed and who suffered from its destruction, no matter in what capacity they suffered, whether directly or indirectly through the ownership of shares of stock in foreign corporations or otherwise, are protected to the extent of their interest. It follows that these claims are properly espoused and presented here by the United States on behalf of these claimants for damages, if any, which they have sustained as shareholders in their British subsidiaries. Nevertheless, there was no purpose to confer upon American shareholders any right to recover damages in excess of those actually suffered by the foreign corporations themselves.

At the time of their destruction the ships were of British ownership and registry and had been lawfully requisitioned by Great Britain, which assumed the risk of operation and undertook, in the event of their loss, to pay the owners the ascertained value at the time of such loss. It is undisputed that these ships, burdened with requisitions, had a value very substantially less than they would have had if they had been free ships in a free market; but the British courts had held in the *Longbenton* case that the government was only obligated to pay the owners its value as a requisitioned ship at the time of loss, and the owners of the seven tankers here under consideration dealt and settled with the British Government on the basis of the rule laid down in that case.

The act of Great Britain in requisitioning these British ships, and the damages flowing therefrom, are not attributable to Germany's act in destroying them as a proximate cause. Her liability is limited to the value at the time of the loss of the seven ships encumbered with British requisitions, and since Great Britain has paid the British owners the money equivalent of these vessels as requisitioned vessels, the American shareholders have failed to establish any loss or damage suffered by them as such shareholders and resulting from Germany's acts in destroying the vessels.

PARKER, *Umpire*, rendered the decision of the Commission.

These three cases, which have been submitted, argued, and considered together, are before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement. They are put forward by the United States on behalf of the Standard Oil Company of New York, the Sun Oil Company, and the Pierce Oil Corporation, all American nationals, for losses alleged to have been suffered by them through the sinking by German submarines of seven steamships (tankers) owned by British subsidiaries of the claimants. All of these tankers were sunk during the period of America's belligerency, the first on April 6, 1917, and the last on October 3, 1918.

*Established in pursuance of the agreement between the United States and Germany of August 10, 1922. Edwin B. Parker, Umpire; Chandler P. Anderson, American Commissioner; Wilhelm Kiesselbach, German Commissioner; Robert W. Bonyng, American Agent; Karl von Lewinski, German Agent.

Headnotes and references in brackets inserted by the Managing Editor of the JOURNAL.

At the time of their destruction they were all under requisition by Great Britain and operated for her by the owners for hire fixed by her. They were all laden with cargoes of oils which were being transported under the directions of the British Government. Under the requisitions Great Britain assumed the risks of war to each vessel and in the event of its total loss from such a risk undertook to pay the owner therefor the ascertained value of the vessel at the time of such loss. It was provided that any dispute arising between the British Government and the owner in the ascertainment of such value should be settled by arbitrators selected by a prescribed method under the provisions of the British Arbitration Act.

By agreements reached between the British Government and the British corporations owning these seven tankers the value of each as a requisitioned vessel as of the time of its loss was arrived at¹ and the amounts so ascertained paid by Great Britain to the owners.² The amounts so paid aggregated \$6,030,686.00. The claimants allege that as free ships in a free market at the time of the loss of each their aggregate value was \$10,607,500.00. Subtracting from this value of free ships the value of requisitioned ships which the owners have received from the British Government leaves a balance of \$4,576,832.00, which is the total of the claims here put forward against Germany. A detailed tabulation of these claims is printed herein.³

In the last analysis, the basis of the claims here put forward is that as the American shareholders of their British subsidiaries the claimants were damaged through the sinking of these seven vessels by Germany to the extent of \$10,607,500.00, being the money equivalent of these ships as free ships at the time of their loss; that the British subsidiaries of claimants have been paid by Great Britain the sum of \$6,030,668.00, being the money equivalent of these ships as requisitioned ships; and that the balance of \$4,576,832.00 represents the uncompensated damage suffered by claimants, American nationals, resulting from Germany's act, and for which it is claimed that Germany is obligated to make compensation under the terms of the Treaty of Berlin.

Under the terms of that treaty Germany is obligated to compensate for damages resulting from her acts indirectly suffered by an American national through the ownership of shares of stock in a British corporation. In other words, if through Germany's act the property of a British corporation has been damaged or destroyed resulting in an American national suffering dam-

¹ In Docket No. 5323 see Exhibit II, "Proof of Claim" and affidavit of George D. Ali; affidavits of Montague Piesse, Exhibits J, H-1, and H-2; Director of Ship Purchases, Exhibit J.

In Docket No. 5434 see affidavit of J. Howard Pew, Exhibit I.

In Docket No. 5469 see affidavit of Clay Arthur Pierce, Exhibit III, page 3.

See original consolidated brief in support of claims, pages 17, 30, and 73.

² The British Reparation Claim against Germany included the value of these tankers with the exception of the *Tatarraiz*, which should have been included but was omitted for the reasons explained in the record (Exhibit J in Docket No. 5323 and claimants' consolidated brief, pages 104 and 105).

³ Tabulation of claims printed at bottom of next page.

age through his ownership of shares therein, then under the Treaty of Berlin Germany is obligated to make compensation to the extent of the damage so suffered by him. No claim for such damage can be espoused by the United States on behalf of the British corporation as such, because (leaving out of consideration government-owned claims) only claims for damages suffered by American nationals fall within the treaty. But, in order to fully protect American nationals who had an interest in the property destroyed and who suffered from its destruction, no matter in what capacity they suffered, whether directly or indirectly through the ownership of shares of stock in foreign corporations or otherwise, they are, under the treaty, protected to the extent of their interest. It follows that these claims are properly espoused and properly presented here by the United States on behalf of these claimants for damages, if any, which they have sustained as shareholders in their British subsidiaries.

The question then arises, What, if any, damage has been sustained by these British subsidiaries through which as shareholders claimants are alleged to have suffered? There is no pretense that these claimants have been directly damaged by Germany's act in sinking the seven ships in question, all of which were owned by British corporations. But the claim is that as shareholders in such British corporations these claimants have been indirectly damaged. The burden, therefore, rests on the claimants to prove that the

Claimant	Date of sinking and name of tanker *	Owner of vessel: British	Alleged value of vessel	Amount paid to owner by Great Britain	Balance claimed here by claimant against Germany
Standard Oil Company of New York	1917, Apr. 6 <i>Powhatan</i>	Tank Storage & Carriage Co., Limited	\$1,275,000.00	\$ 751,685.00	\$523,315.00
	1917, June 15 <i>Wapello</i>	Standard Transportation Co., Ltd., of Hong Kong	1,518,000.00	1,039,513.00	478,487.00
	1918, Mar. 20 <i>Samoset</i>	Ditto	1,398,400.00	884,805.00	513,595.00
	1918, May 30 <i>Wanda</i>	Ditto	442,000.00	440,068.00	1,932.00
	1918 Aug. 10 <i>Tatarraz</i>	Ditto	1,800,000.00	1,336,917.00	463,083.00
Sun Oil Company	1917, May 1 <i>British Sun</i>	British Sun Co., Limited	\$2,674,100.00	\$892,080.00	\$1,782,020.00**
Pierce Oil Corporation	1918, Oct. 3 <i>Eupion</i>	Eupion Steamship Co., Ltd., of London	\$1,500,000.00	\$685,520.00	\$814,480.00
Total: 3 claimants	7 tankers	4 owners	\$10,607,500.00	\$6,030,668.00	\$4,576,832.00

* Each of the 7 vessels was a British registered steamship, was sunk during America's belligerency, and when sunk was in pay of the British Government and had a cargo of fuel oil, spirits, or kerosene.

** After deducting expense of 2,356 pounds sterling.

British corporations suffered damages through the act of Germany and the amount thereof and the extent to which such damages have fallen on the claimants as stockholders of such corporations, and that as such stockholders they have not already been indirectly compensated therefor through payment to the corporations. While one of the results of the provision obligating Germany to make compensation for indirect damages suffered by American nationals as owners of shares of stock in foreign corporations was to give such American nationals the right, through espousal by their government, to assert their claims against Germany before this Commission, notwithstanding claims of the foreign corporations as such could not be presented here, nevertheless there was no purpose to confer upon American shareholders any right to recover damages in excess of those actually suffered by the foreign corporations themselves.

In determining the damage, if any, suffered by the British corporations who owned the seven ships which were sunk by Germany, the status of these ships must be examined and the facts as they existed at the time of their destruction, entering as factors into the determination of their value, ascertained. Without undertaking to enumerate all of those factors, it will suffice to note the following: (1) The ships were tankers in great demand by Great Britain and her allies. (2) They were of British ownership and registry and therefore subject to being and had in fact been requisitioned by Great Britain under her exceptional war powers. (3) The authority for such requisitioning was the Royal Proclamation of August 3, 1914, one of the conditions of which was "that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the government service, and compensation for loss or damage thereby occasioned." (4) The British Government at the time of requisitioning these ships submitted to their owners a form of charterparty known as "T-99" which the owners refused to sign. Nevertheless Great Britain took the ships from their owners and the owners operated, managed, and navigated the ships for her account at the rates of hire fixed by her under this form of charter.⁴ (5) Clause 19 of this charter provided that the British Government should take the risks of war incident to the operation of each ship and in the event of its total loss from such a risk should pay to the owner its ascertained value at the time of such loss and that should a dispute arise as to such value the same should be settled by arbitration under the provisions of the British Arbitration Act. (6) The owners and the ships, the persons and the subject matter, were under the jurisdiction of Great Britain and subject to her laws. Under these laws Great Britain could and did, as an exceptional war measure, requisition the ships for her use and fix a compensation in the nature of hire and an undertaking to compensate in the event of loss on a basis which operated as an onerous burden or encumbrance on the ships, substantially reducing their value, without any legal obligation or un-

⁴ See original consolidated brief in support of claims, pages 8 and 9.

dertaking on her part to compensate the owners for such depreciation in value. (7) At the time of the loss the British owners of these ships did not own free ships but encumbered ships, burdened with the onerous terms of the British requisitions, which encumbered ships were being operated by them for the British Government. The British owners were not free to offer them for sale as free ships but only as encumbered ships.

The British courts have found as a fact that the value of a British ship during the war period varied according as it was or was not under requisition or subject to requisition; that if not under requisition, but with a possible chance of being requisitioned, it would not command as large a price as it would if free from requisition under a guarantee from the government not to requisition it; and if actually under requisition but with a possible chance of being released therefrom it would not command as large a price as it would if free from requisition but with a possible chance of being requisitioned.⁵ In the *Longbenton* case a British vessel was requisitioned by the British Government and operated by the owners under the terms of the official charterparty known as "T-99," under which the ships with which we are here concerned were being operated. The *Longbenton* was lost by enemy action on June 27, 1917. Its owners contended that clause 19 of this charterparty, which provided that in the event of its total loss from risks of war the British Government should pay the owners "the ascertained value of the steamer . . . at the time of such loss," was in effect a contract of indemnity against any requisition, and that they were entitled to recover on the basis of its value had it been free from requisition, and that the government in assessing its value was not entitled to take into account the fact that it was under requisition at the time of its loss. The British High Court of Justice rejected this contention and held that for the purpose of assessing the value of the vessel at the time of its loss all of the facts must be taken into consideration, and one of the most material facts was that the vessel was at the time of its loss under requisition. In other words, at the time of its loss the vessel was a requisitioned vessel, not a free vessel, and its value must be ascertained accordingly. In that case the umpire in the arbitration found as facts that the *Longbenton*, which was under requisition at the time of its loss, had a value of £28,500; that had it not been under requisition but subject to requisition it would have had a value of £44,500; and that had it not been under or subject to requisition it would have commanded a still higher price. The court held that the fact of its being under requisition was one of the most important facts to consider in determining its value at the time of its loss, and that the government was only obligated to pay the owners the sum of £28,500, its value as a requisitioned ship at the time of its loss. The owners of the seven tankers here under consideration dealt and settled with the British

⁵ See award of umpire in the arbitration of the *Longbenton* case in *Harries v. Shipping Controller* (1918), 34 *The Times Law Reports* 446, 118 *Law Times Reports* 603, and 88 *Law Journal Reports* 1919 (N. S. 88, K. B.) 576.

Government on the basis of the rule laid down in this *Longbenton* case.⁶

The British law, and its application to the owners of these vessels and to the vessels themselves, are facts to be taken into account in determining what it was that the owners lost. It is the subject matter of their losses which is here dealt with. The value of that subject matter will be considered later. For some time prior to and at the time the ships were sunk by Germany the British subsidiaries of the claimants were not the owners of free ships. Hence they could not have lost free ships through Germany's act in destroying them. What they did in fact lose were ships encumbered with British requisitions. Such requisitions imposed burdens on the ships, which under the British law were lawfully imposed. It is undisputed that these ships, burdened with requisitions, had a value very substantially less than they would have had if they had been free ships in a free market. But they were not free ships, and the fact that they were not results from the claimants herein having voluntarily placed the title to them in British corporations, registering them as British ships, and subjecting them to British requisitions. As such they were treated by Great Britain as all other British-owned ships were treated. Presumably the claimants derived, or expected to derive, advantage through the British ownership and the British registry of these ships. But they cannot here complain of the disadvantages resulting therefrom.

The claimants earnestly contend that they are entitled to recover the value of free ships as of the time of the loss, and rely on numerous decisions of American courts.⁷ These cases hold in effect that under the Constitution of the United States the Government of the United States is obligated to make compensation for property taken by it, and the measure of such compensation is the value of the property taken at the time of the taking, which must be ascertained by the exercise of "a reasonable judgment having its basis in a proper consideration of all relevant facts."⁸ In ascertaining such value, the United States in taking property for public use can not confine the compensation to a market restricted or controlled by the government itself; but the test is, what is the value in a free market, one which would result from "fair negotiations between an owner willing to sell and a purchaser desiring to buy."⁹ In all of these American cases relied on by the claimants' counsel it will be noted that the question presented was the amount of compensation which the Government of the United States under the Constitution of the United States was required to pay to the owner of property taken

⁶ See affidavit of Montagu Piesse, page 3, Exhibit H-1 in Docket No. 5323.

⁷ *Hudson Navigation Co. v. United States* (1922), 57 Court of Claims, 411; *United States v. New River Collieries Co.* (1923), 262 U. S. 341; *National City Bank v. United States* (1921), 275 Federal Reporter, 855; *Standard Oil Company of New Jersey v. Southern Pacific Company* (1925), 268 U. S. 146; *Brooks-Scanlon Corporation v. United States* (1924), 265 U. S. 106.

⁸ *Standard Oil Company of New Jersey v. Southern Pacific Company* (1925), 268 U. S. 146.

⁹ *Brooks-Scanlon Corporation v. United States* (1924), 265 U. S. 106.

for public use, and that the property taken through requisition was free property at the time of taking. The owners lost free, not encumbered, property. If these arguments, supported by the sound principles announced by the American courts, had been addressed by the British subsidiaries of claimants to the competent authorities of Great Britain, whose duty it was to fix a basis for compensating the owners for the use of requisitioned ships, they would have been pertinent. But obviously they can have no application here nor prove helpful in determining the nature of the subject matter which the British subsidiaries of claimants lost when their ships were destroyed, which must be determined by the laws of Great Britain lawfully exercising jurisdiction over both the person of the owners and the subject matter lost. The controlling fact is that the rules announced in these American decisions did not obtain in Great Britain prior to and at the time the ships were destroyed, and therefore can have no application in determining the status of the value of the ships which were actually destroyed by Germany, namely, requisitioned ships.

The claimants confuse two distinct losses suffered by their British subsidiaries, namely: (1) the damages which such subsidiaries sustained as a result of Great Britain's act in requisitioning their ships and (2) the damages which such subsidiaries sustained by Germany's act in destroying their ships.

The act of Great Britain in requisitioning the ships unquestionably resulted in very materially depreciating their value, to the damage of claimants' British subsidiaries. In the last analysis it is the amount of this damage for which claimants are seeking an award against Germany; that is, the difference between the value these ships would have had if at the time of their destruction they had been free ships and their actual value at the time of their destruction as requisitioned ships. The real question, therefore, presented to this Commission for decision is, Under the Treaty of Berlin is Germany obligated to compensate for damages resulting from the act of Great Britain in exercising her exceptional war powers and requisitioning these ships—British property—for war purposes? From expressions in their briefs it would seem that the claimants would answer this question in the affirmative.¹⁰ For the reasons heretofore announced in the decisions of this Commission the Umpire has no hesitation in answering it in the negative.¹¹ The act of Great Britain in requisitioning these British ships, and in fixing the hire thereof at substantially less than the current market hire, resulted in damages to the British owners, but such damages belong to that large class suffered by thousands of British nationals as a consequence of the war for which no redress has been provided. This act of Great Britain and the damages flowing therefrom are not attributable to Germany's act as a proximate cause.

¹⁰ See original consolidated brief in support of claims, pages 31, 35, and 36.

¹¹ See Opinion in War-Risk Insurance Premium Claims, Decisions and Opinions, pages 33 *et seq.* [this JOURNAL, Vol. 18, p. 580 *et seq.*], and in United States of America on behalf of the Eastern Steamship Lines, Inc., Claimant, *v.* Germany, *ibid.*, pages 71 *et seq.* [this JOURNAL, Vol. 18, p. 611 *et seq.*]

Under the Treaty of Berlin Germany's liability, if any, for damages suffered by American nationals resulting from exceptional war measures is limited territorially to such measures as were "applied in German territory as it existed on August 1, 1914."¹² For all damages sustained by American nationals during America's belligerency outside of German territory as thus defined Germany's obligation to make compensation is limited to "physical or material damage to tangible things" resulting from "acts of Germany or her allies" or "directly in consequence of hostilities or of any operations of war."¹³

Under the Treaty of Berlin Germany is obligated to compensate the claimants as American shareholders in British corporations to the extent of the losses if any they have suffered as such shareholders due to the act of Germany in destroying the seven ships owned by such corporations. But what did Germany destroy? She destroyed seven ships encumbered with British requisitions. Her liability therefor under the treaty is limited to the value at the time of the loss of the ships so encumbered, less the amount which the owners of the ships have already received as indemnity for such loss. But the claimants admit¹⁴ that, following the *Longbenton* case, Great Britain has paid to their British subsidiaries the money equivalent of the value of these vessels as requisitioned vessels, so that it follows that these British subsidiaries have already received the money equivalent of all that they had to lose, and all that they in fact did lose, namely, requisitioned ships.

It follows that the claimants herein, the American shareholders of the British corporations owning these ships, have failed to establish any loss or damage suffered by them as such shareholders and resulting from Germany's acts in destroying these vessels.

Wherefore the Commission decrees that the Government of Germany is not, under the Treaty of Berlin of August 25, 1921, obligated to pay to the Government of the United States any amount on behalf of the claimants herein or any of them on account of the claims asserted in these three cases.

Done at Washington April 21, 1926.

EDWIN B. PARKER,
Umpire.

¹² Article 297 (e) of the Treaty of Versailles carried into the Treaty of Berlin.

¹³ Paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles carried into the Treaty of Berlin and also Administrative Decision No. VII, Decisions and Opinions, at pages 319 and 320. [This JOURNAL, Vol. 20, pp. 179-180.]

¹⁴ See footnote 1 *supra*.

WINTHROP C. NEILSON *v.* GERMANY (Docket No. 6481)

April 21, 1926

Damage to an American vessel due to strain of excessive speed required to escape from a German submarine held to be attributable to Germany's act as a proximate cause and therefore recoverable under the Treaty of Berlin.

Claim rejected for lack of proof of damage.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement. [After giving the facts in detail]:

The claim is made that in escaping from the submarine, which the record identifies as German Submarine U-140, it was necessary for the *Mohegan* to increase the speed of her engines from 64 revolutions per minute with a steam pressure of 135 pounds to 95 revolutions per minute with a steam pressure far beyond the point of safety and that as a result of the strain to which the engines, boilers, and in fact the whole vessel were subjected she was greatly damaged, her seaworthiness impaired, and her market value greatly reduced, to the claimant's damage in the sum of \$65,889.87.

The German Agent contends that the damage complained of can not be attributed to Germany's act as the proximate cause and hence that under the Treaty of Berlin, as heretofore construed by this Commission, Germany is not obligated to make compensation for such damage.

This contention is rejected. If the allegations with respect to damage are true, then the damage was a direct result of the act of the German U-boat in attacking the *Mohegan*. The fact that the U-boat failed to overhaul and destroy the *Mohegan* is immaterial. It is obvious that the master of the *Mohegan* exercised good judgment in running away in an attempt to save his ship, which proved successful, even though she may have been damaged in the attempt. Had one of the shells struck and damaged the *Mohegan*, it would not be contended that this damage did not result from Germany's act. By the same token, whatever damage the *Mohegan* sustained through strain in escaping from the pursuit of the German U-boat under a running fire of shells is clearly attributable to Germany's act.

The question remains, To what extent, if at all, was the *Mohegan* damaged in escaping from the German submarine?

* * * * *

After carefully weighing all of the testimony presented, the Umpire decides that the claimant has failed to discharge the burden resting upon him to prove that the *Mohegan* sustained any damage from the attempt to escape from the German submarine on August 6, 1918.

Wherefore the Commission decrees that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of Winthrop C. Neilson, the claimant herein, or on behalf of the Re-

public Mining and Manufacturing Company, for whose account and benefit he held title to the *Mohegan*, because of the damages alleged to have been sustained by the *Mohegan*.

Done at Washington April 21, 1926.

EDWIN B. PARKER,
Umpire.

WILLIAM J. QUILLIN, *et al.* v. GERMANY (Docket No. 6120)

April 21, 1926

Germany held obligated to pay to American part owners of a vessel of American registry sunk by a German submarine while engaged in private commerce, an amount, allocated according to their interest, equal to the difference between the fair market value of the schooner when lost and the sum received by the owners of the legal title as war risk insurance from the French Government.

The French Government delayed payment of the insurance for three and one-half years, during which period the rate of exchange on the franc depreciated. Held that, in order to determine the amount of the actual loss, in converting into dollars the French francs received by the owners of the vessel the rate of exchange prevailing at the date of payment by the French Government shall be applied.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

On August 29, 1917, the Schooner *Laura C. Anderson*, licensed under the laws of the United States and registered at the port of Philadelphia, Pennsylvania, while engaged in private commerce was captured by a German submarine and sunk about 30 miles from the port of La Havre, France.

The claimants herein, William J. Quillin and 27 others, who were at the time of the loss and have since remained American nationals, were in the aggregate the owners of the legal title of a 52/64 interest in the vessel and have since been and now are the owners of this claim for a like interest in the value of the vessel and stores lost. The owners of the legal title of the remaining 12/64 interest have not established their American nationality.

The American and German Agents agree—confirmed by the National Commissioners—that at the time of her loss the fair market value of the *Laura C. Anderson* was \$120,000 and that there were also lost with her stores of the value of \$1,805.23.

The American and German Agents further agree—confirmed by the National Commissioners—that at the time of the loss of the schooner the owners of her legal title carried French Government insurance indemnifying them against the risks of war to the amount of 348,000 French francs, which converted into dollars at the rate of exchange prevailing at the date of the loss, namely, 17.359 francs to the dollar, equaled \$60,409.32; that although promptly notified of her loss the French Government did not make payment under this policy of insurance until February, 1921, at which time the amount paid, converted into dollars at the rate of exchange then prevailing, namely, 7.17¢ to the franc, equaled \$24.951.60.

The sole question certified to the Umpire for decision is, Which rate of exchange, that prevailing at the date of the loss or that prevailing at the date of payment, shall be applied in converting into dollars the French francs actually received by the owners of the vessel? The German Agent contends for the former basis and the American Agent for the latter.

When the schooner was sunk her fair market value, fixed at \$120,000, was lost. Under the Treaty of Berlin it becomes material to determine who suffered that loss and the extent to which it was impressed with American nationality.

The tangible thing destroyed was the schooner. The owners of the legal title to that schooner suffered no loss to the extent of the payments made to them by the insurer, who was the real loser to the extent of such payments. At the time of the loss the insurer had a contingent or conditional property interest in the tangible thing destroyed—the schooner—which interest became absolute and fixed upon payment by the insurer. The extent of the insurer's interest was measured, not by the amount of the maximum indemnity stipulated for in the policy, but by the amount actually paid by the insurer and received by the insured. The aggregate loss sustained, measured in terms of American dollars, is fixed at \$120,000. This loss Germany is obligated to pay under the Treaty of Berlin to the extent—but only to the extent—that it was impressed with American nationality. Germany's interest in allocating this loss as between the owners of the legal title of the schooner and the insurer thereof is due to their diverse nationalities. To the extent of the damage sustained by the insurer—the French Government—resulting from the loss of the schooner, Germany is not liable under the Treaty of Berlin. What, then, was that damage measured in terms of American dollars? Manifestly it was the 348,000 francs which were paid to the owners of the legal title by the insurer converted into dollars at the rate of exchange prevailing at the date of payment, namely, \$24,951.60. The sum remaining after deducting this payment, so converted, from the \$120,000, the fair market value of the schooner at the time of her loss, represents the net loss to the claimants and their associates from the loss of the hull, namely, \$95,048.40. The stores lost were not insured. Their agreed value was \$1,805.23, which added to the net loss on the hull makes a total loss to the owners of the vessel of \$96,853.63, of which these *claimants* own a 52/64 interest. It follows that the net loss suffered by these claimants was \$78,693.58.

The rule here announced is in entire harmony with the decisions heretofore rendered by this Commission and with the awards made in the American underwriters' claims. The basis of such awards was "the actual net out of pocket payments of the American underwriters . . . after deducting all sums, if any, received by such underwriters under policies of reinsurance." It will be noted that those awards were based, not on the amount of maximum indemnity stipulated to be paid in the policies of insurance, but rather

on the amount actually *paid* by the American underwriters measured in terms of American dollars at the time of payment.

Applying the principles above announced and the rules and principles announced in other decisions of this Commission to the facts in this case, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of the claimants herein the sum of seventy-eight thousand six hundred ninety-three dollars fifty-eight cents (\$78,693.58) with interest thereon at the rate of five per cent per annum from November 11, 1918, distributed as follows:

Claimant	Proportionate share	Net hull loss	Stores, etc.	Total award
William J. Quillin.....	11/128	\$8,168.26	\$155.17	\$8,323.43
Oscar Bell.....	1/128	742.36	14.11	756.67
John W. Callaway.....	1/64	1,485.13	28.20	1,513.33
Annie S. Carey.....	1/64	1,485.13	28.20	1,513.33
James G. Conwell.....	1/64	1,485.13	28.20	1,513.33
Mary S. Coulbourn, Trustee of Joseph N. Coulbourn.....	1/64	1,485.13	28.20	1,513.33
A. D. Cummins.....	8/64	11,881.06	225.67	12,106.73
Alverda Elsey.....	1/64	1,485.13	28.20	1,513.33
S. J. Furniss.....	1/64	1,485.13	28.20	1,513.33
Harlan E. Goodell.....	1/64	1,485.13	28.20	1,513.33
Ethel Hastings.....	2/64	2,970.26	56.42	3,026.68
C. I. Horsey.....	1/128	742.56	14.11	756.67
Charles M. Kelley.....	1/64	1,485.13	28.20	1,513.33
S. Crowley Loveland.....	1/64	1,485.13	28.20	1,513.33
Francis J. McDonald.....	4/64	5,940.52	112.83	6,053.35
William Martino.....	1/64	1,485.13	28.20	1,513.33
Jonathan May & Sons.....	8/64	11,881.06	225.67	12,106.73
C. W. Riffin.....	1/64	1,485.13	28.20	1,513.33
F. H. Small.....	1/128	742.56	14.11	756.67
John Sullivan.....	1/64	1,485.13	28.20	1,513.33
Edward G. Taulane.....	2/64	2,970.26	56.42	3,026.68
George Taulane.....	2/64	2,970.26	56.42	3,026.68
Lewis B. Taulane.....	2/64	2,970.26	56.42	3,026.68
Herbert L. Black.....	1/64	1,485.13	28.20	1,513.33
Harold G. Foss.....	1/64	1,485.13	28.20	1,513.33
Arthur D. Foster.....	1/64	1,485.13	28.20	1,513.33
Joseph O'Brien.....	1/64	1,485.13	28.20	1,513.33
David Baird Company.....	1/64	1,485.13	28.20	1,513.33
Total.....	52/64	\$77,226.83	\$1,466.75	\$78,693.58

Done at Washington April 21, 1926.

EDWIN B. PARKER,
Umpire.

JEANETTE SELINGER *v.* GERMANY (Docket No. 6287)*April 21, 1926*

Applying the rules in the Quillin case, *supra*, the Commission awarded claimant \$156,500 with interest at five per cent per annum from November 11, 1918, being the difference between the amount received from the French Government for war risk insurance at the rate of exchange in effect at the date of payment, and the fair market value of the schooner *Mary W. Bowen* and the bark *Carmela*, both of American registry and sunk by German submarines on July 7, 1917, and July 27, 1917, respectively.

MARINE TRANSPORT COMPANY *v.* GERMANY (Docket No. 5962)*April 21, 1926*

A similar award as in the Quillin case, *supra*, was made for \$41,514.29 for the sinking on October 3, 1917, of the *Annie F. Conlon*, with stores and supplies, after deducting the amount received from the proceeds of the salvaged wreck.

GENERAL CLAIMS COMMISSION—UNITED STATES AND MEXICO *

ILLINOIS CENTRAL RAILROAD COMPANY *v.* UNITED MEXICAN STATES
(Docket No. 432)*Opinion and Decision, March 31, 1926*

International jurisprudence recognizes no rule that contract claims are cognizable only in case of denial of justice or some other form of governmental responsibility; nor can a general rule be discovered according to which mere nonperformance of contractual obligations by a government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the nonperformance is accompanied by some feature of the public capacity of the government as an authority.

Claims arising from breach of contract obligations are included within the terms of Article I of the General Claims Convention of September 8, 1923, between the United States and Mexico.

The Commission has no hesitation in rejecting the contention that while under Article V of the convention legal remedies need not be "exhausted," some resort must nevertheless be had to the local tribunals before the claim can be so impressed with an international character as to confer jurisdiction.

Nonperformance of a contractual obligation may consist either in denial of the obligation itself and nonperformance as a consequence of such denial, or in acknowledgment of the obligation itself and nonperformance notwithstanding such acknowledgment. In both cases such nonperformance may be the basis of a claim cognizable by this Commission.

This case is before this Commission on the Mexican Agent's motion to dismiss.

1. The claim is put forward by the United States of America on behalf of the Illinois Central Railroad Company (an American corporation) to recover

* Established in pursuance of the convention between the United States and Mexico signed September 8, 1923. C. van Vollenhoven, Presiding Commissioner; Edwin B. Parker, Commissioner; G. Fernandez MacGregor, Commissioner; Henry W. Anderson, American Agent; Benito Flores, Mexican Agent.

Headnotes inserted by the Managing Editor of the JOURNAL.

the sum of \$1,807,531.36, with interest thereon from April 1, 1925, alleged to be the balance due on 91 locomotive engines sold and delivered by the claimant to the Government Railway Administration of the National Railways of Mexico. The grounds of the motion to dismiss are (first) that the claim is based on an alleged nonperformance of contractual obligations and therefore not within the jurisdiction of this Commission and (second) that, the obligation itself not being denied by Mexico, no controversy exists for the decision of this Commission.

Jurisdiction over contract claims

2. The challenge of this Commission's jurisdiction to hear and decide any case grounded on a breach of contract obligations requires an examination and construction of the terms of the treaty to ascertain the scope of this Commission's jurisdiction, which must be determined by it.

3. This Commission is constituted in pursuance of the provisions of a convention entered into between the United States of America and the United Mexican States, signed at Washington September 8, 1923, which became effective on March 1, 1924. Its terms clothe this Commission with the jurisdiction and power and made it its duty to hear, examine, and decide:

(a) All claims against one government by nationals of the other for losses or damages suffered by such nationals or by their properties; and

(b) All claims for losses or damages originating from acts of officials or others acting for either government and resulting in injustice; but

(c) There is excepted from the foregoing categories claims "arising from acts incident to the recent revolutions."

The examination and application of clause (a) will suffice for the disposition of this case.

4. Before entering upon this examination the Commission feels bound to state that any representation of international jurisprudence, and especially of the jurisprudence of the Mexican Claims Commission of 1868, intended to proclaim in a general way that such jurisprudence was either in favor of jurisdiction over contract claims or disclaimed jurisdiction over contract claims, is contrary to the wording of the awards themselves. Whatever statements from authors in this respect it may be possible to quote, a perusal of the very awards clearly shows that not only either allowance or disallowance of contract claims is not their general and uniform feature but that it is even impracticable to deduce from them one consistent system. A rule that contract claims are cognizable only in case denial of justice or any other form of governmental responsibility is involved is not in them; nor can a general rule be discovered according to which mere nonperformance of contractual obligations by a government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the nonperformance is accompanied by some feature of the public capacity of the government as an authority. It seems especially hazardous to construe awards like the um-

pire's in the Pond case, the Treadwell case, the DeWitt case, the Kearney case, etc. (Moore, 3466-3469), as if they decided in favor of jurisdiction over contract claims but dismissed the claims on their merits. As, moreover, no claims convention or arbitration treaty known to the Commission used exactly the wording of the present convention of September 8, 1923 (though the treaty of August 7, 1892, between the United States and Chile comes near to it: Moore, 4691), the Commission has to seek its own way.

5. The treaty is this Commission's charter. It must look primarily to the language of that treaty, and particularly to Articles I and VIII and the preamble, to discover the scope and limits of its jurisdiction. The words "all claims for losses or damages suffered by persons or by their properties" (except one group of claims only which has been turned over to a Special Claims Commission) indicate in themselves a broad and liberal spirit underlying and permeating this treaty; and it is well known to have been the purpose of the negotiators to have by this convention removed a source of irritation between the two nations and a constant menace to their friendly intercourse. The phrase "for losses or damages suffered by persons or by their properties" is broader than any provision in similar previous treaties with Mexico—apart from Article VI of the treaty of January 30, 1843, which says "all claims," and from the unratified treaty of November 20, 1843, which said the same (Moore, 1245, 1246; Malloy, 1120). This phrase in no wise limits the preceding phrase "all claims" save that it in effect restricts the Commission's jurisdiction to claims susceptible of measurement by pecuniary standards and excludes those of either a speculative or a punitive character. For all practical purposes the initial words "All claims" of Article I are as broad as the like phrase embodied in the unratified treaty of 1843. This is emphasized by the fact that the other clause in Article I contained in the foregoing paragraph 3 (b), providing for a special contingency, repeats this same phrase, "all claims," and merely adds thereto "for losses or damages . . . resulting in injustice."

6. Must these opening words of Article I be construed in the light of the closing words of paragraph (1) of the same article, reading that the claims should be decided "in accordance with the principles of international law," etc., to the effect that "all claims" must mean all claims for which either government is responsible according to international law? The conclusion suggested exceeds what is required by logic and in the Commission's view goes too far. If it be true that all the claims of Article I should be decided "in accordance with the principles of international law," etc., the only permissible inference is that they must be claims of an international character, not that they must be claims entailing international responsibility of governments. International claims, needing decisions in "accordance with the principles of international law," may belong to any of four types:

a. Claims as between a national of one country and a national of another country. These claims are international, even in cases where international

law declares one of the municipal laws involved to be exclusively applicable; but they do not fall within Article I.

b. Claims as between two national governments in their own right. These claims also are international and also are outside the scope of Article I.

c. Claims as between a citizen of one country and the government of another country acting in its public capacity. These claims are beyond doubt included in Article I.

d. Claims as between a citizen of one country and the government of another country acting in its civil capacity. These claims too are international in their character, and they too must be decided "in accordance with the principles of international law," even in cases where international law should merely declare the municipal law of one of the countries involved to be applicable.

It seems impossible to maintain that legal pretensions belonging to this fourth category are not "claims." It seems equally impossible to maintain that they are not "international claims." If it were advanced that a state turning over claims of this category to an international tribunal waives part of its sovereignty, this would be true; but so does every treaty containing provisions which depart from pure municipal law, as the majority of treaties do. It is entirely clear that on several occasions both the United States and Mexico expressly gave claims commissions jurisdiction over contract claims, showing thereby that in principle conferring on an international tribunal jurisdiction over contract claims is not contrary to their legal conceptions. The so-called Porter Convention of the Second Hague Peace Conference of 1907, to which both the United States and Mexico are parties, though having for its object the prevention of the use of force in collecting debts growing out of contract obligations until other methods, including arbitration, had been exhausted, nevertheless is a striking illustration of the recognition of contract claims as proper subjects for submission to an international tribunal. The Commission concludes that the final words of Article I, which provide that it shall decide cases submitted to it "in accordance with the principles of international law, justice and equity," prescribe the rules and principles which shall govern in the decision of claims falling within its jurisdiction but in no wise limit the preceding clauses, which do fix this Commission's jurisdiction.

7. The argument is advanced that as Article V waives the requirement that as a prerequisite to diplomatic intervention remedies before local courts must be exhausted, and as under its laws the United States can be sued only on claims arising out of contract, therefore Article V must refer to contract claims, as these are the only claims which could be enforced by local American tribunals. This argument lacks force inasmuch as Article V applies as well to Mexico as to the United States and under Mexican law not only claims against the Mexican Government based on contract but on other property rights or on torts may be enforced through the courts.

8. This much for the text of the treaty of 1923. There remains the question whether there has been a misunderstanding on the part of the Mexican negotiators of this treaty with respect to the inclusion of contract claims within its terms. In the absence of all evidence in this respect, an assumption to this effect appears to the Commission unlikely. If the Mexican negotiators of May-August, 1923, had been in doubt as to the views of the American Government relative to contract claims and had been desirous to ascertain it, nothing would have been more obvious than to consult Charles Cheney Hyde's book of 1922, *International Law Chiefly as Interpreted and Applied by the United States*; the more so as since February, 1923, the author was solicitor in the State Department at Washington. Volume I, page 559, of this work sums up the attitude of the United States in the following words:

That it is disposed both to seek and permit the adjustment by arbitration of contractual claims of American citizens against foreign governments, as well as those of citizens of foreign States against itself. Arbitrators have, moreover, not hesitated to interpret broadly the scope of jurisdiction conferred upon them. .

It is irrelevant and immaterial to consider the correctness of this interpretation of Mr. Hyde; the quotation is conclusive to show that if the Mexican negotiators had felt in want of acquainting themselves with current American views as to international jurisdiction over contract claims, they cannot possibly have been victims of the impression that the United States was averse to including contract claims.

9. From the foregoing consideration no other deduction is possible than that claims arising from breach of contract obligations are included within the terms of Article I of the treaty of 1923. This is in conformity with what is known about the broad and liberal intention of the negotiators of the treaty as recalled in paragraph 5 above. The attention of the Commission has been directed to some of the secret records of the negotiations between the representatives of the two nations preliminary to the conclusion of this treaty. These records tend to confirm the soundness of the conclusion reached by the Commission independent of them.

10. That there may be no possible confusion of thought, the Commission expressly states that in what is above written it has not considered the problem whether in the absence of a claims convention a foreign office would be entitled to resort to diplomatic intervention on account of the nonperformance of contractual obligations owing to one of its nationals by the government of another country. Some high executive authorities have denied this right; others have held that it could not be doubted. It is not for this Commission to pronounce upon this problem; the Commission bases its opinion with respect to its jurisdiction on the terms of an express claims convention.

Exhaustion of legal remedies in local courts

11. The construction and application of Article V of the treaty of 1923 has been called in question in connection with the problem of the Commission's jurisdiction over contract claims. The Commission has no hesitation in rejecting the contention that while under Article V the legal remedies need not be "exhausted" some resort must nevertheless be had to the local tribunals before the claim can be so impressed with an international character as to confer jurisdiction on this Commission.

Influence of non-denial of obligation on jurisdiction

12. Nonperformance of a contractual obligation may consist either in denial of the obligation itself and nonperformance as a consequence of such denial, or in acknowledgment of the obligation itself and nonperformance notwithstanding such acknowledgment. In both cases such nonperformance may be the basis of a claim cognizable by this Commission. The fact that the debtor is a sovereign nation does not change the rule. Neither is the rule changed by the fact that the default may arise not from choice but from necessity.

Decision

13. From the foregoing it follows that the motion to dismiss must be and is hereby denied. The running of time for filing the answer has been suspended from November 19, 1925, to March 31, 1926.

Done at Washington this 31st day of March, 1926.

C. VAN VOLLENHOVEN,
Presiding Commissioner.

EDWIN B. PARKER,
Commissioner.

G. FERNANDEZ MACGREGOR,
Commissioner.

NORTH AMERICAN DREDGING COMPANY OF TEXAS *v.* UNITED MEXICAN STATES (Docket No. 1223)

Opinions and Decisions, March 31, 1926

The treaty under which this Commission is constituted requires that a claim to fall within its jurisdiction must be that of a citizen of one government against the other government and must not only be espoused by the first government and put forward by it before this Commission, but, as a condition precedent to such espousal, must have been presented to it for its interposition by the private claimant.

In Article 18 of the contract the claimant expressly agreed that in all matters connected with the execution of the work covered by the contract and the fulfillment of its contract obligations and the enforcement of its contract rights it would be bound and governed by the laws of Mexico administered by the authorities and courts of Mexico and would not invoke or accept the assistance of his government. Under the rules of international law the claimant (as well as the Government of Mexico), was without power to agree, and did not in fact agree, that the claimant would not request the Government of the United States to intervene in its behalf in the event of internationally illegal acts done to the claimant by the Mexican authorities.

The claimant does not pretend that it has made any attempt to comply with the terms of Article 18 of the contract, which is here construed as binding on it. Therefore the claimant has not put itself in a position where it may rightfully present this claim to the Government of the United States for its interposition. While under Article V of the treaty the two governments have agreed that no claim shall be disallowed or rejected because the legal remedies have not been exhausted, this provision is limited to claims rightfully presented by the claimant.

This case is before this Commission on a motion of the Mexican Agent to dismiss. It is put forward by the United States of America on behalf of North American Dredging Company of Texas, an American corporation, for the recovery of the sum of \$233,523.30 with interest thereon, the amount of losses and damages alleged to have been suffered by claimant for breaches of a contract for dredging at the port of Salina Cruz, which contract was entered into between the claimant and the Government of Mexico, November 23, 1912. The contract was signed at Mexico City. The Government of Mexico was a party to it. It had for its subject matter services to be rendered by the claimant in Mexico. Payment therefor was to be made in Mexico. Article 18, incorporated by Mexico as an indispensable provision, not separable from the other provisions of the contract, was subscribed to by the claimant for the purpose of securing the award of the contract. Its translation by the Mexican Agent reads as follows:

The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfillment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract.

1. The jurisdiction of the Commission is challenged in this case on the grounds (first) that claims based on an alleged nonperformance of contract obligations are outside the jurisdiction of this Commission and (second) that a contract containing the so-called Calvo Clause deprives the party subscribing said clause of the right to submit any claims connected with his contract to an international commission.

2. The Commission, in its decision this day rendered on the Mexican motion to dismiss the Illinois Central Railroad Company case, Docket No. 432, has stated the reasons why it deems contractual claims to fall within its jurisdiction. It is superfluous to repeat them. The first ground of the motion is therefore rejected.

The Calvo Clause

3. The Commission is fully sensible of the importance of any judicial decision either sustaining in whole or in part, or rejecting in whole or in part, or construing the so-called "Calvo Clause" in contracts between nations and aliens. It appreciates the legitimate desire on the part of nations to deal with persons and property within their respective jurisdictions according to their own laws and to apply remedies provided by their own authorities and tribunals, which laws and remedies in no wise restrict or limit their international obligations, or restrict or limit or in any wise impinge upon the correlative rights of other nations protected under rules of international law. The problem presented in this case is whether such legitimate desire may be accomplished through appropriate and carefully phrased contracts; what form such a contract may take; what is its scope and its limitations; and does clause 18 of the contract involved in this case fall within the field where the parties are free to contract without violating any rule of international law?

4. The Commission does not feel impressed by arguments either in favor of or in opposition to the Calvo Clause, in so far as these arguments go to extremes. The Calvo Clause is neither upheld by all outstanding international authorities and by the soundest among international awards nor is it universally rejected. The Calvo Clause in a specific contract is neither a clause which must be sustained to its full length because of its contractual nature nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business. The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other. No international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible within the general rules and principles of

international law. By merely ignoring world-wide abuses either of the right of national protection or of the right of national jurisdiction no solution compatible with the requirements of modern international law can be reached.

5. At the very outset the Commission rejects as unsound a presentation of the problem according to which if article 18 of the present contract were upheld Mexico or any other nation might lawfully bind all foreigners by contract to relinquish all rights of protection by their governments. It is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so.

6. The Commission also denies that the rules of international public law apply only to nations and that individuals can not under any circumstances have a personal standing under it. As illustrating the antiquated character of this thesis it may suffice to point out that in Article 4 of the unratified International Prize Court Convention adopted at The Hague in 1907 and signed by both the United States and Mexico and by 29 other nations this conception, so far as ever held, was repudiated.

7. It is well known how largely the increase of civilization, intercourse, and interdependence as between nations has influenced and moderated the exaggerated conception of national sovereignty. As civilization has progressed individualism has increased; and so has the right of the individual citizen to decide upon the ties between himself and his native country. There was a time when governments and not individuals decided if a man was allowed to change his nationality or his residence, and when even if he had changed either of them his government sought to lay burdens on him for having done so. To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself but that short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote good will among nations.

Lawfulness of the Calvo Clause

8. The contested provision, in this case, is part of a contract and must be upheld unless it be repugnant to a recognized rule of international law. What must be established is not that the Calvo Clause is universally accepted or universally recognized, but that there exists a generally accepted rule of international law condemning the Calvo Clause and denying to an individual the right to relinquish to any extent, large or small, and under any circumstances or conditions, the protection of the government to which he owes allegiance. Only in case a provision of this or any similar tendency were established could a parallel be drawn between the illegality of the Calvo Clause in the present contract and the illegality of a similar clause in the

Arkansas contract declared void in 1922 by the Supreme Court of the United States (257 U. S. 529) because of its repugnance to American statute provisions. It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law; but the task before this Commission precisely is to ascertain whether international law really contains a rule prohibiting contract provisions attempting to accomplish the purpose of the Calvo Clause.

9. The Commission does not hesitate to declare that there exists no international rule prohibiting the sovereign right of a nation to protect its citizens abroad from being subject to any limitation whatsoever under any circumstances. The right of protection has been limited by treaties between nations in provisions related to the Calvo Clause. While it is true that Latin-American countries—which are important members of the family of nations and which have played for many years an important and honorable part in the development of international law—are parties to most of these treaties, still such countries as France, Germany, Great Britain, Sweden, Norway, and Belgium, and in one case at least even the United States of America (treaty between the United States and Peru dated September 6, 1870, Volume 2, Malloy's United States Treaties, at page 1426; Article 37) have been parties to treaties containing such provisions.

10. What Mexico has asked of the North American Dredging Company of Texas as a condition for awarding it the contract which it sought is, "If all of the means of enforcing your rights under this contract afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not to call directly upon your own government to intervene in your behalf in connection with any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection?" and the claimant, by subscribing to this contract and seeking the benefits which were to accrue to him thereunder, has answered, "I promise."

11. Under the rules of international law may an alien lawfully make such a promise? The Commission holds that he may, but at the same time holds that he cannot deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract tie in this respect the hands of his government. But while any attempt to so bind his government is void, the Commission has not found any generally recognized rule of positive international law which would give to his government the right to intervene to strike down a lawful contract, in the terms set forth in the preceding paragraph 10, entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to

protection, not to destroy the right itself,—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction. The purpose of such a contract is to draw a reasonable and practical line between Mexico's sovereign right of jurisdiction within its own territory, on the one hand, and the sovereign right of protection of the government of an alien whose person or property is within such territory, on the other hand. Unless such line is drawn and if these two coexisting rights are permitted constantly to overlap, continual friction is inevitable.

12. It being impossible to prove the illegality of the said provision, under the limitations indicated, by adducing generally recognized rules of positive international law, it apparently can only be contested by invoking its incongruity to the law of nature (natural rights) and its inconsistency with inalienable, indestructible, unprescriptible, uncurtailable rights of nations. The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean, but they have failed as a durable foundation of either municipal or international law; and cannot be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the corner stones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace.

Interpretation of the Calvo Clause in the present contract

13. What is the true meaning of Article 18 of the present contract? It is essential to state that the closing words of the article should be combined so as to read: "being deprived, in consequence, of any rights as aliens *in any matter connected with this contract*, and without the intervention of foreign diplomatic agents being in any case permissible *in any matter connected with this contract*." Both the commas and the phrasing show that the words "in any matter connected with this contract" are a limitation on either of the two statements contained in the closing words of the article.

14. Reading this article as a whole, it is evident that its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws. The closing words "in any matter connected with this contract" must be read in connection with the preceding phrase "in everything connected with the execution of such work and the fulfillment of this contract" and also in connection with the phrase "regarding the interests or business connected with this contract." In other words, in executing the contract, in fulfilling the contract, or in putting forth any claim "regarding the interests or business connected with this contract," the

claimant should be governed by those laws and remedies which Mexico had provided for the protection of its own citizens. But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.

15. What, therefore, are the rights which claimant waived and those which he did not waive in subscribing to Article 18 of the contract? (a) He waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfillment, construction, and enforcement of this contract were international remedies. All these he waived and had a right to waive. (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfillment, execution, or enforcement of this contract as such. (c) He did not waive his undoubted right as an American citizen to apply to his government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations. (d) He did not and could not affect the right of his government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his government with respect to the fulfillment and interpretation of his contract and the execution of his work thereunder. The conception that a citizen in doing so impinges upon a sovereign, inalienable, unlimited right of his government belongs to those ages and countries which prohibited the giving up of his citizenship by a citizen or allowed him to relinquish it only with the special permission of his government.

16. It is quite true that this construction of Article 18 of the contract does not effect complete equality between the foreigner subscribing the contract on the one hand and Mexicans on the other hand. Apart from the fact that equality of legal status between citizens and foreigners is by no means a requisite of international law—in some respects the citizen has greater rights and larger duties, in other respects the foreigner has—Article 18 only purposes equality between the foreigner and Mexicans with respect to the execution, fulfillment, and interpretation of this contract and such limited equality is properly obtained.

17. The Commission ventures to suggest that it would strengthen and

stimulate friendly relations between nations if in the future such important clauses in contracts as Article 18 in the contract in question were couched in such clear, simple, and straightforward language, frankly expressing its purpose with all necessary limitations and restraints as would preclude the possibility of misinterpretation and render it insusceptible of such extreme construction as sought to be put upon Article 18 in this instance, which if adopted would result in striking it down as illegal.

The Calvo Clause and the claimant

18. If it were necessary to demonstrate how legitimate are the fears of certain nations with respect to abuses of the right of protection and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced, the present case would furnish an illuminating example. The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if Article 18 of its contract had no existence in fact. It used the article to procure the contract, but this was the extent of its use. It has never sought any redress by application to the local authorities and remedies which Article 18 liberally granted it and which, according to Mexican law, are available to it, even against the government, without restrictions, both in matter of civil and of public law. It has gone so far as to declare itself freed from its contract obligations by its *ipse dixit* instead of having resort to the local tribunals to construe its contract and its rights thereunder. And it has gone so far as to declare that it was not bound by Article 7 of the contract and to forcibly remove a dredge to which, under that article, the Government of Mexico considered itself entitled as security for the proper fulfillment of its contract with claimant. While its behavior during the spring and summer of 1914, the latter part of the Huerta administration, may be in part explained by the unhappy conditions of friction then existing between the two countries in connection with the military occupation of Veracruz by the United States, this explanation cannot be extended from the year 1917 to the date of the filing of its claim before this Commission, during all of which time it has ignored the open doors of Mexican tribunals. The record before this Commission strongly suggests that the claimant used Article 18 to procure the contract with no intention of ever observing its provisions.

The Calvo Clause and the Claims Convention

19. Claims accruing prior to the signing of the treaty must, in order to fall within the jurisdiction of this Commission under Article I of the treaty, either have been "presented" before September 8, 1923, by a citizen of one of the nations parties to the agreement "to [his] Government for its interposition *with the other*," or, after September 8, 1923, "such claims," i.e.,

claims presented for interposition, may be filed by either government *with this Commission*. Two things are therefore essential, (1) the presentation by the citizen of a claim to his government and (2) the espousal of such claim by that government. But it is urged that when a government espouses and presents a claim here, the private interest in the claim is merged in the nation in the sense that the private interest is entirely eliminated and the claim is a national claim, and that therefore this Commission cannot look behind the act of the government espousing it to discover the private interest therein or to ascertain whether or not the private claimant has presented or may rightfully present the claim to his government for interposition. This view is rejected by the Commission for the reasons set forth in the second paragraph of the opinion in the Parker claim (Docket No. 127), this day decided by this Commission, and need not be repeated here.

20. Under Article 18 of the contract declared upon the present claimant is precluded from presenting to its government any claim relative to the interpretation or fulfillment of this contract. If it had a claim for denial of justice, for delay of justice or gross injustice, or for any other violation of international law committed by Mexico to its damage, it might have presented such a claim to its government, which in turn could have espoused it and presented it here. Although the claim as presented falls within the first clause of Article I of the treaty, describing claims coming within this Commission's jurisdiction, it is not a claim that may be rightfully presented by the claimant to its government for espousal and hence is not cognizable here, pursuant to the latter part of paragraph 1 of the same Article I.

21. It is urged that the claim may be presented by claimant to its government for espousal in view of the provision of Article V of the treaty, to the effect "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim." This provision is limited to the application of a general principle of international law to claims that may be presented to the Commission falling within the terms of Article I of the treaty, and if under the terms of Article I the private claimant can not rightfully present its claim to its government and the claim therefore cannot become cognizable here, Article V does not apply to it, nor can it render the claim cognizable, nor does it entitle either government to set aside an express valid contract between one of its citizens and the other government.

Extent of the present interpretation of the Calvo Clause

22. Manifestly it is impossible for this Commission to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo Clause, which may be found in contracts, decrees, statutes, or constitutions, and under widely varying conditions. Whenever such a provision is so phrased as to seek to preclude a government

from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void. Nor does this decision in any way apply to claims not based on express contract provisions in writing and signed by the claimant or by one through whom the claimant has deraigned title to the particular claim. Nor will any provision in any constitution, statute, law, or decree, whatever its form, to which the claimant has not in some form expressly subscribed in writing, howsoever it may operate or affect his claim, preclude him from presenting his claim to his government or the government from espousing it and presenting it to this Commission for decision under the terms of the treaty.

23. Even so, each case involving application of a valid clause partaking of the nature of the Calvo Clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then wilfully ignores them by applying in such matters to his government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim.

Summary of the considerations on the Calvo Clause

24. (a) The treaty between the two governments under which this Commission is constituted requires that a claim accruing before September 8, 1923, to fall within its jurisdiction must be that of a citizen of one government against the other government and must not only be espoused by the first government and put forward by it before this Commission but, as a condition precedent to such espousal, must have been presented to it for its interposition by the private claimant.

(b) The question then arises, Has the private claimant in this case put itself in a position where it has the right to present its claim to the Government of the United States for its interposition? The answer to this question depends upon the construction to be given to Article 18 of the contract on which the claim rests.

(c) In Article 18 of the contract the claimant expressly agreed that in all matters connected with the execution of the work covered by the contract and the fulfillment of its contract obligations and the enforcement of its contract rights it would be bound and governed by the laws of Mexico administered by the authorities and courts of Mexico and would not invoke or accept the assistance of his government. Further than this it did not bind itself. Under the rules of international law the claimant (as well as the

Government of Mexico) was without power to agree, and did not in fact agree, that the claimant would not request the Government of the United States, of which it was a citizen, to intervene in its behalf in the event of internationally illegal acts done to the claimant by the Mexican authorities.

(d) The contract declared upon, which was sought by claimant, would not have been awarded it without incorporating the substance of Article 18 therein. The claimant does not pretend that it has made any attempt to comply with the terms of that article, which as here construed is binding on it. Therefore the claimant has not put itself in a position where it may rightfully present this claim to the Government of the United States for its interposition.

(e) While it is true that under Article V of the treaty the two governments have agreed "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim," this provision is limited to claims falling under Article I and therefore rightfully presented by the claimant.

(f) If it were necessary to so construe Article 18 of the contract as to bind the claimant not to apply to its government to intervene diplomatically or otherwise in the event of a denial of justice to the claimant growing out of the contract declared upon or out of any other situation, then this Commission would have no hesitation in holding such a clause void *ab initio* and not binding on the claimant.

(g) The foregoing pertains to the power of the claimant to bind itself by contract. It is clear that the claimant could not under any circumstances bind its government with respect to remedies for violations of international law.

(h) As the claimant voluntarily entered into a legal contract binding itself not to call as to this contract upon its government to intervene in its behalf, and as all of its claim relates to this contract, and as therefore it cannot present its claim to its government for interposition or espousal before this Commission, the second ground of the motion to dismiss is sustained.

Decision

25. The Commission decides that the case as presented is not within its jurisdiction and the motion of the Mexican Agent to dismiss it is sustained and the case is hereby dismissed without prejudice to the claimant to pursue his remedies elsewhere or to seek remedies before this Commission for claims arising after the signing of the treaty of September 8, 1923.

Done at Washington this 31st day of March, 1926.

C. VAN Vollenhoven,
Presiding Commissioner.

G. FERNANDEZ MACGREGOR,
Commissioner.

Concurring Opinion

My fellow Commissioners construe Article 18 of the contract before the Commission in this case to mean that with respect to all matters involving the execution, fulfillment, and interpretation of that contract the claimant bound itself to exhaust all remedies afforded under Mexican law by resorting to Mexican tribunals or other duly constituted Mexican authorities before applying to its own government for diplomatic or other protection, and that this article imposes no other limitation upon any right of claimant.

They further hold that said Article 18 was not intended to and does not prevent claimant from requesting its government to intervene in its behalf diplomatically or otherwise to secure redress for any wrong which it may heretofore have suffered or may hereafter suffer at the hands of the Government of Mexico resulting from a denial of justice, or delay of justice, or any other violation by Mexico of any right which claimant is entitled to enjoy under the rules and principles of international law, whether such violation grows out of this contract or otherwise. I have no hesitation in concurring in their decision that any provision attempting to bind the claimant in the manner mentioned in this paragraph would have been void *ab initio* as repugnant to the rules and principles of international law.

Article 18, as thus construed, in effect does nothing more than bind the claimant by contract to observe the general principle of international law which the parties to this treaty have expressly recognized in Article V thereof. Mexico's motive for expressly incorporating this rule as an indispensable provision of the contract, which could be ignored by the claimant only by subjecting itself to the penalties flowing from its breach of the contract, seems both obvious and reasonable and in harmony with the spirit and not repugnant to the letter of the rules and principles of international law. The provision as thus construed should be treated both by claimant and its government with the scrupulous and unfaltering respect due any legal contract.

Accepting as correct my fellow Commissioners' construction of Article 18 of the contract, I concur in the disposition made of this case.

EDWIN B. PARKER,
Commissioner.

SUPREME COURT OF THE UNITED STATES

BERIZZI BROTHERS COMPANY *v.* THE STEAMSHIP PESARO¹

June 7, 1926

A ship owned and possessed by a foreign government and operated by it in the carriage of merchandise for hire is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction.

When the decision in *The Exchange* was given in 1812, merchant ships were operated only by private owners. It cannot therefore be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as warships, in the absence of a treaty or statute of the United States evincing a different purpose.

When for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. There is no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was a libel *in rem* against the steamship *Pesaro* on a claim for damages arising out of a failure to deliver certain artificial silk accepted by her at a port in Italy for carriage to the port of New York. The usual process issued, on which the vessel was arrested; and subsequently she was released, a bond being given for her return, or the payment of the libellant's claim, if the court had jurisdiction and the claim was established. In the libel the vessel was described as a general ship engaged in the common carriage of merchandise for hire. The Italian Ambassador to the United States appeared and on behalf of the Italian Government specially set forth that the vessel at the time of her arrest was owned and possessed by that government, was operated by it in its service and interest; and therefore was immune from process of the courts of the United States. At the hearing it was stipulated that the vessel when arrested was owned, possessed and controlled by the Italian Government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries, including the port of New York, and was so employed in the service and interest of the whole Italian nation as distinguished from any individual member thereof, private or official; and that the Italian Government never had consented that the vessel be seized or proceeded against by judicial process. On the facts so appearing the court sustained the plea of immunity and on that ground entered a decree dismissing the libel for want of jurisdiction. This direct appeal is from that decree and was taken before the Act of February 13, 1925, became effective.

The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction.

This precise question never has been considered by this court before.

¹ Advance sheets, Supreme Court Reports.

Several efforts to present it have been made in recent years, but always in circumstances which did not require its consideration. The nearest approach to it in this court's decisions is found in *The Exchange*, 7 Cranch 16, where the opinion was delivered by Chief Justice Marshall. There a libel was brought by citizens of this country against an armed vessel in the possession of French naval officers, the libellants' claim being that they were the true owners, that the vessel had been wrongfully taken from them and then converted into an armed vessel, and that they were entitled to have it restored to them through a proceeding in admiralty. Diplomatic correspondence resulted in the presentation by a law officer of this government of a formal suggestion in the suit to the effect that at the time of the arrest under the libel the vessel was claimed and possessed by the French Government as a war ship, was temporarily within our waters for a lawful purpose, and therefore was immune from the process whereon she was arrested. In the opinion the Chief Justice attributed to every nation an exclusive and absolute jurisdiction within its own territory subject to no limitation not having its consent, observed that the consent might be either express or implied, and then said (p. 136):

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

After discussing the status of a sovereign, his ministers and his troops when they or any of them enter the territory of another sovereign, he proceeded (p. 141):

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly Powers, the conclusion seems irresistible, that they may enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent.

In all cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

And then after suggesting that there is a wide difference between the status of private individuals who enter foreign territory, or send their private ships there for purposes of trade, and the status of public war vessels when in foreign waters, he further said (p. 145):

It seems then to the court, to be a principle of public law, that national ships of war, entering the port of a friendly Power open for their reception, are to be considered as exempted by the consent of that Power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners and there was little thought of governments engaging in such operations. That came much later.

The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of

a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

The subsequent course of decision in other courts gives strong support to our conclusion.

In *Briggs v. Light Boats*, 11 Allen 157, there was involved a proceeding against three vessels to subject them to a lien and to satisfy it through their seizure and sale. The boats had been recently acquired by the United States and were destined for use as floating lights to aid navigation. Whether their ownership and intended use rendered them immune from such a proceeding and seizure was the principal question. In answering it in the affirmative the state court, speaking through Mr. Justice Gray, afterwards a member of this court, said (p. 163): "These vessels were not held by the United States, as property might perhaps be held by a monarch, in a private or personal, rather than in a public or political character. . . . They were, in the precise and emphatic language of the plea to the jurisdiction, held and owned by the United States for public uses." And again (p. 165): "The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted."

In *The Parlement Belge*, L. R. 5 P. D. 197, the question was whether a vessel belonging to Belgium and used by that government in carrying the mail and in transporting passengers and freight for hire could be subjected to a libel *in rem* in the admiralty court of Great Britain. The Court of Appeal gave a negative answer and put its ruling on two grounds, one being that the vessel was public property of a foreign government in use for national purposes. After reviewing many cases bearing on the question, including *The Exchange*, the court said:

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

Sometimes it is said of that decision that it was put on the ground that a libel *in rem* under the British admiralty practice is not a proceeding solely against property, but one directly or indirectly impleading the owner—in that instance the Belgian Government. But this latter was given as an additional and independent ground, as is expressly stated in the opinion at page 217.

The ruling in that case has been consistently followed and applied in England from 1880, when it was made, to the present day. *Young v. The Scotia*, 1903 A. C. 501; *The Jassy*, L. R. 1906 P. D. 270; *The Gagara*, L. R. 1919, P. D. 95; *The Porto Alexandre*, L. R. 1920, P. D. 30; *The Jupiter*, L. R. 1924, P. D. 236.

In the lower federal courts there has been some diversity of opinion on the question, but the prevailing view has been that merchant ships owned and operated by a foreign government have the same immunity that warships have. Among the cases so holding is *The Maipo*, 252 Fed. 627, and 259 Fed. 367. The principal case announcing the other view is *The Pesaro*, 277 Fed. 473. That was a preliminary decision in the present case, but it is not the one now under review, which came later and was the other way.

We conclude that the general words of section 24, clause 3, of the Judicial Code investing the district courts with jurisdiction of "all civil causes of admiralty and maritime jurisdiction" must be construed, in keeping with the last paragraph before quoted from *The Exchange*, as not intended to include a libel *in rem* against a public ship, such as the *Pesaro*, of a friendly foreign government. It results from this that the court below rightly dismissed the libel for want of jurisdiction.

Decree affirmed.

L. LITTLEJOHN & Co., INC., *et al.* v. UNITED STATES*

March 1, 1926

Damages are not recoverable from the United States under the Suits in Admiralty Act (March 9, 1920) for a collision due to the fault of a vessel owned and in possession of the United States and being operated in transporting supplies and troops.

In the absence of convention, every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs.

The Joint Resolution of May 12, 1917, authorized the President to take over to the United States the immediate possession and title of any vessel within the jurisdiction which, at the time of coming therein, was owned by any subject of, or was under register of, an enemy nation; and this was within the power of Congress.

Mr. Justice McREYNOLDS delivered the opinion of the court.

The court below sustained a challenge to its jurisdiction, and this direct appeal followed.

October 9, 1919, in New York harbor the steamships *Antigone* and *Gaelic Prince* collided. Serious injury resulted to the latter and its cargo. Feb-

*Official Reports of the Supreme Court, Preliminary Print, Vol. 270 U. S., No. 2, p. 215.

ruary 19, 1921, relying upon the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525), the owners seek to recover damages. The Act of March 3, 1925, c. 428, 43 Stat. 1112, is not applicable. They allege that the collision resulted from the fault of the *Antigone*. Also that—

At all the times mentioned herein prior to the 13th day of October, 1919, and particularly on the 9th day of October, 1919, the date of the collision hereinafter mentioned, the steamship *Antigone* was owned by a private person or merchant who was solely entitled to the immediate and lawful possession, operation, and control of said vessel. At no time prior to said 13th day of October, 1919, was the said steamship *Antigone* owned, either absolutely or *pro hac vice*, by the United States of America, nor by any corporation in which the United States of America or its representatives owned the entire outstanding capital stock, nor lawfully in the possession of the United States of America or of such corporation, nor lawfully operated by or for the United States of America or such corporation. On the 13th day of October, 1919, the respondent United States of America became, ever since has been, and now is in the lawful possession of the steamship *Antigone*, but at no time has the United States of America held the legal title to or been the absolute owner of said steamship *Antigone*.

The United States appeared specially and suggested that when the collision occurred they owned, possessed and controlled the *Antigone* and therefore the court was without jurisdiction. This was denied and evidence was taken upon the consequent issue. Having considered the evidence, the court held that the United States owned the vessel and were navigating her, with a crew employed by the War Department, in transporting supplies and troops. The libels were accordingly dismissed for want of jurisdiction.

If the established facts show such ownership, possession and control, then, under the doctrine of *The Western Maid*, 257 U. S. 419, to which we adhere, the decree is clearly right.

The history of the matter is this. The *Antigone*—then the privately-owned German merchantman *Neckar*—took refuge within the United States prior to April 6, 1917, when war with Germany was declared. By Joint Resolution of May 12, 1917, c. 13, 40 Stat. 75 (copied in the margin¹),

¹Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to

Congress authorized the President to take over to the United States the immediate possession and title of any vessel within their jurisdiction which at the time of coming therein was owned by any corporation, citizen or subject of an enemy nation, or was under register of any such nation. By Executive Order of June 30, 1917, the President affirmed that the *Neckar* was such a vessel and ordered that "the possession and title" be taken over through the United States Shipping Board. He further authorized that board to repair, equip, man and operate her. It accordingly took her, July 17, 1917, and thereafter a naval board appraised her. Subsequently she was transferred to the Navy Department, renamed the *Antigone*, and later transferred to the Army Transport Service. October 9, 1919, she sailed under a master, officers and crew of the United States Transport Service from New York bound for Brest, from which port she was to return with troops.

Appellants say that the rules of international law as recognized by the United States forbade them from confiscating German vessels within their jurisdiction at outbreak of the war, and that the resolution of May 12, 1917, should be so interpreted as to harmonize with these rules. They further insist that thus interpreted the resolution only gave authority to detain and operate the *Antigone* as enemy property, leaving title in the original German owners and the vessel subject to ordinary maritime liens. Our attention is called to the course pursued by the British Government and to certain decisions of their courts. *The Chile*, 1 Br. & Col. Prize Cases 1; *The Gutenfels*, 2 *id.* 36; *The Prinz Adalbert*, 3 *id.* 70, 72; *The Blonde*, L. R. (1922) 1 A. C. 313, 334.

Both Great Britain and Germany were parties to Convention VI of the Second Hague Peace Conference, 1907,² and the action of the former, referred to by counsel, was taken in view of obligations thus assumed. The

ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation.

²Article 1. When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Article 2. A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, can not be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

United States did not approve that convention, and the cited cases involved problems wholly different from the one here presented.

It is unnecessary to consider how far the ancient rules of international law concerning confiscation of enemy property have been modified by recent practices. In the absence of convention every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs. The Hague Conference (1907) recognized this and sought by agreement to modify the rule. *The Blonde, supra*, p. 326. Our problem is to determine the result of action taken under a joint resolution of Congress whose language is very plain and refers only to enemy vessels. It authorized the President to take "possession and title," and, obeying, he took them. We do not doubt the right of any independent nation so to do without violating any uniform or commonly accepted rule of international law; and Congress had power to authorize the action irrespective of any general views theretofore advanced in behalf of this government. Certainly all courts within the United States must recognize the legality of the seizure; the duly expressed will of Congress when proceeding within its powers is the supreme law of the land.

Brown v. United States, 8 Cranch 110; 122—"That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found; is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall chose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." See *Miller v. United States*, 11 Wall. 268; *The Blonde, supra*.

The decree of the court below is affirmed.

BOOK REVIEWS AND NOTES *

Académie de Droit International. Recueil des Cours, 1923 and 1924. Paris: Librairie Hachette, 1925. 5 vols. pp. xvii, 658; pp. viii, 495; pp. vi, 477; pp. vi, 487; pp. vi, 487. Indexes. 310 francs per set.

These five handsome volumes contain certain of the lectures delivered before the Academy of International Law at the Hague at its first and second sessions, in 1923 and 1924. On account of the uncertainty which existed in the beginning as to whether provision would be made for the official publication of the lectures, the majority of those who gave lectures at the first session allowed their lectures to be published elsewhere. At the second session in 1924, however, the Curatorium decided to provide for the official publication thereafter of all lectures the texts of which should be furnished by the authors. At the same time it decided also to arrange for the publication of all lectures delivered at the first session, except those which had already been published through other channels. The first volume of the *Recueil* contains these; the other four volumes contain those delivered at the second session. Unfortunately, of the twenty-eight professors who lectured at the first session, twelve had already published their lectures either privately, in various journals of international law, or in other serial publications, such as the *Bibliotheca Visseriana*, the *Bulletin de l'institut intermédiaire international*, etc., while several of those who did not adopt this course failed to furnish the Curatorium with the texts of theirs for official publication. The result is, the lectures of only eleven of the twenty-eight professors who taught at the Academy at its first session are found in the official collection. This is regrettable because it leaves the collection very incomplete, and students who wish to make use of the lectures not found in it will be put to the inconvenience of having to search for them elsewhere. Happily, the published collection for the second session is more complete since it contains the lectures of twenty of the twenty-six professors who lectured at that session. The other six having made other arrangements for the publication of their lectures, they were not included in the official publication. The Curatorium has announced that hereafter at the close of each session the lectures delivered at that session will be published in the official collection. To insure that the publication will be complete, it might very appropriately insist as a condition of appointment that the text of all lectures shall be furnished it for publication in its own collection.

The arrangement adopted by the editors of the collection is as follows: each volume will contain approximately about 500 pages (this rule was deviated from for certain necessary reasons in the case of the first volume,

* The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.—Ed.

which contains 636 pages); the lectures of each professor are accompanied by his photograph, a biographical notice concerning his life and work, an outline or table of contents of his lectures, and a bibliography of the literature of the subject with which they deal. At the end of each volume is a detailed index which will greatly facilitate the work of students who may wish to make use of the collection.

The list of those who lectured at the Academy at its first and second sessions includes many of the outstanding authorities of the world today in the field of international law—the list is too long to reproduce here even in abridged form. It may be safely said that never before have students been provided with an opportunity of receiving instruction directly from such an array of eminent jurists, scholars, publicists and practical men of affairs, and the large numbers who availed themselves of it justified the wisdom of those who founded the Academy. Apparently, it is the idea of the Curatorium that each year's faculty shall be entirely different from that of the preceding year, and among the lectures at the first two sessions we find the name of but one professor who lectured at both. It is also evidently the aim of the Curatorium to choose the staff of lecturers so far as possible from the world at large rather than from a small group of countries. Thus we find that the professors whose lectures are published in the official collection of the first two sessions come from fourteen different countries, including those of Europe, the United States and Latin America. If we take into account also those who actually lectured but whose lectures are not published in the official collection, the number of countries represented is larger still. The most numerous countries were England, with five lecturers; Germany and France with four each; and the United States and Belgium with three each.

The subjects dealt with in the lectures at the first two sessions cover a wide range. In addition to international law strictly speaking, they include diplomacy, international relations, the Monroe Doctrine, arbitration, mediation and conciliation, extradition, extraterritoriality, international finance and labor, commercial companies and treaties of commerce, communication and transportation, the Red Cross, the rights of racial, linguistic and religious minorities, League of Nations mandates, the conflict of laws, international administrative unions and *de facto* governments. Until now the Curatorium has not deemed it expedient to include in the program of courses subjects relating directly to the law of war, for the reason that the memories of the recent conflagration are too fresh in the minds of all to insure a scientific and strictly judicial discussion, even by jurists, of such subjects.

It is impossible in his review to summarize a series of lectures which fill five large volumes, to discuss the points of view and conclusions of the authors or to attempt to evaluate their merits. It must suffice to say that most of them being the work of eminent authorities in their respective fields and having been carefully prepared with a view to publication, they attain a

uniformly high standard of excellence and are therefore substantial contributions to the literature of the subjects with which they deal. In some cases the bibliographies accompanying the lectures are quite the most valuable that have been published. Naturally, in a series of lectures by so many different authors, there should be variation among them from the point of view of their scholarly character and their value to students of international law. It is not difficult to single out certain of them which, by reason of the eminence of their authors, the evidence of research which they contain, or the meticulous care with which they have been prepared, easily surpass the others. This is inevitable.

We can only repeat, that taking the collection as a whole, it must be regarded as one of the most useful contributions to the literature of international law that has appeared in recent years. By providing for the publication in this form of the lectures delivered at the Academy the Curatorium has immensely enlarged its usefulness and influence. Henceforth the beneficiaries of the lectures will be not merely the relatively small group who attend the sessions and hear them pronounced, but all students of international law the world over who are able to read the French language in which they are published.

JAMES W. GARNER.

American Relations with China. Report of the Baltimore Conference. Baltimore: The Johns Hopkins Press, 1925. pp. 198. Index.

Bound very attractively, this report of the sessions of the Conference on American Relations with China will prove of considerable value to study clubs. The conference, held September 17-20, 1925, at Johns Hopkins University, following the suggestion of a group of sponsors, which included men from missionary, business, educational and other circles interested in the Chinese problem, attracted an important membership and afforded an opportunity for the presentation of a wide variety of opinions. In addition to the minutes of a number of interesting discussions, the report contains several brief but valuable statements prepared by members or others on specific aspects of the situation, among them a statement by Mr. Walter S. Rogers on "Communications," another by F. R. Eldridge on "Chinese Trade and Customs Control," and a third by F. E. Lee on "Industrial Conditions in China," which are particularly informing. The report is a contribution to the sources because of the intimate touch which many of the members of the conference had enjoyed with Chinese affairs. Among the speakers one notes such names as W. W. Willoughby, Sao-Ke Alfred Sze, P. W. Kuo, A. L. Warnshuis, J. W. Jenks, C. C. Batchelder, Frederick Moore, L. H. Roots, H. K. Norton, S. G. Lowrie, and others able to speak from first-hand knowledge of conditions.

The general tone of the conference as indicated by the report was friendly

to China and optimistic as to her future. One feels that if anything is lacking, it is a sufficient presentation of the facts of the Chinese situation. The expressions of opinion are in some cases unattended with adequate references to the facts. The impression received is that the conference was called less to study a situation than to put through a program. A report was accepted recommending the abolition of extraterritoriality, the granting of customs autonomy and the taking of independent action by the American Government in the event that it was found impossible to secure coöperation for this object among the principal interested Powers. It is hardly to be doubted that an attempt to force the hand of the American Government at the moment when the Tariff Conference and the Extraterritoriality Commission were about to meet was, in view of the lack of information regarding the problems with which the two bodies were to deal, unwise. To demand a leap in the dark by one's own government in order to satisfy another people's demands is not a sound method of improving the position of either country, as a considerable minority of the conference members apparently felt in voting against the report.

HAROLD S. QUIGLEY.

A History of the Foreign Policy of the United States. By Randolph Greenfield Adams. New York: Macmillan Co., 1924. pp. xv, 490. \$3.50.

There are so few books of value upon the specific subject of American foreign relations that any contribution in this field should be welcomed. Dr. Adams' purpose in this work is not to present the results of an extended and minute personal research in this field, nor to add new and startling facts of interest to the specialist. It is, in his own words, to give a "brief survey of the history of our foreign relations which will, in a measure, popularize our knowledge of the subject" and induce Americans "to take a greater interest in their foreign policy." With this laudable purpose in view, the author has gone through an unusually large mass chiefly of secondary material, monographic and periodical literature, and produced a work, with great skill and industry, that can be read with interest and profit both by the layman and the student of international relations. In the hands of a discriminating instructor sufficiently familiar with such affairs and American history to correct any hasty generalizations or overstatements, the book will be very valuable for class use. Its style is vivid, and though the language is sometimes exaggerated and the treatment cavalier and often bordering upon the flippant, one's interest is stimulated and sustained throughout.

The title of the work is misleading. It is not a history of American foreign policies, which receive but a scant and inadequate treatment here as elsewhere, but it is a discussion of the chief events in our diplomatic intercourse with other nations. The story is carried, from the time of the

American Revolution through the Washington Conference under President Harding, in some eighteen chapters arranged chronologically and sometimes topically. In the main the proportion maintained is good, and the chapter captions are dignified and self-explanatory. Some of these headings, however, are either spectacular or misleading, such as: "Drifting into a Useless War" (Cap. VII) for the War of 1812; "Another White Man and His Burden" (Cap. XII) for our Pacific and Cuban relations; "Creeping Down the Caribbean" (Cap. XIII). Some of the sub-titles are far from descriptive of the events related, for instance: "Irresponsible Diplomacy" (p. 68); "The Vengeance of Vanderbilt" (p. 280); "Nagging the British Lion" (p. 365); and "Recrudescence Isolation" (p. 430) for Harding's non-interference policy. Sometimes the adequate treatment of important topics is sacrificed for unimportant detail or comment, which the careful reading of well-known standard writers in the field might have prevented.

Dr. Adams states his own opinions with great vigor and freedom throughout the book. Though these are generally suggestive and most interesting, they do not always show a clear conception of the facts and causes of events or of the motives of the actors in them. The Department of State receives scant and grudging credit for many of its important activities and there is much less appreciation of its services and of the spirit of American diplomacy than we find in the well-known works of the diplomats John W. Foster, John Bassett Moore and David Jayne Hill. The influence of a single economic factor or product, such as sugar in Hawaii or Cuba, in controlling American action or policy is sometimes overemphasized. Dr. Adams gives a very appreciative account of President Wilson's relation to the World War, the treaty, and world peace based upon Baker, Tumulty and other eulogists, but few will admit the good judgment of his repeated criticisms of Senator Lodge and the other "wilful" patriots of the Senate. The author seems somewhat unduly impressed with the *myth* which he, like some others, calls the "isolation" policy, and fears that under Harding it meant "an atavistic reversal—to the negative side of the Monroe Doctrine which had been intelligent before the days of aeroplanes and radio-communication."

While the author modestly disclaims any attempt at specialized research or the addition of new material of importance, he has made a distinctive contribution to the literature of the subject with a presentation that will inspire reading.

The mechanical side of the book is well done. It contains seventeen maps, some unusual illustrations, a good index, and appendices giving a bibliography and a chronological list of Secretaries of State of the United States.

JAMES CURTIS BALLAGH.

La Conciliation Internationale (Règlement des Différends Internationaux).

Par Philip Marshall Brown. Paris: Pedone, 1925. pp. 95.

This booklet contains six lectures delivered by Professor Brown before the Academy of International Law at its second session in 1924. Following an introduction in which he points out that the question of arbitration has heretofore been considered from the historical rather than the analytical point of view, and pronounces as false the notion that international law regulates solely the mutual relations of states and is unconcerned with the protection of the rights of individuals, he proceeds to define the object of international law to be the protection of national interests when those interests have been recognized by international law as legal rights. He devotes a lecture to a consideration of the nature of those interests, which he classifies as moral, political and legal. He dwells upon the differences between international and municipal law and, as stated above, combats the tendency to limit the domain of international law to relations between states and "to reduce men to the status of objects of the common law of dumb brutes." This theory of the function of international law, he says, had its origin in an age when sovereignty was represented by an absolute monarch and when subjects enjoyed only such rights as were graciously "octroyed" to them by sovereign princes—a theory which has no place in an epoch when sovereignty not only resides in the people but is actually exercised by them.

The most important of Professor Brown's lectures are the two which deal in turn with the classification of international differences and the amicable methods for the settlement of those differences: diplomacy, arbitration, judicial settlement, conciliation, commissions of inquiry and others. In the first of these he points out the obstacles which stand in the way of the conclusion of general arbitration treaties, especially the presence of conflicting interests which make states hesitate to agree to arbitrate generally their differences, the impossibility of finding an acceptable test for distinguishing between political and legal differences, and the lack of established rules of international law applicable to many disputes which arise between states. He discusses the differences between arbitration and judicial settlement and, on the basis of the distinction which he draws, he concludes that the Permanent Court of International Justice is neither an arbitral tribunal nor, strictly speaking, a judicial court, but a "Court of Arbitral Justice." In summary form the general conclusions of his study are the following: the basis of international law and of friendly relations between states is mutual respect and common consent; their vital and essential interests are generally moral and political rather than strictly judicial; conflicts of a juridical character are generally of the least importance and are susceptible of peaceable settlement; the more serious differences (those of a moral or political character) should be settled by methods of conciliation, the normal forms of which are diplomacy, confer-

ence, mediation, and commissions of inquiry; obligatory inquiry for the determination of questions of fact is preferable to obligatory arbitration or obligatory conciliation; and finally, the idea of conciliation rather than coercion should be emphasized. "The greatest need of the world is good will and a generous and spontaneous sentiment of conciliation."

J. W. G.

Septième Congrès International de Legislation Aérienne du Comité Juridique International de l'Aviation. Paris: Per Orbem, 1926. pp. 322.

The Seventh Congress of the *Comité Juridique International de l'Aviation* was held at Lyons between September 28 and October 2, 1925. The *Comité* is an unofficial body of jurists maintaining headquarters at Paris. It has met at intervals since 1911 for the purpose of drafting a complete code of international air law, both public and private. The code thus far drafted contains forty-two articles devoted to public law and twenty-six to private law. The work of the Seventh Congress was devoted principally to the elaboration of suitable regulations for customs administration in respect to aircraft, and of legislative clauses applicable to the insurance of lives and property transported by air.

Professor de Lapradelle, who presided over the deliberations of the congress, took occasion at the outset to emphasize the importance of speedy administrative clearances to the progress of aerial navigation as a whole. Any undue hindrances by customs control tends to lessen the importance of aerial traffic (p. 45). The congress adopted the principle that, to avoid descent at the frontier, every private aircraft must depart by and make its first descent at a customhouse aérodrome, unless special authorization is otherwise obtained (Art. a, p. 318). Every aircraft engaged in transporting goods must be provided with a manifest, certified by the custom-house authorities, and must have a bill of lading for each consignee (Art. c, p. 319). Regulations to apply in the event of a forced landing, or an accident, were also adopted (Arts. b, c, d, p. 318).

The congress accepted the principle that every risk in connection with aircraft may be covered by insurance, except that resulting from the intentional act of the assured or of the pilot. The object insured may be surrendered to the insurer in the event that the cost of repairs amounts to three-quarters of its value, or if three months have passed without news of the aircraft (Art. 62, p. 317). All life and accident policies shall be deemed to cover also the risks incurred by the insured while traveling upon regular air lines (Art. 65, p. 318). In countries where the pilot and crew are not covered by legislation for workmen's compensation, coverage shall be deemed obligatory (Art. 66). These provisions were accepted in preference to the proposal of M. Henry-Couannier for the compulsory insurance of passengers (pp. 231-235).

The congress recommended to the attention of the International Conference of the Red Cross, resolutions for the protection of personnel and material used exclusively for the transportation and treatment of wounded by air. These resolutions propose that personnel and material exclusively devoted to the transportation and to the treatment of wounded over aerial routes shall be respected and protected to the same extent as upon land and sea. This protection ceases in the event of any acts committed harmful to the enemy. The use of sanitary aircraft for maintaining a search for wounded on the field of battle is prohibited (p. 319). It is expected that the automobile will act as a liaison between the battlefield and the points behind the lines where aircraft of the Red Cross may operate (p. 304). The proposed rule seems reasonable enough in the light of the experience of the late war, but as aircraft will be the very means by which the plane of battle will be extended in future wars, one is inclined to foresee much difficulty in accurately defining what is embraced in the phrase "*champ de bataille*."

The *Comité Juridique International* has taken the initiative in a new and important field of jurisprudence. Its method of approach is scientific and it is not afraid to strike out into new ground. As the distinguished president of the congress remarked, aviation itself is the result of initiative and courage, and the *Comité* thus aims to prove itself worthy of the art constituting the field of its juristic studies.

ARTHUR K. KUHN.

The League of Nations. By Santos Kumar Das, M.A. Calcutta: G. B. Manna Mitra Press, 1925. pp. xxv, 164.

Professor Das announces in his preface that this small volume is a reprint of a lecture given in Calcutta with the idea "of reducing a complex subject to comprehensible categories, of emphasizing its dominant characteristics, and of rendering it more intelligible." So far as spreading detailed and precise information is concerned, this small volume is no more authoritative than the many others which have been published on the League of Nations; but, it must, in justice, be said, that the author, writing in a foreign language, indicates plainly a surprising mastery of phrase and idiom—which augurs well for the future of the English language in India. The text is marred by numerous typographical errors (*vide* pp. 58, 68, 73, etc., and 163, 164); again, in places the usual constraint of the professor escapes him, and there appear flamboyant passages, (such as pp. 59, 60, 61), the exuberance of which is in marked contrast with preceding and succeeding passages.

The knowledge and wide reading of the author are just as apparent, as is the somewhat slavish adherence to the German system of reference and documentation, once described as "a magnificent pudding of splendid ingredients, but, unfortunately, too heavy for digestion." While adding but

little to the knowledge of the student, the volume presents the evidence that an Indian audience not only was sufficiently interested to assemble to hear this type of lecture, but also to demand that it be reprinted; for which the West should rejoice that the East at least discusses its ideas and their application.

B. C.

Les Mandats Internationaux. Par Giulio Diena. Extrait du Recueil des Cours, 1925, Académie de Droit International. Paris: Librairie Hachette, 1925. pp. iii-51.

This is a reprint from the official collection of the lectures delivered by Professor Diena, of the University of Pavia, before the Academy of International Law at its third session in 1925. After tracing the development of the idea of international mandates as it first appeared in the Brussels Acts of 1885 and 1890, and its adoption by the Peace Conference of 1919 (Article 22 of the Covenant) as the solution for the disposition of the territories taken from Germany and the Ottoman Empire, Professor Diena proceeds to examine the juridical nature of the institution. He points out that it represents a compromise solution between the views of those who desired to see the territories in question annexed by the victorious Powers and those who wished to have them placed under a system of international administration. He admits that the task of describing precisely the juridical nature of the system is a very difficult one, although it had been already attempted by various writers, notably by Professor Quincy Wright in his learned article on "The Sovereignty of the Mandates" in this JOURNAL (Vol. 17, p. 691ff).

Professor Diena addresses himself first to the question as to whether the so-called mandates provided for by Article 22 of the Covenant possess the juridical character of a real mandate as that term is understood in private law. Some jurists, *e.g.*, M. Henry Rolin, have denied this thesis for the reason, as they argue, that the League of Nations does not possess a juridical personality and consequently lacks the capacity to confer a mandate upon a state. Professor Diena declines to accept this view and maintains that the League is endowed with a juridical personality of its own and does therefore possess the capacity to give mandates to particular states. He then considers the question as to whether the relation between the League and the mandatory Power is really a juridical relation, and he concludes that it is not, at least not in the sense of mandates in private law. Is the relation analogous to that between a guardian and a ward (relation of tutelage), or that between a trustee and the object of the trust, according to Anglo-American law? His conclusion is that it is neither, but that it falls within the category of international protectorates which may be distinguished from both. He then proceeds to consider the perplexing question as to where the sovereignty in such a system resides. Is it suspended, as some writers claim? Does it

reside in the League, or in the Allied and Associated Powers, or in the mandatory Power or (in the case of the A Mandates) in the states under mandate? He rejects at the outset the theory of suspended sovereignty, for the reason that no territory which is not *res nullius* can be conceived as being subject to no sovereign. Likewise he rejects the theory of Bileski and Breschi that the sovereignty belongs to the League, and equally the theory of certain writers that it remains with the Allied and Associated Powers. His own conclusion is that the sovereignty remains with the mandatory Power. In the case of the B and C Mandates, it is full sovereignty (*pleine souveraineté*); in the case of the A Mandates it is *haute souveraineté*, by which he apparently means a sovereignty which is limited by the terms of the mandate and by the obligations which the mandatory state has assumed in accepting the mandate. In a final chapter the author examines the restrictions upon the liberty of action of the mandatory Powers, restrictions so important in fact as to negative his conclusion that the mandatory Powers possess the full rights of sovereignty over the territories under their mandate.

J. W. G.

Traité de droit international public. By Paul Fauchille. Tome I, troisième partie, Paix. Paris: Librairie Arthur Rousseau, 1926. pp. xi, 729. Index.

Fauchille's *Traité* is now completed. It consists of 4,064 pages. It is bound up in four parts, three devoted to Peace and one to War and Neutrality. Of all the works on international law appearing since the close of the World War, this is incomparably the largest. It is so voluminous that it will be used chiefly as a book of reference. For that purpose it is excellent in plan and in execution. It presents in detail precept, and example, and breach; and breach certainly cannot be ignored, for at all times, and especially of late, it is in the breach that some rules have, after a manner, been honored. The views of all important authorities are given adequately, with Fauchille's own criticisms. So likewise the historical events. Footnotes of unexcelled thoroughness furnish citations for purposes of verification or of elaboration. The practical man can ask no better tool, whether his wish be simply to know the actual practice or to frame an argument by way of protest. Similarly, the scholar or the reformer finds here the foundations necessary for his own thoughts and labors.

The point of view is the modern one, the emphasizing of usage and not of natural law; for Fauchille knew that international law is one of the fields where experience has triumphed over hope. Indeed, the point of view is somewhat more accurate than that expressed by most books; for Fauchille, instead of describing international law as composed of rules which nations do in practice obey, follows Bonfils in describing it as composed of the rules wherein the respective rights and duties are defined, and thus he seems to recognize the fact, for it is a fact, that international law is a systematized collection of those rules which each nation, whether obeying or not, deems

binding upon other nations. Fauchille does not, to be sure, elaborate this somewhat pessimistic thought; but he clearly had it in mind, and thus he is protected against the criticism deserved by less observant writers. There is room, by the way, for an investigator who will base his doctrines of international law chiefly upon the protests addressed by nations to one another. Not what a nation practices, but what it preaches, is an enlightening standard of international virtue.

Three of the four parts of the *Traité* have already been reviewed in the JOURNAL (XVI, 726; XVII, 812; XIX, 832). The present part, under such general headings as the pacific relations between states and the pacific modes of settling international disputes, covers, among other topics, sovereigns, secretaries of foreign affairs, the rights and powers and duties of diplomats, the functions of consuls—including the so-called capitulations—international congresses and conferences, treaties and conventions, good offices and mediation, arbitration and judicial settlement, retorsion, reprisal, embargo, and pacific and economic blockades.

The value of the *Traité* can be best appraised by noticing the space given to some specific subjects, and also the mode of treating them. Take, for example, good offices and mediation (pp. 518-533). Those sixteen pages, especially when compared with other treatises, will be found to clarify the whole matter in a manner worthy of high praise. Fauchille explains and removes the difficulties which have rather unnecessarily flowed from sometimes distinguishing good offices from mediation and sometimes treating the two terms as interchangeable; and he gives proper attention to the numerous instances in which such negotiations have been used, with description of the practical difficulties encountered.

Similarly, the one hundred and fifty pages (pp. 534-683) devoted to arbitration and judicial settlement give the proper distinctions between the various kinds of machinery sometimes indiscriminately grouped under either or both of those terms, narrate instances, and, without descending to the minuteness of a book of forms, deal with the whole subject in a practical and enlightening way, covering, among other things, the new Permanent Court of International Justice, and demonstrating incidentally that temporary tribunals, and indeed all tribunals deserving to be distinctively termed arbitral rather than judicial, are unfortunately not governed by a fixed procedure or by the need of following precedents. Here, as elsewhere, Fauchille restricts himself to exposition, but gives the facts requisite for intelligent discussion of reform.

In reviewing the parts of the *Traité* heretofore published, attention has been called to Fauchille's modest and loyal wish that this work be deemed in some sense an eighth edition of Bonfils' *Manuel*, of which he himself produced all editions after the first. In the present part of the *Traité* only one-fourth can be credited to Bonfils' hand, and in the complete *Traité* only a little more than one-fifth.

The *Traité*, it should be borne in mind, does not render the *Manuel* wholly useless. Many scholarly persons will wish to own both the *Traité* and the seventh edition of the *Manuel*; for as that edition of the *Manuel*—almost half of it contributed by Fauchille—appeared in 1914, it has permanent value as a picture of international law at the outbreak of the World War and as an unprejudiced test for the acts of the participants therein. Similarly, on the shelves of a scholarly library the *Traité*, depicting international law when transformed by the World War and by the resultant treaties, is indispensable now, and, being the work of an expert contemporaneous observer, can never be displaced.

EUGENE WAMBAUGH.

Le Règlement Pacifique Obligatoire des Différends Internationaux suivant le Pacte de la Société des Nations. By Zygmunt Gralinski. Paris: A. Pedone, 1925. pp. 324. \$2.00.

This writer is a lover of his kind. That is the key to his book; its moral tone is excellent. He wants wars to cease and peace to prevail; he is optimistic, rising in hope with proposals like the Treaty of Mutual Assistance or the Geneva Protocol; and though disappointed when they fail of acceptance, still looking for some favorable solution of the problem of war and peace. But he is no mere sentimentalist. He is a commentator with a gift of analysis, of seeing connections between facts and of making things plain by a simple style. He has done what obviously ought to be done at this time. He has brought together in a continuous study the work of the Hague conferences in establishing mediation, commissions of inquiry, and the Permanent Court of Arbitration; the effort made to institute the Permanent Court of Arbitral Justice in the time of Secretary Knox, and he has related to the Hague movement the Bryan treaties for the advancement of the peace.

From this point on, he takes up the story of the making of the Covenant of the League of Nations. He describes briefly the various projects advocated by this country and other countries from which the covenant was developed. He then elaborates in detail, with comment and historical information, the conciliatory, arbitral, and judicial procedure provided for in Articles 12, 13, 14, 15, and 17 of the covenant, with considerable attention to the institution and operation of the Permanent Court of International Justice. He devotes nearly 200 pages to those articles with sustained interest. He closes with a consideration of the Treaty of Mutual Assistance and the Geneva Protocol, the period covered by his book ending about the first of the year 1925. He gives a long list of authorities which contains names of new publicists that have become known since the World War, as well as of recognized authorities in international law before that time.

This book may not be a classic; it has the character of a thesis, but it is less technical and more readable than most theses. It is useful for its time, and by means of it, considering its general tone and purpose, the writer has taken a good part in the movement for peace with justice.

JAMES L. TRYON.

Transactions of the Grotius Society, 1925. Vol. XI. Problems of Peace and War. London: Sweet & Maxwell, 1926. pp. lxxvii, 138. Price, 7s. 6d. net.

Five interesting papers were read before the Grotius Society of London during the year 1925, and in addition, there was an important discussion of the abolition of submarines. On June 8th the Society held a dinner in celebration of the Tercentenary of Grotius, *De Jure Belli ac Pacis*, at which there was a large and distinguished gathering of English and foreign jurists and members of the diplomatic corps. Dr. Loder, of the Permanent Court of International Justice, was one of the speakers of the evening. A report of the speeches at the dinner is included in the volume of *Transactions*.

Mr. W. S. M. Knight, in a paper read before the Society on January 20 1925, called attention to the work of Seraphin de Freitas, a Portuguese monk and contemporary of Grotius, as a worthy criticism of the latter's *Mare Liberum*. Professor Brierly, of Oxford University, on March 24th read a paper entitled "Some Considerations on the Obsolescence of Treaties," in which he expressed the hope that political as well as commercial treaties will be concluded for a term of years. Dr. Thomas Baty, in a paper on "Judge Betts and Prize Law," read on October 13th, criticized the American Civil War prize decisions, especially the *Springbok*, as being more political than judicial. In a paper entitled "The Legal Meaning of War and the Relation of War to Reprisals," contributed by Dr. Arnold D. McNair, he considered what acts of force committed by one state against another constitute war within the meaning of the Covenant of the League of Nations, and he concluded that the questions addressed to the Committee of Jurists after the Corfu incident and the committee's answers to those questions "suffered from the political atmosphere surrounding that incident." Master Ernest A. Jelf discussed the codification of international law under the title "International Law in its Strictest Meaning." He pointed out that a very small percentage of books on international law contain definite rules which come within the strict definition of that term, and he proposed that if there is to be a code, "let the existing international law in its strictest meaning be codified," to be added to or amended after worldwide discussion by jurists, parliaments, merchants, bankers, soldiers and sailors.

The discussion of the abolition of submarines was opened by the reading of letters from Sir Alfred Hopkinson and Sir Graham Bower. The former defended the affirmative and maintained that submarines are a weapon of offense and not of defense and are practically useless for a peaceful object.

The latter defended the proper use of submarines in war, especially as the weapon of the weaker naval power, and declared to be untrue the assertion of the Washington Treaty that it is practically impossible to use submarines as commerce destroyers without violating the laws of war. The discussion upon the subject led to the adoption by the Society on December 1, 1925, of the following resolution:

Whilst in favor upon humanitarian grounds of the abolition of submarines, the Society is of opinion that the moment is inopportune for urging their abolition, but that, so long as their use is permitted, submarines should be subject to the existing rules regulating the conduct of other armed vessels employed in naval warfare.

The foregoing resolution was accompanied to the press by a letter of explanation signed by the President and Secretary in which it was stated that the provisions of the Treaty of Washington of 1922 are considered to be far from adequate, particularly as they fail to distinguish between the destruction of neutral and merchant vessels.

Dr. W. R. Bisschop contributed a valuable analysis of the Locarno Pact, preceded by an equally valuable summary of the negotiations for security beginning with the Paris Peace Conference of 1919. The concluding paper was read on December 16th by Mr. F. Llewellyn Jones under the title "The Concert of America—The New World's League of Nations," in which are discussed some of the projects for the codification of international law prepared by the American Institute of International Law.

GEO. A. FINCH.

Las Relaciones Diplomáticas de Mexico con Sud-America. Por Jesus Guzman y Raz Guzman. Mexico: Publicaciones de la Secretaría de Relaciones Exteriores, 1925. pp. xvi, 184.

This publication is Number 17 of the series designated *Archivo Histórico Diplomático Mexicano*. The editor, an official of the Mexican Foreign Office, contributes an introduction, covering sixteen pages, in which he explains the scope and character of the work and makes laudatory statements regarding his country's foreign policy, as, on page iv, "Our Nation has no occasion to reproach itself on account of its foreign relations"; and, page ii, "In her relations with her new sister states Mexico has observed a prudent, sound, disinterested, spotless conduct." Regarding the community of interests among them, he says it was natural that the new republics should find themselves drawn toward each other, that they should aspire to form a strongly united entity; but the principle of Latin American unity has been so obstructed at times that it has seemed an unrealizable Utopia. However, hope remains that the natural hindrances may be, as indeed they are now being, overcome.

In selecting material for the volume he says he examined the reports of all the administrations and their respective foreign secretaries from 1822 to 1924. A little more than a fourth of the 180 pages are occupied by re-printed extracts from a report bearing a similar title published in 1878 by A. Nuñez Ortega, who then held the office now held by the present editor, since, the latter explains, copies of his predecessor's report are very scarce. The remaining three-fourths of the volume are occupied, not by a digested narrative or historical review like Nuñez Ortega's, but chiefly by the full texts of selected correspondence, mostly diplomatic, regarding several isolated incidents, which presumably the editor considered the most interesting or important, as follows: Colombia's invitation in 1830 to coöperate in attacking Spanish possessions in the West Indies; proposal regarding effecting the confederation provided for in the treaty of 1823 with Colombia; proposal of Colombia, 1872, that all American governments make a united effort to obtain Spanish recognition of Cuban independence; Mexico's proposal, 1843, to revive the Panamá Congress; relations of Colombia and the United States, 1857, respecting the Isthmus of Panamá; recognition of the independence of Panamá, 1903-04; felicitations exchanged between Mexico and Peru, 1821, 1822, and 1825, regarding victories over Spanish arms; prospective rupture between Peru and Colombia, 1827; Peruvian disposition to aid Mexico in the Spanish invasion of 1830; Peruvian funds offered to aid Mexico, 1863; Mexican offers of relief for Peruvian earthquake sufferers, 1868; Chilean subscriptions to aid Mexico in the French war, 1863.

WILLIAM R. MANNING.

Des Bollwerk des Friedens. Heber Hart, Übersetzt von Gustav Walker (German translation, by Gustav Walker, of *The Bulwarks of Peace*, by Heber L. Hart). Vienna: Oesterreichische Staatsdruckerei, 1926. pp. xvi+256.

In March, 1918, eight months before the signing of the Armistice, Heber L. Hart, Doctor of Laws of the University of London and Recorder of Ipswich, published *The Bulwarks of Peace* (Methuen), a work which he rightly styled "a Primer of Peace." The importance of the book was immediately recognized. Nowhere had the influences making for peace, the causes leading to possible conflicts, and the fundamental conditions necessary for guaranteeing peace, been stated so concisely and so practically before. Nowhere had such a clear exposition been made of the strictly practical means of providing against possible wars in the future. It is a significant fact that now, only eight years later, the book should have been translated into the language of those nations which at the time of its appearance were generally regarded as the chief obstacles to a realization of the very ideals which Dr. Hart espouses. The German translation is the work of Dr. Gustav Walker, Professor of the Legal and Political Sciences

at the University of Vienna and chief judge of the Austrian *Abrechnungsgericht*.

In his German rendering Dr. Walker has acquitted himself creditably of a difficult task. He is usually, though not always, meticulously faithful to his original, and he preserves to a remarkable degree the admirable lucidity of Dr. Hart's style. Indeed, Dr. Walker gives welcome evidence of the fact that the art of translation, when applied to a worthy object, is not beneath the dignity of even a distinguished and busy man of affairs. Quite in harmony with the importance of the work, the translation is handsomely printed on good paper, with an excellent photograph of Dr. Hart as a frontispiece.

In a foreword of the translator, subjoined to the author's preface, Dr. Walker summarizes the reasons which led him to undertake the translation. They are interesting as the reflection of responsible opinion, now current in Germany and Austria, on questions of international peace. Dr. Hart's volume is important, we are informed, because its author is neither a theorist nor a utopian, but a practical thinker. His rejection of the idea of a superstate as a means of peace is applauded. The leading rôle of the United States and Great Britain as custodians of the peace of the world is acknowledged. It is stated with seeming authoritativeness that Dr. Hart's work was not without influence upon the framers of the treaties of Versailles and St. Germain, and that its significance for future generations may become even more profound.

EDWIN H. ZEYDEL.

Europe and the East. By Norman Dwight Harris. Boston and New York: Houghton Mifflin Company, 1926. pp. xvi, 677. \$5.00.

In this timely volume on Asiatic affairs and problems, a companion to his excellent volume on European Colonization and Intervention in Africa which appeared in 1914, Professor Harris has successfully performed a difficult task—a task for which he was well qualified by long study, by research in foreign capitals and by experience with the Colonel House commission which collected data for the Peace Conference in 1917–18. In it he has evidently combined diligent scholarship, careful discrimination in the selection of materials, and historical perspective, and has shown a broad sympathy for all peoples and a proper judicial impartiality. It is a study of recent foreign relations of Asiatic states and the intervention of European Powers in their affairs, and is a useful contribution to the history of Asiatic problems and international relations in Asia in recent times, especially since 1840, but with frequent historical excursions backward to earlier events which have a bearing on later conditions and problems.

Past history, especially the rapidly moving drama of the last two generations, is attractively presented as a background explanation of present situations which constitute the problem of the New East. The author recalls

that the European governments, when they began to assume control of foreign intercourse near the middle of the nineteenth century, were confronted with the legacy of the period of uncontrolled individual initiative and caprice or of soulless commercial corporations whose brutal methods aroused the suspicion and enmity of the Orientals, and that their success was also long conditioned by unscrupulous competition resulting from national ambition and avarice in the stupendous race for world trade and national expansion, which "eclipsed all sense of justice and honor,"—*e.g.*, by such activities as those which marked the progress of Great Britain in India, of Russia in Turkestan and Manchuria, of France in Indo-China, and of Japan in Korea and Manchuria.

The first chapter (on World Politics in the East), which concisely develops and summarizes the author's views of present situations and future policy, is followed by sixteen chapters on the enlargement of intercourse with the Near East, where the storm center has been the Ottoman Empire, with the Middle East centering in India and its dependencies and neighboring regions connected with the problem of its defense, and with the Far East and the Pacific, where competition first centered upon China and later conflicted with Japan or was influenced by changed conditions in Siberia, Manchuria, Mongolia and Korea, and in Indo-China and the neighboring islands.

In considering the future of the young Turkish state he concludes that, although it is hampered by the unsavory reputation of the old Ottoman problem and the abolition of the Caliphate, and by the expatriation of two million Greeks and Armenians, the developments of the last ten years have demonstrated that the Turk can take care of himself, but that material aid and support must come from the outside in order to remove the perpetual threat of war which prevents the concentration of attention on rehabilitation and internal social problems. In the chapter on the Heart of Asia, tracing the expansion of Russia in Central Asia toward the Persian Gulf and the borders of China, and the adjustments with England concerning the Afghanistan frontier, and also tracing the new communities arising after the crumbling of the Russian Empire and the later crime of the Russian Soviet Government, he decides that it is reasonably certain that the great Russia of the future, including the dependent territory of Central Asia, will be a great federation of republics with common ideals, institutions and principles of government, provided the new national organization is based upon suitable principles of honesty, integrity, efficiency, individual freedom, and democracy. He concludes that the future of Persia is "still uncertain." Concerning India, which, by representation in the Imperial Conference, has been transformed from the position of a subject to a partner in the British Empire, he predicts that the English are prepared to make even more concessions until India approaches the new status of a self-governing dominion, but he apparently doubts whether British statesmen will ever be prepared to permit India to leave the British Empire or to become an independent state.

The chapter treating Chinese foreign relations since 1901 and the rise of the republic, is especially timely and full of interest. It summarizes in detail the back-door intrigue which constantly checkmated front-door diplomacy for ten years after the signing of the treaty at Peking and harassed and hindered the weak Manchu government, and it traces the origin and growth and difficulties of the republican movement to 1925, the date of the death of Dr. Sun Yat-sen,—“one of the most fickle and visionary politicians of China.” According to the author, the Washington Conference of 1921, and the resulting Four Power Treaty of December, 1921, and the Nine Power Treaty of 1922 cleared the way for unimpeded work of reconstruction in China by eliminating foreign interference in Chinese affairs, “although foreign powers have not carried out their promises in good faith.”

In another chapter the author presents the problem of the outlying provinces of China—Manchuria, Mongolia, Sinkiang and Chinghai vitally connected with the economic development of eastern Asia. The Mongolia problem is regarded as a great complicated question. He suggests that investigation may prove the advisability of organizing Mongolia, Sinkiang and Chinghai into a single unit composed of two parts: a Mongol state and a territorial region of several semi-independent communities which may gradually be admitted into the Mongol state, or be organized later into one or more independent states under Chinese supervision. Meanwhile “the Mongols and other native races inhabiting the outlying provinces must work out their own salvation.”

In a final chapter on The New Pacific, the author explains the long absence of European imperial designs in the Pacific until, following a period of indiscriminate trading and adventurous colonization which accompanied missionary effort in the century after 1788, they were finally (in the latter half of the nineteenth century) forced to extend their activities for control, with the result that by 1905 the partition of the Pacific islands was completed and the problems of a new Pacific had begun. The final step in completion of the new map was the result of the World War, and the Washington Conference and the Four Power Treaty of 1921. Australia became the leading factor in the South Seas, and Anglo-Saxon solidarity seems certain to be a great factor in determining the future history of the Pacific.

The author is probably too critical of statesmen and diplomats who “have failed to visualize the situation from a nonpartisan view-point,” or whom he charges with “dictatorial attitude,” “stupid blundering” or “unpardonable delays.” At the close of his chapter on the opening of China, he asserts that Secretary Hay’s enunciation of the principles of the “Open Door Policy” remained nothing but a negative self-denying ordinance foredoomed to failure largely because after his death in 1905 “Congress was too indifferent, as well as too ignorant of Far Eastern affairs to support enthusiastically any enlightened policy in the Orient, “while Hay’s successors lacked the initiative and backbone essential to the successful maintenance of his program.

He declares that "there was absolutely no excuse for the failure of the Allied Powers, at the close of the war, to assign to the new Armenian State sufficient territory to enable it to organize on a self-sustaining basis," which would have prevented it from falling a prey to the intrigues and the attacks of Soviet Russia and the Kemalists. In the third chapter on the Near Eastern question, discussing the recent *post-bellum* problem of partition and reconstruction, he blames European statesmen for their blunders of diplomacy and for the long delay between the conclusion of the armistice with Turkey and the signing of the Treaty of Sèvres, stating that the latter delay was sufficient itself to deal a death blow to any well-intentioned plan of reorganization. He considers the final treaty of 1923 as a "real basis for a lasting peace and for the work of reconstruction in the Near East." He thinks that the most disastrous blunder of the negotiators, however, may prove to be the failure to settle the economic disputes concerning concessions and financial problems, thus leaving New Turkey to continue the struggle for economic independence.

Although he recognizes many difficulties which block the way to settlement of the critical pressing problems of Asia, he concludes that they are not insurmountable. He seems somewhat over-optimistic and somewhat impractical in proposing facile immediate solutions of the largest world problems, by sudden adoption of new national ideals concerning the promotion of the interests of others, instead of their own, ideals which he admits have not been practiced heretofore in diplomatic relations. Although he recognizes the necessity of temporary foreign interference in some cases such as India, Korea and the Philippines, where conditions are complicated or unstable, he asserts that governmental control should be exercised "only with consent and in the interest of the community concerned," and with honest efforts to prepare for self-determination and self-administration.

Throughout the work the author emphasizes the importance of mutual confidence and respect and reciprocity among equals as proper bases of international coöperation. The problem of Asia, he asserts, is no longer a matter of trade, but a question of international life, "how to establish between East and West a just, honorable and mutually beneficial relationship which will not subvert Oriental genius or institutions, nor impede the development of civilization, nor seek to control Asia for profit, but will establish mutual "open door" exchange of ideas and principles and methods with a view to the welfare and prosperity of all concerned; a tremendous task, which, according to the author, has only just begun, following the lessons of the World War. He urges prompt efforts toward a practical program of coöperation and responsibility for immediate execution. Ignorance of the problems and policies of other countries he regards as "a crime in international politics" and lack of vision as hardly less culpable.

The book contains an astonishing amount of accurate, well-correlated and well-organized information, including both historical surveys and delinea-

tions of present conditions in each Asiatic country, except Siberia, and is presented in readable form. Apparently it is practically free from errors or omissions. It is illustrated by seven convenient maps and has a selected bibliography of twenty-nine pages arranged according to the various chapter headings. It also has a convenient subject index of twenty-seven pages.

JAMES MORTON CALLAHAN.

Gedanken über Staatsethos im Internationalen Verkehr. By Herbert Kraus. Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte m. b. H., 1925. pp. 166. Index. Mk. 20.

In this characteristically thorough, analytical, yet very realistic little work, Dr. Kraus approaches a subject which is at once fundamental in its importance, wide in its appeal, and baffling in its complexity and unsatisfactory lack of unity and solidity. The result is that when Dr. Kraus has finished with the subject one feels that a solution is not very much nearer than it is after far less capable moralists and litterateurs have poured out their feelings and their cynicisms on the same topic.

The author holds that it is indispensable to work out ethical standards for application to state life and state action, and to insist upon an application of such ethical standards in international relations. The standards must not differ greatly from the ethical standards applicable to relations among individuals. He regards the current ethics of international relations as at once anachronistic and "ragged." Ethical principle is largely subordinated to non-rational reactions as an influence on state activity, despite some lip-service rendered to the former; right is less influential than cleverness, social justice less influential than national greed. Students and critics of the ethical value of any given national action in international relations vary in their judgments as a result of their personal views and the national interests involved, with the result that the aggregate of contemporary ethical judgments of state action is various, fickle, and capricious in quality and content. Between stark nationalism, on the one hand, and universal altruism, on the other, the ethicists fluctuate wildly in their attempts to set up standards of state action. Meanwhile the nations play upon a "double register" in their dealings with one another, acting according to feelings of ruthless nationalism while professing some allegiance to standards of ethics which obtain among individuals.

Dr. Kraus is, however, as optimistic as he is critical of the present situation and determined that it shall be remedied. He sees going on in the world a deepening and a spread of knowledge and scientific thought which is affecting individual and national thought regarding the ethics of state action. The result must be the firm establishment of a true inter-state ethic in place of the narrow ethic of the individual state, an inter-state ethic of communal coexistence of the nations, of internationalism in its most precise meaning.

PITMAN B. POTTER.

The American Task in Persia. By A. C. Millspaugh, Administrator-General of the Finances of Persia. New York: The Century Co., 1925. pp. xiv, 322. Index.

"In the shadows of Persepolis and Susa," says Dr. Millspaugh, with a sense of proportion not too common among experts engaged in large undertakings, "three years, the period of our association with the Persian problem, seem a mere tick of the tireless clock of history." And yet, in that brief moment, as will appear from his modest personal narrative, Dr. Millspaugh and his associates, working as common-sense administrators rather than as financial experts in the narrow sense, have introduced into the chaotic financial situation of Persia a stabilizing and educative influence which may contribute as much as the firm hand of the new Shah toward the revivification of the empire of Cyrus and Xerxes.

The Administrator-General takes pains to avoid giving the impression that the Persians are inherently incapable of progress or of efficient administration. Progress, he observes, had its roots deep in the sentiments of the people and, before the arrival of the American financial mission, had already borne fruit in much sound legislation which had prepared the ground for the mission. Moreover, he believes, there were, before his arrival, numerous Persians who not only knew what reform measures were needed but who also had "the requisite energy, courage, and will to undertake the task." Attempts to reform the financial administration had in fact been made by several Persian ministers of finance. Their failure was due to the political power of those whose interest it was to continue the system of sinecure appointments and loose accounting. It was the realization of the necessity for taking the financial administration out of domestic politics that led to the employment of Mr. Morgan Shuster, whose brief service as Financial Adviser in 1912 gave him "a niche in Persia's Hall of Fame," and it was with a realization of this necessity, accentuated by the serious property losses incident to the invasions of Persian territory during the war, that the Persians, no longer menaced by the Power which had demanded the dismissal of Shuster, again sought the aid of an American mission in 1922.

Dr. Millspaugh's mission, composed of twelve men, was welcomed by the most influential Persians in 1922 and was given as much as nine months to live by even the most cynical foreign observers. It was less than nine months old when it had to meet, with silence, the first concerted attack from the elements affected by the reforms. A year later there was a more serious attack in the course of which the mission was charged, in and out of the Parliament, with "various high crimes and misdemeanors," including illegal and oppressive collection of taxes; delays in the conduct of correspondence; failure of adaptation to the mentality of the Persian people; maintenance of too many high-salaried officials; lack of expert knowledge; and general incompetence.

The criticisms of the mission had reached their height and had given seri-

ous concern to Dr. Millspaugh and his associates at the moment when the tragic murder of Vice-Consul Imbrie occurred. Dr. Millspaugh makes no acknowledgment of any improvement of the position of his mission as an indirect result of the amicable settlement of the question of reparation for the murder, relieving the tension which followed the insistence of the United States upon the responsibility of the Persian Government in the matter. At any rate, the clouds which hung over the financial experts were at length dissipated, and with the indispensable support of Reza Khan (now Reza Shah), who had become Prime Minister in October, 1923, the mission found itself, before the end of its third year, firmly established in its control of the Persian financial administration and with authority to engage additional experts from America.

In his concluding chapter Dr. Millspaugh expresses his views as to "the international measures which are most likely to assist the American Mission and Persian progressives in their task." Adequate assurances, he believes, have been given by foreign governments regarding "the territorial integrity of Persia and equality of economic opportunity in the country." Persia herself accepts the principle of the open door and "desires to make the principle a practical reality by eliminating the discredited ideas of 'spheres of influence' and 'special interests,'" and by establishing conditions of genuine competition for foreign capital. In return for guarantees of equality of opportunity, he urges, all foreign governments which now possess or assert a right to special economic privileges against the will of Persia should be willing to accord her "every fiscal and economic right possessed by other sovereign nations." There is, in his opinion, little hope for a solution of the problem of Persia in the casual and inefficient practices of "politico-economic penetration, the tutelage of the weak by the strong, forced exploitation, and the agglomerating of empires."

EDGAR TURLINGTON.

Diario de un Escribiente de Legacion. Por Joaquín Moreno. Oficial de las Legaciones de México en París y Roma (1833-1836). Mexico: Publicaciones de la Secretaría de Relaciones Exteriores, 1925. pp. xx, 289.

Director Genaro Estrada of the series known as *Archivo Histórico Diplomático Mexicano*, of which this publication is Number 16, has supplied an interesting fourteen-page introduction to this chatty diary of a young diplomatic secretary, written during the four-year period nearly a century ago while the latter was attached to the Mexican Mission to France and the Vatican, of which Lorenzo de Zavala was chief. Estrada says apologetically that the diary is not one of transcendental tone, nor a writing of great political value nor, strictly speaking, of a diplomatic value which would justify its inclusion in the series; but he adds it shows an intimate contact with a diplomatic mission and is full of such observations, data, and meditations as are

customary in reports of an international character, and is a vivid reminder of the incipient, convulsed Mexico of the Santa Annas, Bustamantes, and Zavallas. The diary, as would be expected, is occupied with comments sometimes on the daily routine of the chancellery and news of the unimportant doings of friends at home, and at other times on important political occurrences in the homeland or at the capitals to which the mission was accredited, or in the other European countries.

WILLIAM R. MANNING.

American and British Claims Arbitration under the Special Agreement of August 18, 1910. Report of Fred K. Nielsen. Washington: Government Printing Office, 1926. pp. 638.

The American and British Claims Arbitration Tribunal has completed its work, and Mr. Fred K. Nielsen, Agent and Counsel for the United States, has issued his report. The scope of the arbitration included questions of law and fact incidental to fishing and shipping claims, property rights, collection of customs duties, naval and military operations and government contracts.

The arrangement of the report renders it a welcome addition to that relatively small number of authorities which comprise the working library of those engaged in international litigation. The report is arranged as follows: (1) the text of the Special Claims Convention of August 18, 1910; (2) the Rules of Procedure adopted by the Tribunal; (3) list of claims scheduled for arbitration under the convention, showing the disposition of each claim; (4) summary of cases argued, tabulating complete statistical data with respect to amounts claimed, and the awards made; (5) opinions of the Tribunal and summaries of arguments of counsel.

There are several other features of the report which distinguish it from similar publications and render it peculiarly useful. The index, embracing eight pages, is carefully prepared and facilitates the use of the report as a source book. The orderly presentation of the separate claims affords a clear-cut picture of the origin and evolution of the various issues. Each case carries a catchword headnote indicating the international law points considered by the Tribunal. Following each headnote, there is a short statement of facts setting out the history of the claim, a synopsis of the arguments of counsel for the two governments, and the Award of the Tribunal. In several of the more important cases the American Agent has elaborated the foregoing sequence by the inclusion of briefs. The briefs in the State Succession claims, the Robert E. Brown and the Hawaiian claims, contain valuable collections of authorities in a field marked by few arbitral decisions. These briefs add to the value and completeness of the report and evidence the thorough manner in which the work of the American Agency was conducted.

The Cayuga Indian claim was the largest and the last of the claims heard and decided by the Tribunal. This venerable claim, dating back to 1789, comprising an exceptionally long and complicated record, raised questions with which the Tribunal wrestled in an Award covering some twenty-five pages. The American Agent in his report of this case subjects the award to a searching analysis which throws grave doubt on certain of the grounds on which the Tribunal rested its award.

This report is a significant contribution to international arbitral law and procedure, both as a record of continuing Anglo-American arbitral relations, and as a collection of precedents by which to chart international action.

HOWARD S. LEROY.

La Communauté Internationale. Extrait du Recueil des Cours, 1925, Académie de Droit International. Par Jesse S. Reeves. Paris: Librairie Hachette, 1925. pp. iii-90.

This is a reprint from the official collection (reviewed in this number of the JOURNAL)¹ of the lectures delivered by Professor Reeves before the Academy of International Law at its second session in 1924. It is, in the main, a study of the nature of international society. In the language of the author, it represents an attempt to present the facts of international life and to discover the fundamental bases or major premises upon which may be established a valid hypothesis in the domain of international law. After an introductory survey of the common factors (territory, population, government, and a juridical régime) of international life and the differences (race, language, history, economic situation, industrial organization, institutions, ideas) which characterize it, the author considers in turn the theories of Grotius relative to international society, and those of his "naturalistic" successors, Pufendorf, Wolff, Vattel and others. Grotius, he says, was an internationalist. His conception of international society was a society based on the consent of all, within the limitation that this consent must not be in contradiction with the law of nature. But his conception was not that of a system resting upon a theory of the fundamental rights of states. To him, states as members of international society were not unities: society was only the consequence of the sociability of man; an international society composed of states which represented unities was, in his eyes, only secondary and derivative. The world as he conceived it was neither a world of mutual dependence nor one of independence. The author approves the dictum of Grotius that peace and not war is the normal condition of mankind, but he qualifies it with the reservation that it must be a peace of life and movement and not of fixity or stagnation. Of Grotius's successors, Pufendorf and Vattel exerted the most powerful influence. The former recognized a society of states governed by natural law, which states possessed fundamental

¹*Supra*, p. 819.

primary rights; the latter rejected Wolff's fiction of a *civitas maxima* as incompatible with the fundamental rights of internal sovereignty and independence of foreign control. In successive chapters Professor Reeves discusses the nature, tasks and obligations of international law; the theories of security and common interests; and the conceptions of international justice and its relation to public opinion. The notion of some authors that the end of international law is nothing more than the realization of international justice or international peace, or both together, he rejects. Neither is, he says, an end of international law; rather each represents an *ensemble* of conditions which alone renders possible the realization of certain ends.

On the whole, the author's conception of international society represents the moderate view. To him it is neither an aggregation of absolutely sovereign unities nor, as the late Alpheus H. Snow and others maintained, a society already juridically organized and governed by a régime of law imposed upon states from above without their consent and to which all municipal law must conform. His study is characterized by originality, keen thinking and, on the whole, by a rigorous juridical method of treatment.

J. W. G.

The United States and Mexico. By J. Fred Rippy. New York: Alfred A. Knopf, 1926. pp. xii, 403.

The author informs us, in his preface to this volume, that it presents the first general survey of the diplomatic relations of the United States and Mexico that has appeared in any language. He also states, and this is confirmed by an examination of the contents, that the three decades subsequent to the Mexican War of 1846-1848 have been treated most fully, and that "except for the periods prior to 1848 and subsequent to 1910, and the administrations of Buchanan and Lincoln, the author has broken virgin soil." His reasons for not extending his survey of the diplomatic relations of the two countries beyond the Hayes Administration are stated to be that "the thirty years which followed the advent of Porfirio Diaz were marked in general by a pacific intercourse yielding comparatively little for the historian to record."

The author has been eminently successful in achieving his avowed purpose, which was "to set forth in simple narrative designed to appeal to the public as well as to students of college and university rank, the difficulties which have arisen between the two countries, the factors which have produced them, and the spirit in which they have been met." He frankly concedes, however, that he has produced very little new material concerning the period prior to the war of 1846, because "the earlier period has already been written upon extensively by others." On the other hand, his contributions to the history of the three decades above mentioned are of notable interest and value, being based almost entirely on primary material

consisting of contemporary newspapers and periodicals and documents published by the two governments or drawn from their archives.

As to the period since 1910, following the overthrow of Diaz, the author contents himself with giving only his own brief interpretation of it, because "the most important of the sources necessary for the final history of the years following his overthrow are not yet available." This period covers the Wilson Administration, and the personal interpretation which the author has put forward in estimating the meaning and effect of the policies of that administration in dealing with Mexico discloses a strong partisan bias in favor of those policies, but his arguments in support of them are not convincing as to their usefulness in settling the so-called Mexican problems. President Wilson's Mexican policy, he says, consisted of "Moral assistance to a régime of constitutional order; steadfast refusal to place the interests of a few thousand Americans in Mexico above the interests of fifteen million Mexican people; championship of democracy, opposition to official economic imperialism—these principles were so often reiterated as to leave no room for doubt."

It does not as yet appear, however, that the Wilson policy, whatever it was, has produced the results designed, or is likely to produce them, so far as the Mexican Government is concerned. On the other hand, the disadvantages resulting from the Wilson policy are recognized by the author as calling for a qualified apology, for he says: "But it would be a mistake to assume that Wilson intended while insisting on such principles entirely to abandon American rights and interests. He attempted to save Americans from death and personal injury by repeatedly urging them to leave Mexico and assisting them to get out of the country."

In evaluating our Mexican policy since the end of the Diaz régime, what was done both before and after the Wilson Administration must also be taken into consideration, and the author is on safer ground in admitting that it is advisable for the historian to postpone the consideration of that period until he has access to sources necessary for its final history, which are not as yet available.

CHANDLER P. ANDERSON.

Les Allemands en Belgique, 1914-1918. Conclusions de l'Enquête officielle belge. Par Baron Alberic Rolin. Liege: Georges Thone, 1925. pp. 62.

In 1916 the Belgian Government published a *Livre Gris* which embodied the results of an official investigation of German atrocities and violations of the law of nations in Belgium, which the Germans answered in a ponderous White Book issued in the same year. According to M. Rolin, the Belgian exhibit was not entirely complete or even accurate because of the difficulties experienced at the time in obtaining evidence regarding the conduct of the Germans. Five years after the close of the war the Belgian Government

appointed a new commission to conduct another inquiry, and it is the report of this commission which M. Rolin analyzes and summarizes in the booklet here reviewed.

The report of the commission embraces four volumes, of which the first and third are each divided into two parts, making six books altogether. The two parts of the first volume deal with the *attentats* committed by the German troops during the invasion and occupation of Belgium; the second volume describes the deportations of the Belgian civil population by the Germans; the two parts of volume three contain a recital of the German measures against Belgian industry; and the fourth volume is devoted to the legislative, judicial, administrative and political acts of the Germans during the period of occupation. At the end of each volume will be found the texts of numerous depositions and official German documents which tell their own story. M. Rolin's summary of the report is a recital of massacres of civilians, hostages and prisoners of war; of pillage, devastation and bombardments; of exorbitant exactions in the form of contributions, fines and requisitions; of measures against the liberty of Belgian citizens and against the independence of the judiciary; of attempts to set the Flemish part of the population against the Walloon element; of the destruction of Belgian industry, etc. His final conclusion is that there was not one of the provisions of the Hague Convention of 1907 respecting the laws and customs of war on land and not one of the prescriptions of humanity and justice which was not violated by the Germans in the invaded districts of Belgium. The invasion of Belgium he pronounces a flagrant violation of the most solemn treaty ever concluded, and he quotes an opinion to the same effect from Baron Von Schoen, German Ambassador to France at the outbreak of the War. Three different proposals in succession, he says, were made by Belgian bodies for an investigation of the charges against the Germans, by a mixed commission, all of which the Germans rejected. He emphasizes that the indictment of the Germans on many points is confirmed by their own official proclamations, orders, acts and other documents, which constitute an important part of the mass of evidence contained in the report of the commission.

The whole story is a sickening one, but the investigation was one which should have been made. It is to be hoped that charges so grave and supported by so great a mass of evidence may yet be answered by those against whom they are made.

J. W. G.

The International Government of the Saar. By Frank M. Russell. Berkeley: University of California Press, 1926. (Publications of the Bureau of International Relations, Vol. 1, No. 2, pp. 113-249.)

It is a relief to find a work which openly and honestly attempts to take an unbiased and impartial attitude on the Saar Government. Its success

cannot be judged until the present perspective has changed; but there is little doubt that a real contribution has been made in the present volume. It is divided, first, into a discussion of the treaty provisions and the success of their operation under the new régime. There follows a treatment of the 1935 plebiscite provision and the perennial difficulty caused by the presence of French troops. Chapter VIII, which deals with the inquiry of 1923, is a little more of the author than the preceding seven, and Chapter IX, which is named "Concluding Observations," is the author's own reactions and conclusions.

The documentation is excellent. The footnotes are not only suggestive, but contain a fund of information relative to the topics which are taken up. At times the grammatical construction might be improved, but the reader is apt to disregard this in view of the orderly arrangement of material. The bibliography is divided into sources, books and articles dealing with the Saar Question, and secondary works consulted in connection with the study. There are many who would have omitted the last because of the chance connection which it has to the topic. The author does well to draw distinctions as to the relative values of his authorities, but there seems to be too strong a tendency at times to lean for support on Haskin's section on the Saar in his *Some Problems of the Peace Conference* (p. 205 *et passim*).

Undoubtedly this relatively short, but exhaustive publication is the most able and thorough treatment of the Saar Question in English, and certainly the most unbiased of any work in print.

THORSTEN KALIJARVI.

Sociedad Cubana de Derecho Internacional. Anuario de 1925. Habana: Imprenta "El Siglo XX," 1925. pp. 533.

This well printed and edited volume contains the proceedings of the Eighth Annual Meeting of the Cuban Society of International Law held at Habana, May 8-12, 1925. The volume contains a large number of interesting papers and discussions, among which may be especially mentioned the inaugural address by Dr. Carlos Manuel de Céspedes, the Cuban Secretary of State, entitled "International Responsibility;" the address of Dr. Herminio Rodríguez y Von Sobotker on "Disarmament and Security;" and the account of Dr. Fernando Sánchez de Fuentes of the conference on specifications held at the Third Pan American Scientific Congress at Lima. Dr. Pedro Martínez Fraga contributes an interesting paper in celebration of the 300th anniversary of Grotius' *De Jure Belli ac Pacis*. Among the resolutions adopted by the Society was one declaring that Cuba is not a "client state" of the United States. The adoption of this resolution was the result of a paper by Dr. Enrique Gay Calbó, who undertook to refute a statement which appears in Lawrence's *Principles of International Law* that Cuba occupies such a position toward the United States. Following the previous custom

of the Society, a session was held in the great hall of the University of Habana, at which papers were read by ten students of international law. The meeting of the Society closed with a banquet given to Dr. Cosme de la Torriente, former Ambassador at Washington, in appreciation of his services in connection with the ratification of the treaty relating to the sovereignty of the Isle of Pines.

GEO. A. FINCH.

El Imperialismo del Petróleo y la Paz Mundial. By Camilo Barcia Trelles. Valladolid: Talleres Tipográficos "Cuesta," 1925. pp. 253. Index.

The author, who is a professor of international law at the University of Valladolid, has made an interesting study of what he terms the imperialism of petroleum with reference to world peace. The volume is divided into three parts, the first treating of petroleum as a decisive factor in international order; the second showing the world-wide struggle for the acquisition of oil deposits; and the third discussing petroleum and its relation to American international policy.

Part one is divided into two chapters, the first dealing with petroleum and the dominion of the seas, and the second with petroleum and its use in the World War. The author contends that a struggle has begun between large trusts, whose power at times is greater than that of the states in which they are incorporated, and whose action threatens the independence of other states. He says petroleum is today the determining cause of the most active and far-reaching diplomatic negotiations, and to such a point that the international policy of the great Powers is frequently determined by the desire to possess petroleum, which they may lack, or by the ambition to create a monopoly, by exercising a world petroleum dictatorship. The possession of fuel oil constitutes an element of life or death for the great sea Powers, especially those needing the submarine. He considers Petroleum has eliminated coal in navigation by reason of the advantages secured in its use. In time of war petroleum is essential for the operation of aeroplanes and automobiles, which have taken the place of slower methods of transportation.

Part two is divided into three chapters, the first dealing with the struggle between the large oil companies of different nations, and the last two with oil and the Far Eastern question, and oil and Soviet Russia. The "Standard Oil," "Royal-Dutch" and the latter's alliance with the "Shell," now known as the Royal-Dutch-Shell, and their struggle for control of the world oil fields, backed respectively by the American and British Governments, the case of ex-Secretary Fall and his relation to the Doheny and Sinclair companies, the Bagdad railroad with its oil concessions, and the struggle before the World War between Germany and Great Britain for the control of the oil fields of Asia Minor, form interesting subjects of discussion.

Part three is divided into four chapters, the first dealing with the pre-

ponderance of the United States in the Caribbean Sea, the second with Japan, Russia and the United States with respect to the problem of petroleum and the question of the Pacific, the third with the oil possibilities in such of the American Republics as are of Spanish origin, including a discussion of the oil laws and concessions of Honduras, Guatemala, Costa Rica, Venezuela, Ecuador, Peru, Bolivia and Argentina, and the fourth with the oil question in Mexico, especially with reference to Article 27 of the Constitution of 1917.

The Panama Canal controversy is fully discussed, the author concluding that it was the discovery of oil in Colombia which caused the United States finally to ratify the long-pending treaty, and that if it had not been for such discovery, the relations between the two countries would today be the same as from 1903 to 1921.

The author has given considerable time to the preparation of his subject, which is well written and presented in an extremely interesting and scholarly manner. However, the reviewer cannot be in accord with all his conclusions, nor can he feel that the author has taken sufficient time before the publication of the work to check up on his facts. For instance, in discussing Costa Rica, he mentions among existing concessions that of "Pinto-Graulich" and that of "Amory." The former was cancelled by the government on the ground of violation of contract by the company, and the latter, the British Oil Fields concession, was cancelled by award of Chief Justice Taft on the ground that the concession was invalid.

WALTER SCOTT PENFIELD.

Union Interparlementaire. Compte Rendu de la XXIII^e Conférence tenue à Washington du 1^{er} au 7 Octobre et à Ottawa le 13 Octobre 1925. Lausanne: Librairie Payot & Cie, 1926. pp. xx, 829. Index.

This volume contains the reports and other preliminary documents presented to the Interparliamentary Union at its twenty-third conference, and the deliberations and debates had upon them. It includes documents and discussions relating to the Pan American Union, the development of international law, a European customs understanding, the problem of national minorities, the fight against dangerous drugs, the reduction of armament, the present crisis in the parliamentary system and its remedies. The consideration of the development of international law was opened with the reading of a paper by the Honorable Elihu Root entitled "The Codification of International Law" (printed in this JOURNAL for October, 1925, Vol. 19, pp. 675-684). Senator La Fontaine, of Belgium, presented a project of a declaration of the rights and duties of nations, and Professor V. V. Pella, of Rumania, presented a report on the criminality of wars of aggression. On the subject of the codification of international law, the conference, while expressing its satisfaction with the labors of the Committee of Experts of the

League of Nations and of the Pan American Union, expressed the view that "the best method to follow would consist in establishing a general and constructive plan . . . with a view to defining the fundamental conditions of the régime of peace to be instituted between the nations, to provide for the judicial settlement of disputes which constitute a threat to that régime and to the application, if necessary, of methods of execution and of sanction," proposals to this end to be submitted eventually to an international conference of nations called for the purpose of effectuating the codification of international law (p. 800). An elaborate resolution was adopted containing the fundamental principles of an international legal code for the repression of international crimes, the code to be applicable both to states and individuals, and to be adjudicated by the Permanent Court of International Justice, whose decisions are to be executed by the Council of the League of Nations (pp. 47-50, 801).

GEO. A. FINCH.

Der Versailler Vertrag und die Sanktionen. By Dr. Conrad A. Wille. Berlin: Verlag von Georg Stilke, 1925. pp. 243. Index. Mk. 6.

In this book of less than 250 pages, Dr. Wille succeeds in presenting a comprehensive review of the sanctions prescribed by the Treaty of Versailles under seven headings. The reprisal character of the sanctions; the conditions of non-fulfilment, or "defalcation," under the treaty; the sanctions specified in the treaty; the relation of the League of Nations to them; the Rhineland Commission's connection with them; their character as tested by ordinary international law; and their place in *haute politique*: Such are the aspects of the question which are treated in the book with a fair degree of the thoroughness characteristic of German scholarship.

This monograph is one of a vast swarm which are destined to attack every aspect of the treaty so bitterly hated in Germany; and it bears some evidence of the bitterness felt even by that country's men of calm and scientific mind. The "deception of the Armistice," the "dictated peace," the "assertion of Germany's sole responsibility for the War as the basis of the Treaty," the "determination of the victors to crush the vanquished,"—all of which make for perpetual war (*den Krieg zu verewigen*): Such are some of the windows in the author's soul, through which the reader looks deep and sees much that is unexpressed in his book.

On the other hand, it supplies detached and instructive reviews of several outstanding events since 1921, such as the action of the Allies in that year in response to Germany's alleged "defalcations," an analysis of these, Germany's counter-proposals, the occupation of the Ruhr, its character and alleged justification, the attempt to collect the twenty billion gold marks, Lloyd-George's charge that Germany had not disarmed, the facts in that case and in the delivery of the coal and wood requisitions. Some sixty pages are devoted to a searching discussion of the functioning and responsibility of

the League of Nations, the Rhineland Commission and the Reparations Commission, regarding the application of the treaty's sanctions.

But the portion of the book (some 60 pages) which will prove most interesting to the readers of this JOURNAL is that which tests the treaty's sanctions by measuring them up with some of the generally accepted principles of international law, such as the right of self-preservation and the Porter Proposition of 1907, and those which have been used as the basis of the laws of war on land, especially in regard to the treatment of private property.

A trained student in international law finds no difficulty, of course, in showing the wide discrepancy between its principles and the prescriptions of the Treaty of Versailles. But our author argues the various points involved with all the solemnity and acumen of a serious essayist; and of course his effort is not merely that of threshing straw or beating the wind. The last dozen pages of his book, however, are devoted to showing that the sanctions of the treaty were motivated not by law or equity, but by national interest, chiefly that of France; that the document is not really a legal one, but a political one; and that it is substantially only one more link in the long, long chain of contest which has bound France and Germany together for a tug-of-war over the Rhineland during more than a thousand years.

WILLIAM I. HULL.

Wörterbuch des Völkerrechts und der Diplomatie. Begun by Professor Julius Hatschek, continued and edited by Dr. Karl Strupp. Berlin-Leipzig: Walther de Gruyter & Co., 1924-1925. 2 v. pp. 860 and 779.

This important encyclopedia of international law is the tribute of German and Austrian scholarship in international law to the commemoration of the tri-centennial of Grotius' *De Jure Belli ac Pacis*. It is published by the house of Walther de Gruyter, a consolidation of some of the oldest publishers of continental Europe, namely, Göschen, Guttentag, Reimer, Trübner and Veit.

The method of treatment, expository rather than critical, is to present a short and concise discussion by some qualified expert of each of the several hundred topics into which the work is divided. Each topic is followed by a selected bibliography. The topics covered, as the title indicates, include the field of diplomacy and diplomatic history, as well as international law. Aside from the more common divisions of these general subjects, leading cases, both international and municipal, are covered, by description, to a very considerable and welcome extent. The encyclopedic character of the work necessarily involves certain limitations, but as practically the first work of its kind since Calvo, it supplies a definite need in the literature of international law. It may be suggested that, in view of the lack of an encyclopedia of international law in the English language, the present work could be used to advantage as the basis for an enlarged English and French edition, recruiting additional contributors from the other countries of the world and extending the range of topics covered.

E. M. B.

Cuestiones Diversas. By Alberto J. Pani. Mexico: Imprenta Nacional, 1922. pp. 414. Index.

This book for the most part consists of a series of letters written to President Carranza by the author, who was Mexican Minister at Paris in 1919 and 1920, also including some other letters and articles and after-dinner speeches by the same person after he became Minister of Exterior Relations of Mexico. Their value is largely that of showing the attitude of the writer toward the League of Nations then under consideration and culminating in the Treaty of Versailles.

Labor Internacional de la Revolución Constitucionalista de Mexico. Mexico: Imprenta de la Secretaría de Relaciones Exteriores. pp. xvi, 517.

This work contains correspondence between Mexico and the United States and other data largely relating to Mexican-American affairs between 1913 and 1918, particularly covering the different outrages committed upon American citizens. It has some historical value to those making a study of the difficulties between the United States and Mexico between the years mentioned.

Die Völkerbundssatzung. By Hans Wehberg. Berlin, Hensel & Co., 1926. pp. 145. Mk. 3.

This is a critical study of the work of the League of Nations. It gives information regarding the status of the legal, economic, humanitarian and other work of the League, and considers in detail the Locarno Agreements and the treaty between Germany and Soviet Russia. The practical use of the book is facilitated by an index of references, persons and subject-matter.

The United States in Relation to the European Situation. The Annals of the American Academy of Political and Social Science, July, 1926, Vol. CXXVI, No. 215. Philadelphia: American Academy of Political and Social Science, 1926. pp. vi, 177. Index.

The proceedings of the Thirtieth Annual Meeting of the Academy, held at Philadelphia, May 14 and 15, 1926, are printed in this volume. The papers and discussions are divided into six parts dealing with (1) the present situation in Germany and France; (2) the effect of the debt situation upon Europe's relations with the United States; (3) the World Court, the Locarno pacts and European security; (4) the investment of American capital in Europe and its probable effect upon American foreign-policy; (5) the United States and Russia; (6) Disarmament and the present outlook for peace. Between six and eight contributions are made under each heading by authors prominent in educational, political and international circles.

Die Nationalen Aufgaben Unserer Auswärtigen Politik. By Walther Schücking. Berlin: Hensel & Co., 1926. pp. 75. Index. Price, 2.50 marks.

This is a collection of articles written from time to time during the last several years by Professor Walther Schücking. Sixteen subjects are covered, among the most important being those relating to international law in world organization, the structure of the League of Nations and the reform of the Council, the Permanent Court of International Justice, the Washington Conference, militarizing the League of Nations, and the security pact.

Der Sicherheitspakt. By Hans Wehberg. Staatsbürger Bibliothek. Heft 135-136. Berlin: Volksvereins-Verlag GmbH, 1926. pp. 76. Index.

This is a discussion by Dr. Wehberg of the security problem and its solution, including a consideration of the Locarno Conference, with a reprint of the documents constituting the security pact.

International Law Decisions and Notes. Naval War College, 1923. Washington: Government Printing Office, 1925. pp. vii, 224. Index. Price, 75 cents.

International Law Documents with Notes and Index. Naval War College, 1924. Washington: Government Printing Office, 1926. pp. viii, 190. Price, 65 cents.

These two volumes relate to the discussions upon questions of international law before the classes of 1923 and 1924 at the Naval War College, Newport, Rhode Island, conducted by Professor George Grafton Wilson of Harvard University, the Editor-in-Chief of the JOURNAL.

The 1923 volume is a compilation made by Professor Wilson of the decisions of various prize courts that are considered to be of special interest and value to officers in the naval service. In a prefatory note, Admiral Williams, President of the College, explains that the problems submitted to the class of 1923 required the interpretation of certain treaties about which there is a difference of opinion and involved points of law which have not yet been decided by the courts. It was therefore considered inexpedient to publish this material at the present time, but the prize decisions herein published which have been considered, for the most part, at the War College, were published instead.

The 1924 volume contains the text of a number of international agreements which have been the subject of discussion or have been consulted by the class of 1924. Among the documents included are the Washington treaties on the Limitation of Armament and Pacific Possessions, the Nicaraguan Canal Convention, the Danish West Indies Convention, the Spitzbergen Treaty, the Aaland Islands Neutralization Convention, treaties of the United States relating to certain mandates, the Halibut Fishery Treaty, certain treaties relating to the smuggling of intoxicating liquors, the report of the Commis-

sion of Jurists upon the revision of the rules of warfare dealing with radio and aerial, and the Geneva Protocol of October 2, 1924.

Permanent Court of International Justice. Second Annual Report. Publications of the Court, Series E, No. 2. Leyden: A. W. Sijthoff Publishing Company. pp. 369.

This report covers the activities of the Permanent Court of International Justice from June 15, 1925, to June 15, 1926. Its contents follow in outline the plan of the first annual report, which was reviewed in this JOURNAL for October, 1925 (Vol. 19, p. 844). The volume contains a resumé of the judgments delivered and advisory opinion given by the Court during the period covered, and the texts of all the administrative decisions rendered since the foundation of the Court. Three chapters relate to the organization of the Court, its statutes and rules; two others deal with the jurisdiction of the Court as determined by various treaties and international agreements. A bibliography of over 150 pages of publications and articles relating to the Court augments and brings up to date the similar bibliography printed in the first annual report. The present report gives a complete record of the activities of the Court and the changes in its organization during the annual period 1925-1926.

Cuestiones Internacionales, Economicas, Politicas y Sociales. By Antonio José Uribe. Bogota: Libreria Colombiana, 1925. pp. xiii, 302.

The eminent statesman and publicist of Colombia has here published a collection of articles written by him at various times, including some of his addresses in the Colombian Senate and as Minister of Foreign Affairs. The first part of the book relating to international questions comprises about two-thirds of the volume. Among the subjects included are the treaty of 1914 between the United States and Colombia; territorial questions with Panama, Ecuador and Peru, Brazil, Venezuela and Nicaragua, and with the United States growing out of the separation of Panama; the law of nations; the treaty between Colombia and the United States and the question of petroleum, written on the occasion of the Fall investigation by the Senate; the territorial sea of Colombia; the League of Nations and the Pan American Union; and the codification of international law by the American Institute of International Law.

Selected Documents and Material for the Study of International Law and Relations. With introductory chapters. By John Eugene Harley. Revised and enlarged edition. Los Angeles: Times-Mirror Press, 1926. pp. xviii, 422. Index.

The purpose of the author "is to supply the student and instructor with the actual texts of important documents illustrative of the most recent thinking and practice in world relations," and the material gives special

emphasis to international organization and international peace. The documents included relate to the pacific settlement of international disputes, the Covenant of the League of Nations and the Washington Conference on Limitation of Armament and Pacific and Far Eastern Questions. An extended review of the complete contents of the original edition of 1923 appeared in this JOURNAL for April, 1924 (Vol. 18, page 388). The present edition is a reprint of the first edition, with the addition of eleven pages at the end, giving the texts of the Final Protocol of the Locarno Conference of 1925, the Treaty of Mutual Guarantee signed at the same conference, the draft collective note to Germany regarding Article 16 of the Covenant of the League of Nations, and the resolution of the United States Senate advising and consenting to the adherence of the United States to the Permanent Court of International Justice. Footnotes have been inserted showing the dates of going into effect of the amendments to Articles 12, 13 and 15 of the League of Nations Covenant.

La Cour Permanente de Justice Internationale. By Antonio Sánchez de Bustamante y Sirvén. Traduit de l'espagnol par Paul Goulé. Paris: Recueil Sirey, 1925. pp. iv, 367.

This is a French translation from the Spanish of the volume which was reviewed in English translation under the title *The World Court* in this JOURNAL for April, 1926 (Vol. 20, page 401). Although both the French and the English translation bear the imprint of the year 1925, the English translation contains eight more sections than the French translation, the former having evidently been brought up to date immediately before publication by the inclusion of sections dealing with the tenth and eleventh advisory opinions of the Court on the subject of the exchange of Greek and Turkish populations and the Polish postal service in Danzig, and with the judgment on the merits in the Mavrommatis concessions case, the decision and later developments in the interpretation of the Treaty of Neuilly in regard to Bulgarian reparation payments, and the decision relating to certain German interests in Polish Upper Silesia.

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CONVENTION BETWEEN THE UNITED STATES AND THE DOMINICAN REPUBLIC
TO REPLACE THE CONVENTION OF FEBRUARY 8, 1907, BETWEEN THE TWO
GOVERNMENTS PROVIDING FOR THE ASSISTANCE OF THE UNITED STATES
IN THE COLLECTION AND APPLICATION OF THE CUSTOMS REVENUES OF THE
DOMINICAN REPUBLIC¹

*Signed at Washington, December 27, 1924; ratifications exchanged October
24, 1925*

Whereas a convention between the United States of America and the Dominican Republic providing for the assistance of the United States in the collection and application of the customs revenues of the Dominican Republic, was concluded and signed by their respective plenipotentiaries at the City of Santo Domingo, on the eighth day of February, one thousand nine hundred and seven, and

Whereas that convention was entered into to enable the Dominican Government to carry out a plan of settlement for the adjustment of debts and claims against the government; and

Whereas, in accordance with that plan of settlement, the Dominican Republic issued in 1908, bonds to the amount of \$20,000,000, bearing 5 per cent interest, payable in 50 years and redeemable after 10 years at 102- $\frac{1}{2}$, and requiring payment of at least 1 per cent per annum for amortization; and

Whereas additional obligations have been incurred by the Dominican Government in the form of the issuance, in 1918, of bonds to the amount of \$5,000,000, bearing 5 per cent interest, payable in 20 years, and redeemable at par on each interest date as the amount of amortization fund available on such interest dates will permit, and requiring payment of at least 5 per cent per annum for amortization; and in the form of the issuance of bonds, in 1922, to the amount of \$10,000,000, bearing 5- $\frac{1}{2}$ per cent interest, payable in 20 years, and redeemable after 8 years at 101 and requiring payment after such period of at least \$563,916.67 per annum for amortization; and

Whereas certain of the terms of the contracts under which these bonds have been issued have proven by experience unduly onerous to the Dominican Republic and have compelled it to devote a larger portion of the customs revenues to provide the interest and sinking fund charges pledged to the service of such bonds than is deemed advisable or necessary; and

Whereas it is the desire of the Dominican Government and appears to be to the best interest of the Dominican Republic to issue bonds to a total amount of \$25,000,000, in order to provide for the refunding on terms more

¹ U. S. Treaty Series, No. 726.

advantageous to the republic of its obligations represented by the bonds of the three issues above mentioned still outstanding and for a balance remaining after such operation is concluded to be devoted to permanent public improvements and to other projects designed to further the economic and industrial development of the country; and

Whereas the whole of this plan is conditioned and dependent upon the assistance of the United States in the collection of customs revenues of the Dominican Republic and the application thereof so far as necessary to the interest upon and the amortization and redemption of said bonds, and the Dominican Republic has requested the United States to give and the United States is willing to give such assistance:

The United States of America, represented by Charles Evans Hughes, Secretary of State of the United States of America; and the Dominican Republic, represented by Señor José del Carmen Ariza, Envoy Extraordinary and Minister Plenipotentiary of the Dominican Republic in Washington, have agreed:

ARTICLE I

That the President of the United States shall appoint a General Receiver of Dominican Customs, who, with such assistant receivers and other employees of the Receivership as shall be appointed by the President of the United States in his discretion, shall collect all the customs duties accruing at the several customs houses of the Dominican Republic until the payment or retirement of any and all bonds issued by the Dominican Government in accordance with the plan and under the limitations as to terms and amounts hereinbefore recited; and said General Receiver shall apply the sums so collected, as follows:

First, to paying the expenses of the receivership; second, to the payment of interest upon all bonds outstanding; third, to the payment of the annual sums provided for amortization of said bonds including interest upon all bonds held in sinking fund; fourth, to the purchase and cancellation or the retirement and cancellation pursuant to the terms thereof of any of said bonds as may be directed by the Dominican Government; fifth, the remainder to be paid to the Dominican Government.

The method of distributing the current collections of revenue in order to accomplish the application thereof as hereinbefore provided shall be as follows:

The expenses of the receivership shall be paid by the Receiver as they arise. The allowances to the General Receiver and his assistants for the expenses of collecting the revenues shall not exceed five per cent unless by agreement between the two governments.

On the first day of each calendar month shall be paid over by the Receiver to the Fiscal Agent of the loan a sum equal to one twelfth of the annual interest of all the bonds issued and of the annual sums provided for amorti-

zation of said bonds and the remaining collection of the last preceding month shall be paid over to the Dominican Government, or applied to the sinking fund for the purchase or redemption of bonds or for other purposes as the Dominican Government shall direct.

Provided, that in case the customs revenues collected by the General Receiver shall in any year exceed the sum of \$4,000,000, 10 per cent of the surplus above such sum of \$4,000,000 shall be applied to the sinking fund for the redemption of bonds.

ARTICLE II

The Dominican Government will provide by law for the payment of all customs duties to the General Receiver and his assistants, and will give to them all needful aid and assistance and full protection to the extent of its powers. The Government of the United States will give to the General Receiver and his assistants such protection as it may find to be requisite for the performance of their duties.

ARTICLE III

Until the Dominican Republic has paid the whole amount of the bonds of the debt, its public debt shall not be increased except by previous agreement between the Dominican Government and the United States.

ARTICLE IV

The Dominican Government agrees that the import duties will at no time be modified to such an extent that, on the basis of exportations and importations to the like amount and the like character during the two years preceding that in which it is desired to make such modification, the total net customs receipts would not at such altered rates have amounted for each of such two years to at least $1\frac{1}{2}$ times the amount necessary to provide for the interest and sinking fund charges upon its public debt.

ARTICLE V

The accounts of the General Receiver shall be rendered monthly to the Ministry of Finance and Commerce of the Dominican Republic and to the State Department of the United States and shall be subject to examination and verification by the appropriate officers of the Dominican and the United States Governments.

ARTICLE VI

The determination of any controversy which may arise between the contracting parties in the carrying out of the provisions of this convention shall, should the two governments be unable to come to an agreement through diplomatic channels, be by arbitration. In the carrying out of this agreement in each individual case, the contracting parties, once the necessity of

arbitration is determined, shall conclude a special agreement defining clearly the scope of the dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure. The special agreement providing for arbitration shall, in all cases, be signed within a period of three months from the date upon which either one of the contracting parties shall notify the other contracting party of its desire to resort to arbitration. It is understood that on the part of the United States, such special agreements will be made by the President of the United States by and with the advice and consent of the Senate thereto, and on the part of the Dominican Republic, shall be subject to the procedure required by the Constitution and laws thereof.

ARTICLE VII

This agreement shall take effect after its approval by the contracting parties in accordance with their respective constitutional methods. Upon the exchange of ratifications of this convention, which shall take place at Washington as soon as possible, the convention between the United States of America and the Dominican Republic providing for the assistance of the United States in the collection and application of the customs revenues, concluded and signed at the City of Santo Domingo on the 8th day of February, 1907, shall be deemed to be abrogated.

Done in duplicate in the English and Spanish languages at the City of Washington this 27th day of December, nineteen hundred and twenty-four.

[SEAL] CHARLES EVANS HUGHES.

[SEAL] J. C. ARIZA.

TREATY OF FRIENDSHIP, COMMERCE AND CONSULAR RIGHTS BETWEEN THE UNITED STATES AND GERMANY¹

Signed at Washington, December 8, 1923; ratifications exchanged October 14, 1925

The United States of America and Germany, desirous of strengthening the bond of peace which happily prevails between them, by arrangements designed to promote friendly intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the peoples thereof, have resolved to conclude a treaty of friendship, commerce and consular rights and for that purpose have appointed as their plenipotentiaries:

The President of the United States of America,

Mr. Charles Evans Hughes, Secretary of State of the United States of America, and

The President of the German Empire,

Dr. Otto Wiedfeldt, German Ambassador to the United States of America,

¹ U. S. Treaty Series, No. 725.

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles:

ARTICLE I

The nationals of each of the high contracting parties shall be permitted to enter, travel and reside in the territories of the other; to exercise liberty of conscience and freedom of worship; to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes; to employ agents of their choice, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the state of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established.

The nationals of either high contracting party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.

The nationals of each high contracting party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each high contracting party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

[Nothing herein contained shall be construed to affect existing statutes of either country in relation to the immigration of aliens or the right of either country to enact such statutes.]¹

ARTICLE II

With respect to that form of protection granted by national, state or provincial laws establishing civil liability for injuries or for death, and giving to relatives or heirs or dependents of an injured party a right of action or a pecuniary benefit, such relatives or heirs or dependents of the injured party, himself a national of either of the high contracting parties and within any of the territories of the other, shall regardless of their alienage or residence out-

¹See Senate resolution and President's ratification, p. 19.

side of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions.

ARTICLE III

The dwellings, warehouses, manufacturies, shops and other places of business, and all premises thereto appertaining of the nationals of each of the high contracting parties in the territories of the other used for any purposes set forth in Article I, shall be respected. It shall not be allowable to make a domiciliary visit to, or search of any such buildings and premises, or there to examine and inspect books, papers or accounts, except under the conditions and in conformity with the forms prescribed by the laws, ordinances and regulations for nationals.

ARTICLE IV

Where, on the death of any person holding real or other immovable property or interests therein within the territories of one high contracting party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other high contracting party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either high contracting party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the high contracting party within whose territories such property may be or belong shall be liable to pay in like cases.

ARTICLE V

The nationals of each of the high contracting parties in the exercise of the right of freedom of worship, within the territories of the other, as hereinabove provided may, without annoyance or molestation of any kind by reason of their religious belief or otherwise, conduct services either within their own houses or within any appropriate buildings which they may be at liberty to erect and maintain in convenient situations, provided their teachings or practices are not contrary to public morals; and they may also be

permitted to bury their dead according to their religious customs in suitable and convenient places established and maintained for the purpose, subject to the reasonable mortuary and sanitary laws and regulations of the place of burial.

ARTICLE VI

In the event of war between either high contracting party and a third State, such party may draft for compulsory military service nationals of the other having a permanent residence within its territories and who have formally, according to its laws, declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent party within sixty days after a declaration of war.

ARTICLE VII

Between the territories of the high contracting parties there shall be freedom of commerce and navigation. The nationals of each of the high contracting parties equally with those of the most favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation. Nothing in this treaty shall be construed to restrict the right of either high contracting party to impose, on such terms as it may see fit, prohibitions or restrictions of a sanitary character designed to protect human, animal or plant life, or regulations for the enforcement of police or revenue laws.

Each of the high contracting parties binds itself unconditionally to impose no higher or other duties or conditions and no prohibition on the importation of any article, the growth, produce or manufacture, of the territories of the other than are or shall be imposed on the importation of any like article, the growth, produce or manufacture of any other foreign country.

Each of the high contracting parties also binds itself unconditionally to impose no higher or other charges or other restrictions or prohibitions on goods exported to the territories of the other high contracting party than are imposed on goods exported to any other foreign country.¹

Any advantage of whatsoever kind which either high contracting party may extend to any article, the growth, produce, or manufacture of any other foreign country shall simultaneously and unconditionally, without request and without compensation, be extended to the like article the growth, produce or manufacture of the other high contracting party.

All the articles which are or may be legally imported from foreign countries into ports of the United States, in United States vessels, may likewise be imported into those ports in German vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported in United States vessels; and, reciprocally, all articles which are or may be legally imported from foreign countries into the ports of Germany,

in German vessels, may likewise be imported into these ports in United States vessels without being liable to any other or higher duties or charges whatsoever than if such were imported from foreign countries in German vessels.¹

With respect to the amount and collection of duties on imports and exports of every kind, each of the two high contracting parties binds itself to give to the nationals, vessels and goods of the other the advantage of every favor, privilege or immunity which it shall have accorded to the nationals, vessels and goods of a third state, and regardless of whether such favored state shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treatment. Every such favor, privilege or immunity which shall hereafter be granted the nationals, vessels or goods of a third state shall simultaneously and unconditionally, without request and without compensation, be extended to the other high contracting party, for the benefit of itself, its nationals and vessels.

The stipulations of this article shall apply to the importation of goods into and the exportation of goods from all areas within the German customs lines, but shall not extend to the treatment which either contracting party shall accord to purely border traffic within a zone not exceeding ten miles (15 kilometers) wide on either side of its customs frontier, or to the treatment which is accorded by the United States to the commerce of Cuba under the provisions of the commercial convention concluded by the United States and Cuba on December 11, 1902, or any other commercial convention which hereafter may be concluded by the United States with Cuba, or to the commerce of the United States with any of its dependencies and the Panama Canal Zone under existing or future laws.

ARTICLE VIII

The nationals and merchandise of each high contracting party within the territories of the other shall receive the same treatment as nationals and merchandise of the country with regard to internal taxes, transit duties, charges in respect to warehousing and other facilities and the amount of drawbacks and bounties.

ARTICLE IX

No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels. Such equality of treatment shall apply reciprocally to

¹ See Senate resolution and President's ratification, p. 19.

the vessels of the two countries respectively from whatever place they may arrive and whatever may be their place of destination.¹

ARTICLE X

Merchant vessels and other privately owned vessels under the flag of either of the high contracting parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other high contracting party and on the high seas, be deemed to be the vessels of the party whose flag is flown.

ARTICLE XI

Merchant vessels and other privately owned vessels under the flag of either of the high contracting parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other high contracting party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the United States is exempt from the provisions of this article and from the other provisions of this treaty, and is to be regulated according to the laws of the United States in relation thereto. It is agreed, however, that the nationals of either high contracting party shall within the territories of the other enjoy with respect to the coasting trade the most favored nation treatment.²

ARTICLE XII

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, national, state or provincial, of either high contracting party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other high contracting party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

The right of such corporations and associations of either high contracting party so recognized by the other to establish themselves within its territories, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such party as expressed in its national, state, or provincial laws.

¹ See Senate resolution and President's ratification, p. 19.

² See Senate resolution and President's ratification, p. 19.

ARTICLE XIII

The nationals of either high contracting party shall enjoy within the territories of the other, reciprocally and upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other state with respect to the organization of and participation in limited liability and other corporations and associations, for pecuniary profit or otherwise, including the rights of promotion, incorporation, purchase and ownership and sale of shares and the holding of executive or official positions therein. In the exercise of the foregoing rights and with respect to the regulation or procedure concerning the organization or conduct of such corporations or associations, such national shall be subjected to no conditions less favorable than those which have been or may hereafter be imposed upon the nationals of the most favored nation. The rights of any of such corporations or associations as may be organized or controlled or participated in by the nationals of either high contracting party within the territories of the other to exercise any of their functions therein, shall be governed by the laws and regulations, national, state or provincial, which are in force or may hereafter be established within the territories of the party wherein they propose to engage in business. The foregoing stipulations do not apply to the organization of and participation in political associations.

The nationals of either high contracting party shall, moreover, enjoy within the territories of the other, reciprocally and upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other state with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain of the other.

ARTICLE XIV

(a) Manufacturers, merchants, and traders domiciled within the jurisdiction of one of the high contracting parties may operate as commercial travelers either personally or by means of agents or employees within the jurisdiction of the other high contracting party on obtaining from the latter, upon payment of a single fee, a license which shall be valid throughout its entire territorial jurisdiction.

In case either of the high contracting parties shall be engaged in war, it reserves to itself the right to prevent from operating within its jurisdiction under the provisions of this article, or otherwise, enemy nationals or other aliens whose presence it may consider prejudicial to public order and national safety.

(b) In order to secure the license above mentioned the applicant must obtain from the country of domicile of the manufacturers, merchants, and traders represented a certificate attesting his character as a commercial

traveler. This certificate, which shall be issued by the authority to be designated in each country for the purpose, shall be viséed by the consul of the country in which the applicant proposes to operate, and the authorities of the latter shall, upon the presentation of such certificate, issue to the applicant the national license as provided in section (a).

(c) A commercial traveler may sell his samples without obtaining a special license as an importer.

(d) Samples without commercial value shall be admitted to enter free of duty.

Samples marked, stamped or defaced in such manner that they cannot be put to other uses shall be considered as objects without commercial value.

(e) Samples having commercial value shall be provisionally admitted upon giving bond for the payment of lawful duties if they shall not have been withdrawn from the country within a period of six (6) months.

Duties shall be paid on such portion of the samples as shall not have been so withdrawn.

(f) All customs formalities shall be simplified as much as possible with a view to avoid delay in the despatch of samples.

(g) Peddlers and other salesmen who vend directly to the consumer, even though they have not an established place of business in the country in which they operate, shall not be considered as commercial travelers, but shall be subject to the license fees levied on business of the kind which they carry on.

(h) No license shall be required of:

(1) Persons traveling only to study trade and its needs, even though they initiate commercial relations, provided they do not make sales of merchandise.

(2) Persons operating through local agencies which pay the license fee or other imposts to which their business is subject.

(3) Travelers who are exclusively buyers.

(i) Any concessions affecting any of the provisions of the present article that may hereafter be granted by either high contracting party, either by law or by treaty or convention, shall immediately be extended to the other party.

ARTICLE XV

(a) Regulations governing the renewal and transfer of licenses issued under the provisions of Article XIV, and the imposition of fines and other penalties for any misuse of licenses may be made by either of the high contracting parties whenever advisable within the terms of Article XIV and without prejudice to the rights defined therein.

If such regulations permit the renewal of licenses, the fee for renewal will not be greater than that charged for the original license.

If such regulations permit the transfer of licenses, upon satisfactory proof that transferee or assignee is in every sense the true successor of the original

licensee, and that he can furnish a certificate of identification similar to that furnished by the original licensee, he will be allowed to operate as a commercial traveler pending the arrival of the new certificate of identification, but the cancellation of the bond for the samples shall not be effected before the arrival of the said certificate.

(b) It is the citizenship of the firm that the commercial traveler represents, and not his own, that governs the issuance to him of a certificate of identification.

The high contracting parties agree to empower the local customs officials or other competent authorities to issue the said licenses upon surrender of the certificate of identification and authenticated list of samples, acting as deputies of the central office constituted for the issuance and regulation of licenses. The said officials shall immediately transmit the appropriate documentation to the central office, to which the licensee shall thereafter give due notice of his intention to ask for the renewal or transfer of his license, if these acts be allowable, or cancellation of his bond, upon his departure from the country. Due notice in this connection will be regarded as the time required for the exchange of correspondence in the normal mail schedules, plus five business days for purposes of official verification and registration.

(c) It is understood that the traveler will not engage in the sale of other articles than those embraced by his lines of business; he may sell his samples, thus incurring an obligation to pay the customs duties thereupon, but he may not sell other articles brought with him or sent to him, which are not reasonably and clearly representative of the kind of business he purports to represent.

(d) Advertising matter brought by commercial travelers in appropriate quantities shall be treated as samples without commercial value. Objects having a depreciative commercial value because of adaptation for purposes of advertisement, and intended for gratuitous distribution, shall, when introduced in reasonable quantities, also be treated as samples without commercial value. It is understood, however, that this prescription shall be subject to the customs laws of the respective countries. Samples accompanying the commercial traveler will be despatched as a portion of his personal baggage; and those arriving after him will be given precedence over ordinary freight.

(e) If the original license was issued for a period longer than six months, or if the license be renewed, the bond for the samples will be correspondingly extended. It is understood, however, that this prescription shall be subject to the customs laws of the respective countries.

ARTICLE XVI

There shall be complete freedom of transit through the territories including territorial waters of each high contracting party on the routes most convenient for international transit, by rail, navigable waterway, and canal, other

than the Panama Canal and waterways and canals which constitute international boundaries of the United States, to persons and goods coming from or going through the territories of the other high contracting party, except such persons as may be forbidden admission into its territories or goods of which the importation may be prohibited by law. Persons and goods in transit shall not be subjected to any transit duty, or to any unnecessary delays or restrictions, and shall be given national treatment as regards charges, facilities, and all other matters.

Goods in transit must be entered at the proper customhouse, but they shall be exempt from all customs or other similar duties.

All charges imposed on transport in transit shall be reasonable, having regard to the conditions of the traffic.

ARTICLE XVII

Each of the high contracting parties agrees to receive from the other consular officers in those of its ports, places and cities, where it may be convenient and which are open to consular representatives of any foreign country.

Consular officers of each of the high contracting parties shall, after entering upon their duties, enjoy reciprocally in the territories of the other all the rights, privileges, exemptions and immunities which are enjoyed by officers of the same grade of the most favored nation. As official agents, such officers shall be entitled to the high consideration of all officials, national or local, with whom they have official intercourse in the state which receives them.

The government of each of the high contracting parties shall furnish free of charge the necessary exequatur of such consular officers of the other as present a regular commission signed by the chief executive of the appointing state and under its great seal; and it shall issue to a subordinate or substitute consular officer duly appointed by an accepted superior consular officer with the approbation of his government, or by any other competent officer of that government, such documents as according to the laws of the respective countries shall be requisite for the exercise by the appointee of the consular function. On the exhibition of an exequatur, or other document issued in lieu thereof to such subordinate, such consular officer shall be permitted to enter upon his duties and to enjoy the rights, privileges and immunities granted by this treaty.

ARTICLE XVIII

Consular officers, nationals of the state by which they are appointed, shall be exempt from arrest except when charged with the commission of offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty thereof to punishment. Such officers shall be exempt from military billetings, and from service of any military or naval, administrative or police character whatsoever.

In criminal cases the attendance at the trial by a consular officer as a witness may be demanded by the prosecution or defense. The demand shall be made with all possible regard for the consular dignity and the duties of the office; and there shall be compliance on the part of the consular officer.

Consular officers shall be subject to the jurisdiction of the courts in the state which receives them in civil cases, subject to the proviso, however, that when the officer is a national of the state which appoints him and is engaged in no private occupation for gain, his testimony shall be taken orally or in writing at his residence or office and with due regard for his convenience. The officer should, however, voluntarily give his testimony at the trial whenever it is possible to do so without serious interference with his official duties.

ARTICLE XIX

Consular officers, including employees in a consulate, nationals of the state by which they are appointed other than those engaged in private occupations for gain within the state where they exercise their functions shall be exempt from all taxes, national, state, provincial and municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the territories of the state within which they exercise their functions. All consular officers and employees, nationals of the state appointing them shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services.

Lands and buildings situated in the territories of either high contracting party, of which the other high contracting party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, national, state, provincial and municipal, other than assessments levied for services or local public improvements by which the premises are benefited.

ARTICLE XX

Consular officers may place over the outer door of their respective offices the arms of their state with an appropriate inscription designating the official office. Such officers may also hoist the flag of their country on their offices including those situated in the capitals of the two countries. They may likewise hoist such flag over any boat or vessel employed in the exercise of the consular function.

The consular offices and archives shall at all times be inviolable. They shall under no circumstances be subjected to invasion by any authorities of any character within the country where such offices are located. Nor shall the authorities under any pretext make any examination or seizure of papers or other property deposited within a consular office. Consular offices shall

not be used as places of asylum. No consular officer shall be required to produce official archives in court or testify as to their contents.

Upon the death, incapacity, or absence of a consular officer having no subordinate consular officer at his post, secretaries or chancellors, whose official character may have previously been made known to the government of the state where the consular function was exercised, may temporarily exercise the consular function of the deceased or incapacitated or absent consular officer; and while so acting shall enjoy all the rights, prerogatives and immunities granted to the incumbent.

ARTICLE XXI

Consular officers, nationals of the state by which they are appointed, may, within their respective consular districts, address the authorities, national, state, provincial or municipal, for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise. Complaint may be made for the infraction of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative, a consul general or the consular officer stationed at the capital may apply directly to the government of the country.

ARTICLE XXII

Consular officers may, in pursuance of the laws of their own country, take, at any appropriate place within their respective districts, the depositions of any occupants of vessels of their own country, or of any national of, or of any person having permanent residence within the territories of, their own country. Such officers may draw up, attest, certify and authenticate unilateral acts, deeds, and testamentary dispositions of their countrymen, and also contracts to which a countryman is a party. They may draw up, attest, certify and authenticate written instruments of any kind purporting to express or embody the conveyance or encumbrance of property of any kind within the territory of the state by which such officers are appointed, and unilateral acts, deeds, testamentary dispositions and contracts relating to property situated, or business to be transacted, within the territories of the state by which they are appointed, embracing unilateral acts, deeds, testamentary dispositions or agreements executed solely by nationals of the state within which such officers exercise their functions.

Instruments and documents thus executed and copies and translations thereof, when duly authenticated under his official seal by the consular officer shall be received as evidence in the territories of the contracting parties as original documents or authenticated copies, as the case may be, and shall have the same force and effect as if drawn by and executed before a notary or other public officer duly authorized in the country by which the consular officer was appointed; provided, always that such documents shall have been

drawn and executed in conformity to the laws and regulations of the country where they are designed to take effect.

ARTICLE XXIII

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

When an act committed on board of a private vessel under the flag of the state by which the consular officer has been appointed and within the territorial waters of the state to which he has been appointed constitutes a crime according to the laws of that state, subjecting the person guilty thereof to punishment as a criminal, the consular officer shall not exercise jurisdiction except in so far as he is permitted to do so by the local law.

A consular officer may freely invoke the assistance of the local police authorities in any matter pertaining to the maintenance of internal order on board of a vessel under the flag of his country within the territorial waters of the state to which he is appointed, and upon such a request the requisite assistance shall be given.

A consular officer may appear with the officers and crews of vessels under the flag of his country before the judicial authorities of the state to which he is appointed to render assistance as an interpreter or agent.

ARTICLE XXIV

In case of the death of a national of either high contracting party in the territory of the other without having in the territory of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the state of which the deceased was a national of the fact of his death, in order that necessary information may be forwarded to the parties interested.

In case of the death of a national of either of the high contracting parties without will or testament, in the territory of the other high contracting party, the consular officer of the state of which the deceased was a national and within whose district the deceased made his home at the time of death, shall, so far as the laws of the country permit and pending the appointment of an administrator and until letters of administration have been granted, be deemed qualified to take charge of the property left by the decedent for the preservation and protection of the same. Such consular officer shall have the right to be appointed as administrator within the discretion of a

tribunal or other agency controlling the administration of estates provided the laws of the place where the estate is administered so permit.

Whenever a consular officer accepts the office of administrator of the estate of a deceased countryman, he subjects himself as such to the jurisdiction of the tribunal or other agency making the appointment for all necessary purposes to the same extent as a national of the country where he was appointed.

ARTICLE XXV

A consular officer of either high contracting party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called workmen's compensation laws or other like statutes provided he remit any funds so received through the appropriate agencies of his government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.

ARTICLE XXVI

A consular officer of either high contracting party shall have the right to inspect within the ports of the other high contracting party within his consular district, the private vessels of any flag destined or about to clear for ports of the country appointing him in order to observe the sanitary conditions and measures taken on board such vessels, and to be enabled thereby to execute intelligently bills of health and other documents required by the laws of his country, and to inform his government concerning the extent to which its sanitary regulations have been observed at ports of departure by vessels destined to its ports, with a view to facilitating entry of such vessels therein.

ARTICLE XXVII

Each of the high contracting parties agrees to permit the entry free of all duty and without examination of any kind, of all furniture, equipment and supplies intended for official use in the consular offices of the other, and to extend to such consular officers of the other and their families and suites as are its nationals, the privilege of entry free of duty of their baggage and all other personal property, whether accompanying the officer to his post or imported at any time during his incumbency thereof; provided, nevertheless, that no article, the importation of which is prohibited by the law of either of the high contracting parties, may be brought into its territories.

It is understood, however, that this privilege shall not be extended to consular officers who are engaged in any private occupation for gain in the countries to which they are accredited, save with respect to governmental supplies.

ARTICLE XXVIII

All proceedings relative to the salvage of vessels of either high contracting party wrecked upon the coasts of the other shall be directed by the consular officer of the country to which the vessel belongs and within whose district the wreck may have occurred. Pending the arrival of such officer, who shall be immediately informed of the occurrence, the local authorities shall take all necessary measures for the protection of persons and the preservation of wrecked property. The local authorities shall not otherwise interfere than for the maintenance of order, the protection of the interests of the salvors, if these do not belong to the crews that have been wrecked, and to carry into effect the arrangements made for the entry and exportation of the merchandise saved. It is understood that such merchandise is not to be subjected to any customhouse charges, unless it be intended for consumption in the country where the wreck may have taken place.

The intervention of the local authorities in these different cases shall occasion no expense of any kind, except such as may be caused by the operations of salvage and the preservation of the goods saved, together with such as would be incurred under similar circumstances by vessels of the nation.

ARTICLE XXIX

Subject to any limitation or exception hereinabove set forth, or hereafter to be agreed upon, the territories of the high contracting parties to which the provisions of this treaty extend shall be understood to comprise all areas of land, water, and air over which the parties respectively claim and exercise dominion as sovereign thereof, except the Panama Canal Zone; for purposes connected with customs administration the territory of Germany shall be deemed to be co-terminus with the area included within the German customs lines.

ARTICLE XXX

Nothing in the present treaty shall be construed to limit or restrict in any way the rights, privileges and advantages accorded to the United States or its nationals or to Germany or its nationals, by the treaty between the United States and Germany restoring friendly relations, concluded on August 25, 1921.

ARTICLE XXXI

The present treaty shall remain in full force for the term of ten years from the date of the exchange of ratifications, on which date it shall begin to take effect in all of its provisions.

If within one year before the expiration of the aforesaid period of ten years neither high contracting party notifies to the other an intention of modifying, by change or omission, any of the provisions of any of the articles in this treaty or of terminating it upon the expiration of the aforesaid period, the treaty shall remain in full force and effect after the aforesaid

period and until one year from such a time as either of the high contracting parties shall have notified to the other an intention of modifying or terminating the treaty.

ARTICLE XXXII

The present treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington as soon as possible.

In witness whereof the respective plenipotentiaries have signed the same and have affixed their seals hereto.

Done in duplicate, in the English and German languages, at the City of Washington, this 8th day of December, 1923.

[SEAL] CHARLES EVANS HUGHES.

[SEAL] DR. OTTO WIEDFELDT.

Senate Resolution Advising and Consenting to Ratification

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES

February 10, 1925.

Resolved (Two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive D, 68th Congress, 1st session, a treaty of friendship, commerce and consular rights between the United States and Germany, signed at Washington on December 8, 1923, subject to the following reservations and understandings to be set forth in an exchange of notes between the high contracting parties so as to make it plain that this condition is understood and accepted by each of them:

First, that there shall be added to Article I of said treaty the following: "Nothing herein contained shall be construed to affect existing statutes of either country in relation to the immigration of aliens or the right of either country to enact such statutes."

Second, that the fifth paragraph of Article VII and Articles IX and XI shall remain in force for twelve months from the date of exchange of ratification, and if not then terminated on ninety days previous notice shall remain in force until Congress shall enact legislation inconsistent therewith when the same shall automatically lapse at the end of sixty days from such enactment, and on such lapse each high contracting party shall enjoy all the rights which it would have possessed had such paragraph or articles not been embraced in the treaty.

Attest:

GEORGE A. SANDERSON,
Secretary.

Ratification

CALVIN COOLIDGE,

President of the United States of America

To All to Whom These Presents Shall Come, Greeting:

Know ye, That whereas a treaty of friendship, commerce and consular rights between the United States and Germany was concluded and signed by

their respective plenipotentiaries at Washington on the eighth day of December, one thousand nine hundred and twenty-three, a true copy of which treaty is hereto annexed;

And whereas, the Senate of the United States by their resolution of February 10, 1925, (two-thirds of the Senators present concurring therein) did advise and consent to the ratification of the said treaty subject to certain reservations and understandings to be set forth in an exchange of notes between the high contracting parties, so as to make it plain that this condition is understood and accepted by each of them:

[Here follows the text of the first and second reservations as contained in the Senate resolution printed above.]

And whereas, the said reservations and understandings have been accepted by the two governments in an exchange of notes between the Secretary of State of the United States, dated March 19, 1925, and the German Ambassador at Washington, dated May 21, 1925, subject on the part of Germany to ratification, true copies of which notes are word for word as follows:

EXCELLENCY:

Referring to the treaty of friendship, commerce and consular rights signed by the United States and Germany on December 8, 1923, I beg to inform you that the Senate on February 10, 1925, gave its advice and consent to the ratification of the said treaty in a resolution as follows:

[Here follows the text of the Senate resolution of February 10, 1925, as printed above.]

It will be observed that by this resolution the advice and consent of the Senate to the ratification of the treaty are given subject to certain reservations and understandings.

I shall be glad if when bringing the foregoing resolution to the attention of your government you will inform it that it is the hope of this government that your government will find acceptable the reservations and understandings which the Senate has made a condition of its advice and consent to the ratification of the treaty. You may regard this note as sufficient acceptance by the Government of the United States of these reservations and understandings. An acknowledgment of this note on the occasion of the exchange of ratifications accepting, by direction and on behalf of your government, the said reservations and understandings, will be considered as completing the required exchange of notes and the acceptance by both governments of the reservations and understandings.

Accept, Excellency, the renewed assurance of my highest consideration.

FRANK B. KELLOGG.

His Excellency

Baron AGO VON MALTZAN,

Ambassador of Germany.

[Translation]

MR. SECRETARY OF STATE: I have the honor, in the name and by direction of my government, to acknowledge to Your Excellency the receipt of the note of March 19 of this year concerning the treaty of friendship, commerce and consular rights signed between Germany and the United States on December 8, 1923, and to make the following statement.

The German Government has acquainted itself with the resolution of the American Senate of February 10, 1925, reading as follows:

[Here follows the text of the Senate resolution of February 10, 1925, as printed above.]

Notwithstanding serious fundamental objections to the second resolution of the Senate

referring to navigation, the German Government, for the sake of the success of the treaty, has, subject to ratification, decided to declare that it agrees to the resolution of the Senate.

I avail myself of this opportunity to renew to Your Excellency the assurances of my most distinguished high consideration.

MALTZAN

His Excellency

HON. FRANK B. KELLOGG

The Secretary of State of the United States,
Washington, D. C.

FINAL PROTOCOL OF THE LOCARNO CONFERENCE, 1925 (AND ANNEXES),
TOGETHER WITH TREATIES BETWEEN FRANCE AND POLAND AND FRANCE
AND CZECHOSLOVAKIA¹

*Initialled at Locarno, October 16, 1925; signed at London, December 1, 1925;
not ratified at date of publication herein*

No. 1

Final Protocol of the Locarno Conference, 1925

The representatives of the German, Belgian, British, French, Italian, Polish and Czechoslovak Governments, who have met at Locarno from the 5th to 16th October, 1925, in order to seek by common agreement means for preserving their respective nations from the scourge of war and for providing for the peaceful settlement of disputes of every nature which might eventually arise between them,

Have given their approval to the draft treaties and conventions which respectively affect them and which, framed in the course of the present conference, are mutually interdependent:

Treaty between Germany, Belgium, France, Great Britain and Italy
(Annex A).

Arbitration Convention between Germany and Belgium (Annex B).

Arbitration Convention between Germany and France (Annex C).

Arbitration Treaty between Germany and Poland (Annex D).

Arbitration Treaty between Germany and Czechoslovakia (Annex E).

These instruments, hereby initialled *ne varietur*, will bear to-day's date, the representatives of the interested parties agreeing to meet in London on the 1st December next, to proceed during the course of a single meeting to the formality of the signature of the instruments which affect them.

The Minister for Foreign Affairs of France states that as a result of the draft arbitration treaties mentioned above, France, Poland and Czechoslovakia have also concluded at Locarno draft agreements in order reciprocally to assure to themselves the benefit of the said treaties. These agreements

¹ Translation reprinted from British Parliamentary command paper 2525 (Misc. No. 11, 1925).

will be duly deposited at the League of Nations, but M. Briand holds copies forthwith at the disposal of the Powers represented here.

The Secretary of State for Foreign Affairs of Great Britain proposes that, in reply to certain requests for explanations concerning Article 16 of the Covenant of the League of Nations presented by the Chancellor and the Minister for Foreign Affairs of Germany, a letter, of which the draft is similarly attached (Annex F) should be addressed to them at the same time as the formality of signature of the above-mentioned instruments takes place. This proposal is agreed to.

The representatives of the governments represented here declare their firm conviction that the entry into force of these treaties and conventions will contribute greatly to bring about a moral relaxation of the tension between nations, that it will help powerfully towards the solution of many political or economic problems in accordance with the interests and sentiments of peoples, and that, in strengthening peace and security in Europe, it will hasten on effectively the disarmament provided for in Article 8 of the Covenant of the League of Nations.

They undertake to give their sincere coöperation to the work relating to disarmament already undertaken by the League of Nations and to seek the realization thereof in a general agreement.

Done at Locarno, the 16th October, 1925.

LUTHER.

STRESEMANN.

EMILE VANDERVELDE.

ARI. BRIAND.

AUSTEN CHAMBERLAIN.

BENITO MUSSOLINI.

AL. SKRZYNSKI.

EDUARD BENES.

ANNEX A

Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy

The President of the German Reich, His Majesty the King of the Belgians, the President of the French Republic, and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, His Majesty the King of Italy;

Anxious to satisfy the desire for security and protection which animates the peoples upon whom fell the scourge of the war of 1914-18;

Taking note of the abrogation of the treaties for the neutralization of Belgium, and conscious of the necessity of ensuring peace in the area which has so frequently been the scene of European conflicts;

Animated also with the sincere desire of giving to all the signatory Powers concerned supplementary guarantees within the framework of the Covenant of the League of Nations and the treaties in force between them;

Have determined to conclude a treaty with these objects, and have appointed as their plenipotentiaries:

Who, having communicated their full powers, found in good and due form, have agreed as follows:

ARTICLE 1

The high contracting parties collectively and severally guarantee, in the manner provided in the following articles, the maintenance of the territorial *status quo* resulting from the frontiers between Germany and Belgium and between Germany and France and the inviolability of the said frontiers as fixed by or in pursuance of the Treaty of Peace signed at Versailles on the 28th June, 1919, and also the observance of the stipulations of Articles 42 and 43 of the said treaty concerning the demilitarized zone.

ARTICLE 2

Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each other.

This stipulation shall not, however, apply in the case of—

1. The exercise of the right of legitimate defence, that is to say, resistance to a violation of the undertaking contained in the previous paragraph or to a flagrant breach of Articles 42 or 43 of the said Treaty of Versailles, if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone immediate action is necessary.

2. Action in pursuance of Article 16 of the Covenant of the League of Nations.

3. Action as the result of a decision taken by the Assembly or by the Council of the League of Nations or in pursuance of Article 15, paragraph 7, of the Covenant of the League of Nations, provided that in this last event the action is directed against a state which was the first to attack.

ARTICLE 3

In view of the undertakings entered into in Article 2 of the present treaty, Germany and Belgium and Germany and France undertake to settle by peaceful means and in the manner laid down herein all questions of every kind which may arise between them and which it may not be possible to settle by the normal methods of diplomacy:

Any question with regard to which the parties are in conflict as to their respective rights shall be submitted to judicial decision, and the parties undertake to comply with such decision.

All other questions shall be submitted to a conciliation commission. If the proposals of this commission are not accepted by the two parties, the question shall be brought before the Council of the League of Nations, which will deal with it in accordance with Article 15 of the Covenant of the League.

The detailed arrangements for effecting such peaceful settlement are the subject of special agreements signed this day.

ARTICLE 4

1. If one of the high contracting parties alleges that a violation of Article 2 of the present treaty or a breach of Articles 42 or 43 of the Treaty of Versailles has been or is being committed, it shall bring the question at once before the Council of the League of Nations.

2. As soon as the Council of the League of Nations is satisfied that such violation or breach has been committed, it will notify its finding without delay to the Powers signatory of the present treaty, who severally agree that in such case they will each of them come immediately to the assistance of the Power against whom the act complained of is directed.

3. In case of a flagrant violation of Article 2 of the present treaty or of a flagrant breach of Articles 42 or 43 of the Treaty of Versailles by one of the high contracting parties, each of the other contracting parties hereby undertakes immediately to come to the help of the party against whom such a violation or breach has been directed as soon as the said Power has been able to satisfy itself that this violation constitutes an unprovoked act of aggression and that by reason either of the crossing of the frontier or of the outbreak of hostilities or of the assembly of armed forces in the demilitarized zone immediate action is necessary. Nevertheless, the Council of the League of Nations, which will be seized of the question in accordance with the first paragraph of this article, will issue its findings, and the high contracting parties undertake to act in accordance with the recommendations of the Council provided that they are concurred in by all the members other than the representatives of the parties which have engaged in hostilities.

ARTICLE 5

The provisions of Article 3 of the present treaty are placed under the guarantee of the high contracting parties as provided by the following stipulations:

If one of the Powers referred to in Article 3 refuses to submit a dispute to peaceful settlement or to comply with an arbitral or judicial decision and commits a violation of Article 2 of the present treaty or a breach of Articles 42 or 43 of the Treaty of Versailles, the provisions of Article 4 shall apply.

Where one of the Powers referred to in Article 3 without committing a violation of Article 2 of the present treaty or a breach of Articles 42 or 43 of the Treaty of Versailles, refuses to submit a dispute to peaceful settlement or to comply with an arbitral or judicial decision, the other party shall bring the matter before the Council of the League of Nations, and the Council shall propose what steps shall be taken; the high contracting parties shall comply with these proposals.

ARTICLE 6

The provisions of the present treaty do not affect the rights and obligations of the high contracting parties under the Treaty of Versailles or under arrangements supplementary thereto, including the agreements signed in London on the 30th August, 1924.

ARTICLE 7

The present treaty, which is designed to ensure the maintenance of peace, and is in conformity with the Covenant of the League of Nations, shall not be interpreted as restricting the duty of the League to take whatever action may be deemed wise and effectual to safeguard the peace of the world.

ARTICLE 8

The present treaty shall be registered at the League of Nations in accordance with the Covenant of the League. It shall remain in force until the Council, acting on a request of one or other of the high contracting parties notified to the other signatory Powers three months in advance, and voting at least by a two-thirds' majority, decides that the League of Nations ensures sufficient protection to the high contracting parties; the treaty shall cease to have effect on the expiration of a period of one year from such decision.

ARTICLE 9

The present treaty shall impose no obligation upon any of the British dominions, or upon India, unless the government of such dominion, or of India, signifies its acceptance thereof.

ARTICLE 10

The present treaty shall be ratified and the ratifications shall be deposited at Geneva in the archives of the League of Nations as soon as possible.

It shall enter into force as soon as all the ratifications have been deposited and Germany has become a member of the League of Nations.

The present treaty, done in a single copy, will be deposited in the archives of the League of Nations, and the Secretary-General will be requested to transmit certified copies to each of the high contracting parties.

In faith whereof the above-mentioned plenipotentiaries have signed the present treaty.

Done at Locarno, the 16th October, 1925.

LUTHER.

A. BRIAND.

STRESEMANN.

AUSTEN CHAMBERLAIN.

EMILE VANDERVELDE.

BENITO MUSSOLINI.

ANNEX B

Arbitration Convention between Germany and Belgium

The undersigned duly authorized,

Charged by their respective governments to determine the methods by

which, as provided in Article 3 of the treaty concluded this day between Germany, Belgium, France, Great Britain and Italy, a peaceful solution shall be attained of all questions which cannot be settled amicably between Germany and Belgium,

Have agreed as follows:

PART I

ARTICLE 1

All disputes of every kind between Germany and Belgium with regard to which the parties are in conflict as to their respective rights, and which it may not be possible to settle amicably by the normal methods of diplomacy, shall be submitted for decision either to an arbitral tribunal or to the Permanent Court of International Justice, as laid down hereafter. It is agreed that the disputes referred to above include in particular those mentioned in Article 13 of the Covenant of the League of Nations.

This provision does not apply to disputes arising out of events prior to the present convention and belonging to the past.

Disputes for the settlement of which a special procedure is laid down in other conventions in force between Germany and Belgium shall be settled in conformity with the provisions of those conventions.

ARTICLE 2

Before any resort is made to arbitral procedure or to procedure before the Permanent Court of International Justice, the dispute may, by agreement between the parties, be submitted, with a view to amicable settlement, to a permanent international commission styled the Permanent Conciliation Commission, constituted in accordance with the present convention.

ARTICLE 3

In the case of a dispute the occasion of which, according to the municipal law of one of the parties, falls within the competence of the national courts of such party, the matter in dispute shall not be submitted to the procedure laid down in the present convention until a judgment with final effect has been pronounced, within a reasonable time, by the competent national judicial authority.

ARTICLE 4

The Permanent Conciliation Commission mentioned in Article 2 shall be composed of five members, who shall be appointed as follows, that is to say: the German Government and the Belgian Government shall each nominate a commissioner chosen from among their respective nationals, and shall appoint, by common agreement, the three other commissioners from among the nationals of third Powers; these three commissioners must be of different

nationalities, and the German and Belgian Governments shall appoint the president of the commission from among them.

The commissioners are appointed for three years, and their mandate is renewable. Their appointment shall continue until their replacement and, in any case, until the termination of the work in hand at the moment of the expiry of their mandate.

Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

ARTICLE 5

The Permanent Conciliation Commission shall be constituted within three months from the entry into force of the present convention.

If the nomination of the commissioners to be appointed by common agreement should not have taken place within the said period, or, in the case of the filling of a vacancy, within three months from the time when the seat falls vacant, the President of the Swiss Confederation shall, in the absence of other agreement, be requested to make the necessary appointments.

ARTICLE 6

The Permanent Conciliation Commission shall be informed by means of a request addressed to the president by the two parties acting in agreement or, in the absence of such agreement, by one or other of the parties.

The request, after having given a summary account of the subject of the dispute, shall contain the invitation to the commission to take all necessary measures with a view to arrive at an amicable settlement.

If the request emanates from only one of the parties, notification thereof shall be made without delay to the other party.

ARTICLE 7

Within fifteen days from the date when the German Government or the Belgian Government shall have brought a dispute before the Permanent Conciliation Commission either party may, for the examination of the particular dispute, replace its commissioner by a person possessing special competence in the matter.

The party making use of this right shall immediately inform the other party; the latter shall in that case be entitled to take similar action within fifteen days from the date when the notification reaches it.

ARTICLE 8

The task of the Permanent Conciliation Commission shall be to elucidate questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavor to bring the parties to an agreement. It may, after the case has been examined, inform the parties

of the terms of settlement which seem suitable to it, and lay down a period within which they are to make their decision.

At the close of its labors the commission shall draw up a report stating, as the case may be, either that the parties have come to an agreement and, if need arises, the terms of the agreement, or that it has been impossible to effect a settlement.

The labors of the commission must, unless the parties otherwise agree, be terminated within six months from the day on which the commission shall have been notified of the dispute.

ARTICLE 9

Failing any special provision to the contrary, the Permanent Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to enquiries the commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Chapter III (International Commissions of Enquiry) of the Hague Convention of the 18th October, 1907, for the Pacific Settlement of International Disputes.

ARTICLE 10

The Permanent Conciliation Commission shall meet, in the absence of agreement by the parties to the contrary, at a place selected by its president.

ARTICLE 11

The labors of the Permanent Conciliation Commission are not public, except when a decision to that effect has been taken by the commission with the consent of the parties.

ARTICLE 12

The parties shall be represented before the Permanent Conciliation Commission by agents, whose duty it shall be to act as intermediary between them and the commission; they may, moreover, be assisted by counsel and experts appointed by them for that purpose, and request that all persons whose evidence appears to them useful should be heard.

The commission, on its side, shall be entitled to request oral explanations from the agents, counsel and experts of the two parties, as well as from all persons it may think useful to summon with the consent of their government.

ARTICLE 13

Unless otherwise provided in the present convention, the decisions of the Permanent Conciliation Commission shall be taken by a majority.

ARTICLE 14

The German and Belgian Governments undertake to facilitate the labors of the Permanent Conciliation Commission, and particularly to supply it

to the greatest possible extent with all relevant documents and information, as well as to use the means at their disposal to allow it to proceed in their territory and in accordance with their law to the summoning and hearing of witnesses or experts, and to visit the localities in question.

ARTICLE 15

During the labors of the Permanent Conciliation Commission each commissioner shall receive salary, the amount of which shall be fixed by agreement between the German and Belgian Governments, each of which shall contribute an equal share.

ARTICLE 16

In the event of no amicable agreement being reached before the Permanent Conciliation Commission the dispute shall be submitted by means of a special agreement either to the Permanent Court of International Justice under the conditions and according to the procedure laid down by its statute or to an arbitral tribunal under the conditions and according to the procedure laid down by The Hague Convention of the 18th October, 1907, for the Pacific Settlement of International Disputes.

If the parties cannot agree on the terms of the special agreement after a month's notice one or other of them may bring the dispute before the Permanent Court of International Justice by means of an application.

PART II

ARTICLE 17

All questions on which the German and Belgian Governments shall differ without being able to reach an amicable solution by means of the normal methods of diplomacy the settlement of which cannot be attained by means of a judicial decision as provided in Article 1 of the present convention, and for the settlement of which no procedure has been laid down by other conventions in force between the parties, shall be submitted to the Permanent Conciliation Commission, whose duty it shall be to propose to the parties an acceptable solution and in any case to present a report.

The procedure laid down in Articles 6-15 of the present convention shall be applicable.

ARTICLE 18

If the two parties have not reached an agreement within a month from the termination of the labors of the Permanent Conciliation Commission the question shall, at the request of either party, be brought before the Council of the League of Nations, which shall deal with it in accordance with Article 15 of the Covenant of the League.

General Provision

ARTICLE 19

In any case, and particularly if the question on which the parties differ arises out of acts already committed or on the point of commission, the Conciliation Commission or, if the latter has not been notified thereof, the arbitral tribunal or the Permanent Court of International Justice, acting in accordance with Article 41 of its statute, shall lay down within the shortest possible time the provisional measures to be adopted. It shall similarly be the duty of the Council of the League of Nations, if the question is brought before it, to ensure that suitable provisional measures are taken. The German and Belgian Governments undertake respectively to accept such measures, to abstain from all measures likely to have a repercussion prejudicial to the execution of the decision or to the arrangements proposed by the Conciliation Commission or by the Council of the League of Nations, and in general to abstain from any sort of action whatsoever which may aggravate or extend the dispute.

ARTICLE 20

The present convention continues applicable as between Germany and Belgium, even when other Powers are also interested in the dispute.

ARTICLE 21

The present convention shall be ratified. Ratifications shall be deposited at Geneva with the League of Nations at the same time as the ratifications of the treaty concluded this day between Germany, Belgium, France, Great Britain and Italy.

It shall enter into and remain in force under the same conditions as the said treaty.

The present convention, done in a single copy, shall be deposited in the archives of the League of Nations, the Secretary-General of which shall be requested to transmit certified copies to each of the two contracting Governments.

Done at Locarno the 16th October, 1925.

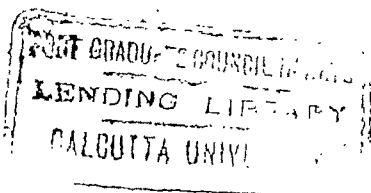
STR.

E. V.

ANNEX C

Arbitration Convention between Germany and France

[This convention is the same, word for word, as the preceding arbitration convention between Germany and Belgium, except for the necessary substitution throughout of France for Belgium. It is initialled STR. and A. B.]



ANNEX D

Arbitration Treaty between Germany and Poland

The President of the German Empire and the President of the Polish Republic;

Equally resolved to maintain peace between Germany and Poland by assuring the peaceful settlement of differences which might arise between the two countries;

Declaring that respect for the rights established by treaty or resulting from the law of nations is obligatory for international tribunals;

Agreeing to recognize that the rights of a state cannot be modified save with its consent;

And considering that sincere observance of the methods of peaceful settlement of international disputes permits of resolving, without recourse to force, questions which may become the cause of division between states;

Have decided to embody in a treaty their common intentions in this respect, and have named as their plenipotentiaries the following:

Who, having exchanged their full powers, found in good and due form, are agreed upon the following articles:

[Articles 1 to 20, inc., of this treaty are the same as Articles 1 to 20, inc., of the preceding arbitration convention between Germany and Belgium, except for the necessary substitution throughout of Poland for Belgium.]

ARTICLE 21

The present treaty, which is in conformity with the Covenant of the League of Nations, shall not in any way affect the rights and obligations of the high contracting parties as members of the League of Nations and shall not be interpreted as restricting the duty of the League to take whatever action may be deemed wise and effectual to safeguard the peace of the world.

ARTICLE 22

The present treaty shall be ratified. Ratifications shall be deposited at Geneva with the League of Nations at the same time as the ratifications of the treaty concluded this day between Germany, Belgium, France, Great Britain and Italy.

It shall enter into and remain in force under the same conditions as the said treaty.

The present treaty, done in a single copy, shall be deposited in the archives of the League of Nations, the Secretary-General of which shall be requested to transmit certified copies to each of the high contracting parties.

Done at Locarno the 16th October, 1925.

STR.

A. S.

ANNEX E

Arbitration Treaty between Germany and Czechoslovakia

[This treaty is the same, word for word, as the preceding arbitration treaty between Germany and Poland, except for the necessary substitution throughout of Czechoslovakia for Poland. It is initialled STR. and DR. B.]

ANNEX F

Draft Collective Note to Germany regarding Article 16 of the Covenant of the League of Nations

The German delegation has requested certain explanations in regard to Article 16 of the Covenant of the League of Nations.

We are not in a position to speak in the name of the League, but in view of the discussions which have already taken place in the Assembly and in the commissions of the League of Nations, and after the explanations which have been exchanged between ourselves, we do not hesitate to inform you of the interpretation which, in so far as we are concerned, we place upon Article 16.

In accordance with that interpretation the obligations resulting from the said article on the members of the League must be understood to mean that each state member of the League is bound to coöperate loyally and effectively in support of the Covenant and in resistance to any act of aggression to an extent which is compatible with its military situation and takes its geographical position into account.

E. V.

A. B.

A. C.

B. M.

DR. B.

A. S.

No. 2

Treaty between France and Poland

The President of the French Republic and the President of the Polish Republic;

Equally desirous to see Europe spared from war by a sincere observance of the undertakings arrived at this day with a view to the maintenance of general peace;

Have resolved to guarantee their benefits to each other reciprocally by a treaty concluded within the framework of the Covenant of the League of Nations and of the treaties existing between them;

And have to this effect nominated for their plenipotentiaries:

Who, after having exchanged their full powers, found in good and due form, have agreed on the following provisions:

ARTICLE 1

In the event of Poland or France suffering from a failure to observe the undertakings arrived at this day between them and Germany with a view

to the maintenance of general peace, France, and reciprocally Poland, acting in application of Article 16 of the Covenant of the League of Nations, undertake to lend each other immediately aid and assistance, if such a failure is accompanied by an unprovoked recourse to arms.

In the event of the Council of the League of Nations, when dealing with a question brought before it in accordance with the said undertakings, being unable to succeed in making its report accepted by all its members other than the representatives of the parties to the dispute, and in the event of Poland or France being attacked without provocation, France, or reciprocally Poland, acting in application of Article 15, paragraph 7, of the Covenant of the League of Nations, will immediately lend aid and assistance.

ARTICLE 2

Nothing in the present treaty shall affect the rights and obligations of the high contracting parties as members of the League of Nations, or shall be interpreted as restricting the duty of the League to take whatever action may be deemed wise and effectual to safeguard the peace of the world.

ARTICLE 3

The present treaty shall be registered with the League of Nations, in accordance with the Covenant.

ARTICLE 4

The present treaty shall be ratified. The ratifications will be deposited at Geneva with the League of Nations at the same time as the ratification of the treaty concluded this day between Germany, Belgium, France, Great Britain and Italy, and the ratification of the treaty concluded at the same time between Germany and Poland.

It will enter into force and remain in force under the same conditions as the said treaties.

The present treaty done in a single copy will be deposited in the archives of the League of Nations, and the Secretary-General of the League will be requested to transmit certified copies to each of the high contracting parties.

Done at Locarno the 16th October, 1925.

No. 3

Treaty between France and Czechoslovakia

[This treaty is the same, word for word, as the preceding treaty between France and Poland, except for the necessary substitution throughout of Czechoslovakia for Poland.]

THE PAN AMERICAN SANITARY CODE¹

Signed at Havana, November 14, 1924; ratification of the United States deposited with the Government of Cuba, April 13, 1925

The presidents of Argentine, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Guatemala, Haiti, Honduras, Mexico, Salvador, Panama, Paraguay, Peru, United States of America, Uruguay and Venezuela, being desirous of entering into a sanitary convention for the purpose of better promoting and protecting the public health of their respective nations, and particularly to the end that effective coöperative international measures may be applied for the prevention of the international spread of the communicable infections of human beings and to facilitate international commerce and communication, have appointed as their plenipotentiaries, to-wit:

[Here follow the names of the plenipotentiaries as they appear in the signatures to the convention.]

Who, having exchanged their full powers, found in good and due form, have agreed to adopt, *ad referendum*, the following

CHAPTER I. OBJECTS OF THE CODE AND DEFINITIONS OF TERMS USED THEREIN

ARTICLE 1. The objects of this code are:

(a) The prevention of the international spread of communicable infections of human beings.

(b) The promotion of coöperative measures for the prevention of the introduction and spread of disease into and from the territories of the signatory governments.

(c) The standardization of the collection of morbidity and mortality statistics by the signatory governments.

(d) The stimulation of the mutual interchange of information which may be of value in improving the public health, and combating the diseases of man.

(e) The standardization of the measures employed at places of entry, for the prevention of the introduction and spread of the communicable diseases of man, so that greater protection against them shall be achieved and unnecessary hindrance to international commerce and communication eliminated.

ART. 2. DEFINITIONS. As herein used, the following words and phrases shall be taken in the sense hereinbelow indicated, except as a different meaning for the word or phrase in question may be given in a particular article, or is plainly to be collected from the context or connection where the term is used.

¹ U. S. Treaty Series, No. 714.

AIRCRAFT.—Any vehicle which is capable of transporting persons or things through the air, including aeroplanes, seaplanes, gliders, helicopters, air ships, balloons and captive balloons.

AREA.—A well determined portion of territory.

DISINFECTION.—The act of rendering free from the causal agencies of disease.

FUMIGATION.—A standard process by which the organisms of disease or their potential carriers are exposed to a gas in lethal concentrations.

INDEX, *Aedes aegypti*.—The percentage ratio determined after examination between the number of houses in a given area and the number in which larvae or mosquitoes of the *Aedes aegypti* are found, in a fixed period of time.

INSPECTION.—The act of examining persons, buildings, areas, or things which may be capable of harboring, transmitting or transporting the infectious agents of disease, or of propagating or favoring the propagation of such agents. Also the act of studying and observing measures put in force for the suppression or prevention of disease.

INCUBATION, PERIOD OF.—For plague, cholera and yellow fever, each 6 days, for smallpox, 14 days, and for typhus fever 12 days.

ISOLATION.—The separation of human beings or animals from other human beings or animals in such manner as to prevent the interchange of disease.

PLAGUE.—Bubonic, septicemic, pneumonic or rodent plague.

PORT.—Any place or area where a vessel or aircraft may seek harbor, discharge or receive passengers, crew, cargo or supplies.

RODENTS.—Rats, domestic and wild, and other rodents.

CHAPTER II

SECTION 1. *Notification and subsequent communications to other countries*

ART. 3. Each of the signatory governments agrees to transmit to each of the other signatory governments and to the Pan American Sanitary Bureau, at intervals of not more than two weeks, a statement containing information as to the state of its public health, particularly that of its ports.

The following diseases are obligatorily reportable:

Plague, cholera, yellow fever, smallpox, typhus, epidemic cerebro-spinal meningitis, acute epidemic poliomyelitis, epidemic lethargic encephalitis, influenza or epidemic la grippe, typhoid and paratyphoid fevers, and such other diseases as the Pan American Sanitary Bureau may, by resolution, add to the above list.

ART. 4. Each signatory government agrees to notify adjacent countries and the Pan American Sanitary Bureau immediately by the most rapid available means of communication, of the appearance in its territory of an authentic or officially suspected case or cases of plague, cholera, yellow fever, smallpox, typhus or any other dangerous contagion liable to be spread through the intermediary agency of international commerce.

ART. 5. This notification is to be accompanied, or very promptly followed, by the following additional information:

1. The area where the disease has appeared.
2. The date of its appearance, its origin, and its form.
3. The probable source or country from which introduced and manner of introduction.
4. The number of confirmed cases, and number of deaths.
5. The number of suspected cases and deaths.
6. In addition, for plague, the existence among rodents of plague, or of an unusual mortality among rodents; for yellow fever, the *Aedes aegypti* index of the locality.
7. The measures which have been applied for the prevention of the spread of the disease, and its eradication.

ART. 6. The notification and information prescribed in Articles 4 and 5 are to be addressed to diplomatic or consular representatives in the capital of the infected country, and to the Pan American Sanitary Bureau at Washington, which shall immediately transmit the information to all countries concerned.

ART. 7. The notification and the information prescribed in Articles 3, 4, 5, and 6 are to be followed by further communications in order to keep other governments informed as to the progress of the disease or diseases. These communications will be made at least once weekly, and will be as complete as possible, indicating in detail the measures employed to prevent the extension of the disease. The telegraph, the cable, and the radio will be employed for this purpose, except in those instances in which the data may be transmitted rapidly by mail. Reports by telegraph, cable or radio will be confirmed by letter. Neighboring countries will endeavor to make special arrangements for the solution of local problems that do not involve widespread international interest.

ART. 8. The signatory governments agree that in the event of the appearance of any of the following diseases, namely: cholera, yellow fever, plague, typhus fever or other pestilential diseases in severe epidemic form, in their territory, they will immediately put in force appropriate sanitary measures for the prevention of the international carriage of any of the said diseases therefrom by passengers, crew, cargo and vessels, and mosquitoes, rats and vermin that may be carried thereon, and will promptly notify each of the other signatory governments and the Pan American Sanitary Bureau as to the nature and extent of the sanitary measures which they have applied for the accomplishment of the requirements of this article.

SECTION 2. *Publication of prescribed measures*

ART. 9. Information of the first non-imported case of plague, cholera, or yellow fever justifies the application of sanitary measures against an area where said disease may have appeared.

ART. 10. The government of each country obligates itself to publish immediately the preventive measures which will be considered necessary to be taken by vessels or other means of transport, passengers and crew at any port of departure or place located in the infected area. The said publication is to be communicated at once to the accredited diplomatic or consular representatives of the infected country, and to the Pan American Sanitary Bureau. The signatory government also obligate themselves to make known in the same manner the revocation of these measures, or of modifications thereof that may be made.

ART. 11. In order that an area may be considered to be no longer infected, it must be officially established:

1. That there has neither been a death nor a new case as regards plague or cholera for ten days; and as regards yellow fever for twenty days, either since the isolation, or since the death or recovery of the last patient.

2. That all means for the eradication of the disease have been applied and, in the case of plague, that effective measures against rats have been continuously carried out, and that the disease has not been discovered among them within six months; in the case of yellow fever, that *Aedes aegypti* index of the infected area has been maintained at an average of not more than 2 per cent for the 30-day period immediately preceding, and that no portion of the infected area has had an index in excess of 5 per cent for the same period of time.

SECTION 3. *Morbidity and mortality statistics*

ART. 12. The international classification of the causes of death is adopted as the Pan American Classification of the Causes of Death, and shall be used by the signatory nations in the interchange of mortality and morbidity reports.

ART. 13. The Pan American Sanitary Bureau is hereby authorized and directed to republish from time to time the Pan American Classification of the Causes of Death.

ART. 14. Each of the signatory governments agrees to put in operation at the earliest practicable date a system for the collection and tabulation of vital statistics which shall include:

1. A central statistical office presided over by a competent official.
2. The establishment of regional statistical offices.
3. The enactment of laws, decrees or regulations requiring the prompt reporting of births, deaths and communicable diseases, by health officers, physicians, midwives and hospitals, and providing penalties for failure to make such reports.

ART. 15. The Pan American Sanitary Bureau shall prepare and publish standard forms for the reporting of deaths and cases of communicable disease, and all other vital statistics.

CHAPTER III. SANITARY DOCUMENTS

SECTION 1. *Bills of health*

ART. 16. The master of any vessel or aircraft which proceeds to a port of any of the signatory governments, is required to obtain at the port of departure and ports of call, a bill of health, in duplicate, issued in accordance with the information set forth in the appendix and adopted as the standard bill of health.

ART. 17. The bill of health will be accompanied by a list of the passengers, and stowaways if any, which shall indicate the port where they embarked and the port to which they are destined, and a list of the crew.

ART. 18. Consuls and other officials signing or countersigning bills of health should keep themselves accurately informed with respect to the sanitary conditions of their ports, and the manner in which this code is obeyed by vessels and their passengers and crews while therein. They should have accurate knowledge of local mortality and morbidity, and of sanitary conditions which may affect vessels in port. To this end, they shall be furnished with information they request pertaining to sanitary records, harbors and vessels.

ART. 19. The signatory governments may assign medical or sanitary officers as public health attaches to embassies or legations, and as representatives to international conferences.

ART. 20. If at the port of departure there be no consul or consular agent of the country of destination, the bill of health may be issued by the consul or consular agent of a friendly government authorized to issue such bill of health.

ART. 21. The bill of health should be issued not to exceed forty-eight hours before the departure of the ship to which it is issued. The sanitary visa should not be given more than twenty-four hours before departure.

ART. 22. Any erasure or alteration of a bill of health shall invalidate the document, unless such alteration or erasure shall be made by competent authority, and notation thereof appropriately made.

ART. 23. A clean bill of health is one which shows the complete absence in the port of departure of cholera, yellow fever, plague, typhus fever, or of other pestilential disease in severe epidemic form, liable to be transported by international commerce. Provided, that the presence only of bona fide imported cases of such disease, when properly isolated, shall not compel the issuance of a foul bill of health, but notation of the presence of such cases will be made under the heading of "Remarks" on the Bill of health.

ART. 24. A foul bill of health is one which shows the presence of non-imported cases of any of the diseases referred to in Art. 23.

ART. 25. Specific bills of health are not required of vessels which, by reason of accident, storm or other emergency condition, including wireless change of itinerary, are obliged to put into ports other than their original

destinations but such vessels shall be required to exhibit such bills of health as they possess.

ART. 26. It shall be the duty of the Pan American Sanitary Bureau to publish appropriate information which may be distributed by port health officers, for the purpose of instructing owners, agents and master of vessels as to the methods which should be put in force by them for the prevention of the international spread of disease.

SECTION 2. *Other sanitary documents*

ART. 27. Every vessel carrying a medical officer will maintain a sanitary log which will be kept by him, and he will record therein daily: the sanitary condition of the vessel, and its passengers and crew; a record showing the names of passengers and crew which have been vaccinated by him; name, age, nationality, home address, occupation and nature of illness or injury of all passengers and crew treated during the voyage; the source and sanitary quality of the drinking water of the vessel, the place where taken on board, and the method in use on board for its purification; sanitary conditions, observed in ports visited during the voyage; the measures taken to prevent the ingress and egress of rodents to and from the vessel; the measures which have been taken to protect the passengers and crew against mosquitoes, other insects, and vermin. The sanitary log will be signed by the master and medical officer of the vessel, and will be exhibited upon the request of any sanitary or consular officer. In the absence of a medical officer, the master shall record the above information in the log of the vessel, in so far as possible.

ART. 28. Equal or similar forms for Quarantine Declarations, Certificate of Fumigation, and Certificate of Vaccination, set forth in the appendix, are hereby adopted as standard forms.

CHAPTER IV. CLASSIFICATION OF PORTS

ART. 29. An infected port is one in which any of the following diseases exist, namely, plague, cholera, yellow fever, or other pestilential disease in severe epidemic form.

ART. 30. A suspected port, is a port in which, or in the areas contiguous thereto, a non-imported case or cases of any of the diseases referred to in Art. 23, have occurred within sixty days, or which has not taken adequate measures to protect itself against such diseases, but which is not known to be an infected port.

ART. 31. A clean port, Class A, is one in which the following conditions are fulfilled:

1. The absence of non-imported cases of any of the diseases referred to in Art. 23, in the port itself and in the areas contiguous thereto.
2. (a) The presence of a qualified and adequate health staff.
(b) Adequate means of fumigation.

(c) Adequate personnel and material for the capture or destruction of rodents.

(d) An adequate bacteriological and pathological laboratory.

(e) A safe water supply.

(f) Adequate means for the collection of mortality and morbidity data.

(g) Adequate facilities for the isolation of suspects and the treatment of infectious diseases.

(h) Signatory governments shall register in the Pan-American Sanitary Bureau those places that comply with these conditions.

ART. 32. A clean port, Class B, is one in which the conditions described in Art. 31, 1 and 2 (a) above, are fulfilled, but in which one or more of the other requirements of Art. 31, 2 are not fulfilled.

ART. 33. An unclassified port is one with regard to which the information concerning the existence or non-existence of any of the diseases referred to in Art. 23, and the measures which are being applied for the control of such diseases, is not sufficient to classify such port.

An unclassified port shall be provisionally considered as a suspected or infected port, as the information available in each case may determine, until definitely classified.

ART. 34. The Pan American Sanitary Bureau shall prepare and publish, at intervals, a tabulation of the most commonly used ports of the Western Hemisphere, giving information as to sanitary conditions.

CHAPTER V. CLASSIFICATION OF VESSELS

ART. 35. A clean vessel is one coming from a clean port, Class A or B, which has had no case of plague, cholera, yellow fever, smallpox or typhus aboard during the voyage, and which has complied with the requirements of this code.

ART. 36. An infected or suspected vessel is:

1. One which has had on board during the voyage a case or cases of any of the diseases mentioned in Art. 35.
2. One which is from an infected or suspected port.
3. One which is from a port where plague or yellow fever exists.
4. Any vessel on which there has been mortality among rats.
5. A vessel which has violated any of the provisions of this code.

Provided that the sanitary authorities should give due consideration in applying sanitary measures to a vessel that has not docked.

ART. 37. Any master or owner of any vessel, or any person violating any provisions of this code or violating any rule or regulation made in accordance with this code, relating to the inspection of vessels, the entry or departure from any quarantine station, grounds or anchorages, or trespass thereon, or to the prevention of the introduction of contagious or infectious disease into any of the signatory countries, or any master, owner, or agent of a vessel making a false statement relative to the sanitary condition of a

vessel, or its contents, or as to the health of any passenger, or person thereon, or who interferes with a quarantine or health officer in the proper discharge of his duty, or fails or refuses to present bills of health, or other sanitary document, or pertinent information to a quarantine or health officer, shall be punished in accordance with the provisions of such laws, rules or regulations, as may be or may have been enacted, or promulgated, in accordance with the provisions of this code, by the government of the country within whose jurisdiction the offense is committed.

CHAPTER VI. THE TREATMENT OF VESSELS

ART. 38. Clean vessels will be granted pratique by the port health authority upon acceptable evidence that they properly fulfill the requirements of Art. 35.

ART. 39. Suspected vessels will be subjected to necessary sanitary measures to determine their actual condition.

ART. 40. Vessels infected with any of the diseases referred to in Art. 23 shall be subjected to such sanitary measures as will prevent the continuance thereon, and the spread therefrom, of any of said diseases to other vessels or ports. The disinfection of cargo, stores and personal effects shall be limited to the destruction of the vectors of disease which may be contained therein, provided that things which have been freshly soiled with human excretions capable of transmitting disease, shall always be disinfected. Vessels on which there is undue prevalence of rats, mosquitoes, lice, or any other potential vector of communicable disease, may be disinfected irrespective of the classification of the vessel.

ART. 41. Vessels infected with plague shall be subjected to the following treatment.

1. The vessel shall be held for observation and necessary treatment.
2. The sick, if any, shall be removed and placed under appropriate treatment in isolation.
3. The vessel shall be simultaneously fumigated throughout for the destruction of rats. In order to render fumigation more effective, cargo may be wholly or partially discharged prior to such fumigation, but care will be taken to discharge no cargo which might harbor rats,¹ except for fumigation.
4. All rats recovered after fumigation should be examined bacteriologically.
5. Healthy contacts, except those actually exposed to cases of pneumonic plague, will not be detained in quarantine.

¹ Explanatory Footnote.—The nature of the goods or merchandise likely to harbor rats (plague suspicious cargo), shall, for purpose of this section, be deemed to be the following, namely; rice or other grain (exclusive of flour); oilcake in sacks, beans in mats or sacks; goods packed in crates with straw or similar packing material; matting in bundles; dried vegetables in baskets or cases; dried and salted fish; peanuts in sacks; dry ginger; curios, etc., in fragile cases, copra, loose hemp in bundles; coiled rope in sacking kapok, maize in bags, sea grass in bales; tiles, large pipes and similar articles, and bamboo poles in bundles.

6. The vessel will not be granted pratique until it is reasonably certain that it is free from rats and vermin.

ART. 42. Vessels infected with cholera shall be subjected to the following treatment.

1. The vessels shall be held for observation and necessary treatment.

2. The sick, if any, shall be removed and placed under appropriate treatment in isolation.

3. All persons on board shall be subjected to bacteriological examination, and shall not be admitted to entry until demonstrated free from cholera vibrios.

4. Appropriate disinfection shall be performed.

ART. 43. Vessels infected with yellow fever shall be subjected to the following treatment.

1. The vessel shall be held for observation and necessary treatment.

2. The sick if any, shall be removed and placed under appropriate treatment in isolation from *Aedes aegypti* mosquitoes.

3. All persons on board non-immune to yellow fever shall be placed under observation to complete six days from the last possible exposure to *Aedes aegypti* mosquitoes.

4. The vessel shall be freed from *Aedes aegypti* mosquitoes.

ART. 44. Vessels infected with smallpox shall be subjected to the following treatment.

1. The vessels shall be held for observation and necessary treatment.

2. The sick, if any, shall be removed and placed under appropriate treatment in isolation.

3. All persons on board shall be vaccinated. As an option the passenger may elect to undergo isolation to complete fourteen days from the last possible exposure to the disease.

4. All living quarters of the vessels shall be rendered mechanically clean, and used clothing and bedding of the patient disinfected.

ART. 45. Vessels infected with typhus shall be subjected to the following treatment:

1. The vessel shall be held for observation and necessary treatment.

2. The sick, if any, shall be removed and placed under appropriate treatment in isolation from lice.

3. All persons on board and their personal effects shall be deloused.

4. All persons on board who have been exposed to the infection shall be placed under observation to complete twelve days from the last possible exposure to the infection.

5. The vessel shall be deloused.

ART. 46. The time of detention of vessels for inspection or treatment shall be the least consistent with public safety and scientific knowledge. It is the duty of port health officers to facilitate the speedy movement of vessels to the utmost compatible with the foregoing.

ART. 47. The power and authority of quarantine will not be utilized for financial gain, and no charges for quarantine services will exceed actual cost plus a reasonable surcharge for administrative expenses and fluctuations in the market prices of materials used.

CHAPTER VII. FUMIGATION STANDARDS

ART. 48. Sulphur dioxide, hydrocyanic acid and cyanogen chloride gas mixture shall be considered as standard fumigants when used in accordance with the table set forth in the appendix, as regards hours of exposure and of quantities of fumigants per 1,000 cubic feet.

ART. 49. Fumigation of ships to be most effective should be performed periodically and preferably at six months intervals, and should include the entire vessel and its lifeboats. The vessels should be free of cargo.

ART. 50. Before the liberation of hydrogen cyanide or cyanogen chloride, all personnel of the vessel will be removed, and care will be observed that all compartments are rendered as nearly gas tight as possible.

CHAPTER VIII. MEDICAL OFFICERS OF VESSELS

ART. 51. In order to better protect the health of travelers by sea, to aid in the prevention of the international spread of disease and to facilitate the movement of international commerce and communication, the signatory governments are authorized in their discretion to license physicians employed on vessels.

ART. 52. It is recommended that license not issue unless the applicant therefor is a graduate in medicine from a duly chartered and recognized school of medicine, is the holder of an unrepealed license to practice medicine, and has successfully passed an examination as to his moral and mental fitness to be the surgeon or medical officer of a vessel. Said examination shall be set by the directing head of the national health service, and shall require of the applicant a competent knowledge of medicine and surgery. Said directing head of the national health service may issue a license to an applicant who successfully passes the examination, and may revoke said license upon conviction of malpractice, unprofessional conduct, offenses involving moral turpitude or infraction of any of the sanitary laws or regulations of any of the signatory governments based upon the provisions of this code.

ART. 53. When duly licensed as aforesaid, said surgeons or medical officers of vessels may be utilized in aid of inspection as defined in this code.

CHAPTER IX. THE PAN AMERICAN SANITARY BUREAU

Functions and Duties

ART. 54. The organization, functions and duties of the Pan American Sanitary Bureau shall include those heretofore determined for the International Sanitary Bureau by the various international sanitary and other

conferences of American Republics, and such additional administrative functions and duties as may be hereafter determined by Pan American Sanitary Conferences.

ART. 55. The Pan American Sanitary Bureau shall be the central coördinating sanitary agency of the various member Republics of the Pan American Union, and the general collection and distribution center of sanitary information to and from said republics. For this purpose it shall, from time to time, designate representatives to visit and confer with the sanitary authorities of the various signatory governments on public health matters, and such representatives shall be given all available sanitary information in the countries visited by them in the course of their official visits and conferences.

ART. 56. In addition, the Pan American Sanitary Bureau shall perform the following specific functions:

To supply to the sanitary authorities of the signatory governments through its publications, or in other appropriate manner, all available information relative to the actual status of the communicable diseases of man, new invasions of such diseases, the sanitary measures undertaken, and the progress effected in the control or eradication of such diseases; new methods for combating disease; morbidity and mortality statistics; public health organization and administration; progress in any of the branches of preventive medicine, and other pertinent information relative to sanitation and public health in any of its phases, including a bibliography of books and periodicals on public hygiene.

In order to more efficiently discharge its functions, it may undertake coöperative epidemiological and other studies; may employ at headquarters and elsewhere, experts for this purpose; may stimulate and facilitate scientific researches and the practical application of the results therefrom; and may accept gifts, benefactions and bequests, which shall be accounted for in the manner now provided for the maintenance funds of the bureau.

ART. 57. The Pan American Sanitary Bureau shall advise and consult with the sanitary authorities of the various signatory governments relative to public health problems, and the manner of interpreting and applying the provisions of this code.

ART. 58. Officials of the national health services may be designated as representatives, ex-officio, of the Pan American Sanitary Bureau, in addition to their regular duties, and when so designated they may be empowered to act as sanitary representatives of one or more of the signatory governments when properly designated and accredited to so serve.

ART. 59. Upon request of the sanitary authorities of any of the signatory governments, the Pan American Sanitary Bureau is authorized to take the necessary preparatory steps to bring about an exchange of professors, medical and health officers, experts or advisers in public health of any of the sanitary

sciences, for the purpose of mutual aid and advancement in the protection of the public health of the signatory governments.

ART. 60. For the purpose of discharging the functions and duties imposed upon the Pan American Sanitary Bureau, a fund of not less than \$50,000 shall be collected by the Pan American Union, apportioned among the signatory governments on the same basis as are the expenses of the Pan American Union.

CHAPTER X. AIRCRAFT

ART. 61. The provisions of this convention shall apply to aircraft, and the signatory governments agree to designate landing places for aircraft which shall have the same status as quarantine anchorages.

CHAPTER XI. SANITARY CONVENTION OF WASHINGTON

ART. 62. The provisions of Articles 5, 6, 13, 14, 15, 16, 17, 18, 25, 30, 32, 33, 34, 37, 38, 39, 40, 41, 42, 43, 44, 45, 49, and 50, of the Pan American Sanitary Convention concluded in Washington on October 14, 1905, are hereby continued in full force and effect,¹ except in so far as they may be in conflict with the provisions of this convention.

CHAPTER XII

Be it understood that this code does not in any way abrogate or impair the validity or force of any existing treaty, convention or agreement between any of the signatory governments and any other government.

CHAPTER XIII. TRANSITORY DISPOSITION

ART. 63. The governments which may not have signed the present convention are to be admitted to adherence thereto upon demand, notice of this adherence to be given through diplomatic channels to the Government of the Republic of Cuba.

Made and signed in the city of Havana, on the fourteenth day of the month of November, 1924, in two copies, in English and Spanish, respectively, which shall be deposited with the Department of Foreign Relations of the Republic of Cuba, in order that certified copies thereof, in both English and Spanish, may be made for transmission through diplomatic channels to each of the signatory governments.

By the Republic of Argentina:

GREGORIO ARAOZ ALFARO.

JOAQUIN LLAMBIAS.

By the United States of Brazil:

NASCIMENTO GURGEL.

RAUL ALMEIDA MAGALHAES.

¹ See Annex, p. 47, *infra*.

By the Republic of Chile:

CARLOS GRAF.

By the Republic of Colombia:

R. GUTIERREZ LEE.

By the Republic of Costa Rica:

JOSÉ VARELA ZEQUEIRA.

By the Republic of Cuba:

MARIO G. LEBREDO.

JOSÉ A. LOPEZ DEL VALLE.

HUGO ROBERTS.

DIEGO TAMAYO.

FRANCISCO M. FERNANDEZ.

DOMINGO F. RAMOS.

By the Republic of El Salvador:

LEOPOLDO PAZ.

By the United States of America:

HUGH S. CUMMING.

RICHARD CREEL.

P. D. CRONIN.

By the Republic of Guatemala:

JOSÉ DE CUBAS Y SERRATE.

By the Republic of Haiti:

CHARLES MATHON.

By the Republic of Honduras:

ARISTIDES AGRAMONTE.

By the Republic of Mexico:

ALFONSO PRUNEDA.

By the Republic of Panama:

JAIME DE LA GUARDIA.

By the Republic of Paraguay:

ANDRES GUBETICH.

By the Republic of Peru:

CARLOS E. PAZ SOLDAN.

By the Dominican Republic:

R. PEREZ CABRAL.

By the Republic of Uruguay:

JUSTO F. GONZALEZ.

By the United States of Venezuela:

ENRIQUE TEJERA.

ANTONIO SMITH.

APPENDIX

[The Appendix, consisting of Tables of Fumigation Standards, Certificate of Vaccination against Smallpox, Certificate of Discharge from National

Quarantine, Certificate of Fumigation, Quarantine Declaration, and International Standard Form Bill of Health, is omitted from this SUPPLEMENT.]

[ANNEX]

PAN AMERICAN SANITARY CODE

ARTICLES OF THE SANITARY CONVENTION OF WASHINGTON WHICH ARE TO
CONTINUE IN FORCE BY CHAPTER XI

Article V. The prompt and faithful execution of the preceding provisions is of the very first importance.

The notifications only have a real value if each government is warned in time of cases of plague, cholera or yellow fever and of suspicious cases of those diseases supervening in its territory. It cannot then be too strongly recommended to the various governments to make obligatory the declaration of cases of plague, cholera or yellow fever, and of giving information of all unusual mortality of rats and mice especially in ports.

Article VI. It is understood that neighboring countries reserve to themselves the right to make special arrangements with a view of organizing a service of direct information between the chiefs of administration upon the frontiers.

Article XIII. In the case of cholera and plague there is no reason to forbid the transit through an infected district of merchandise, and the objects specified in Nos. 1 and 2 of the preceding article² if they are so packed that they cannot have been exposed to infection in transit.

² The following articles, not included in the official reprint of the Annex, are reprinted from the text of the Sanitary Convention of 1905 which appeared in the SUPPLEMENT to this JOURNAL, Vol. III, pages 237-251:

Article XII. No merchandise or objects shall be subjected to disinfection on account of yellow fever, but in cases covered by the previous article the vehicle of transportation may be subjected to fumigation to destroy mosquitoes. In the case of cholera and plague disinfection should only be applied to merchandise and objects which the local sanitary authority considers as infected.

Nevertheless, merchandise, or objects enumerated hereafter, may be subjected to disinfection, or prohibited entry, independently of all proof that they may or may not be infected:

1. Body linen, wearing apparel in use, clothing which has been worn, bedding already used.

When these objects are transported as baggage, or in the course of a change of residence (household furniture), they should not be prohibited, and are to be subjected to the regulations prescribed by Article XIX.

Baggage left by soldiers and sailors, and returned to their country after death, are considered as objects comprised in the first paragraph of number 1 of this article.

2. Rags, and rags for making paper, with the exception, as to cholera, of rags which are transported as merchandise in large quantities compressed in bales held together by hoops.

New clippings coming directly from spinning mills, weaving mills, manufactories or bleacheries, shoddy, and clippings of new paper, should not be forbidden.

Article XIX. Baggage. In the case of soiled linen, bed clothing, clothing and objects forming a part of baggage or furniture coming from a territorial area declared contaminated, disinfection is only to be practiced in cases where the sanitary authority considers them as contaminated. There shall be no disinfection of baggage on account of yellow fever.

In like manner, when merchandise or objects are so transported that, in transit, they cannot come in contact with soiled objects, their transit across an infected territorial area should not be an obstacle to their entry into the country of destination.

Article XIV. The entry of merchandise and objects specified in Nos. 1 and 2 of Article XII² should not be prohibited, if it can be shown to the authorities of the country of destination that they were shipped at least five days before the beginning of the epidemic.

Article XV. The method and place of disinfection, as well as the measures to be employed for the destruction of rats, and mosquitoes, are to be fixed by authority of the country of destination, upon arrival at said destination. These operations should be performed in such a manner as to cause the least possible injury to the merchandise.

It devolves upon each country to determine questions relative to the payment of damages resulting from disinfection, or from the destruction of rats or mosquitoes.

If taxes are levied by a sanitary authority, either directly or through the agency of any company or agent, to insure measures for the destruction of rats and mosquitoes on board ships, the amount of these taxes ought to be fixed by a tariff published in advance, and the result of these measures should not be a source of profit for either state or sanitary authorities.

Article XVI. Letters and correspondence, printed matter, books, newspapers, business papers, etc., (postal parcels not included), are not to be submitted to any restriction or disinfection. In case of yellow fever postal parcels are not to be subjected to any restrictions or disinfection.

Article XVII. Merchandise, arriving by land or by sea, should not be detained permanently at frontiers or in ports.

Measures which it is permissible to prescribe with respect to them are specified in Article 12.²

Nevertheless, when merchandise, arriving by sea in bulk (*vrac*) or in defective packages, is contaminated by pest-stricken rats during the passage, and is incapable of being disinfected, the destruction of the germs may be assured by putting said merchandise in a warehouse for a period to be decided by the sanitary authorities of the port of arrival.

It is to be understood that the application of this last measure should not entail delay upon any vessel nor extraordinary expenses resulting from the want of warehouses in ports.

Article XVIII. When merchandise has been disinfected by the application of the measures prescribed in Article 12,² or put temporarily in warehouses in accordance with the third paragraph of Article 17, the owner, or his representative, has the right to demand from the sanitary authority which has ordered such disinfection, or storage, a certificate setting forth the measures taken.

² See footnote on page 47.

Article XXV. The sanitary authorities of the port must deliver to the captain, the owner, or his agent, whenever a demand for it is made, a certificate setting forth that the measures for the destruction of rats have been efficacious and indicating the reasons why these measures have been applied.

Article XXX. Special measures may be prescribed in regard to crowded ships, notably emigrant ships, or any other ship presenting bad hygienic conditions.

Article XXXII. Ships coming from a contaminated port, which have been disinfected and which may have been subjected to sanitary measures applied in an efficient manner, shall not undergo a second time the same measures upon their arrival at a new port, provided that no new case shall have appeared since the disinfection was practiced, and that the ships have not touched in the meantime at an infected port.

When a ship only disembarks passengers and their baggage, or the mails, without having been in communication with terra firma, it is not to be considered as having touched at a port, provided that in the case of yellow fever it has not approached sufficiently near the shore to permit the access of mosquitoes.

Article XXXIII. Passengers arriving on an infected ship have the right to demand of the sanitary authority of the port a certificate showing the date of their arrival and the measures to which they and their baggage have been subjected.

Article XXXIV. Packet boats shall be subjected to special regulations, to be established by mutual agreement between the countries in interest.

Article XXXVII. Land quarantines should no longer be established, but the governments reserve the right to establish camps of observation if they should be thought necessary for the temporary detention of suspects.

This principle does not exclude the right for each country to close a part of its frontier in case of necessity.

Article XXXVIII. It is important that travelers should be submitted to a surveillance on the part of the personnel of railroads, to determine their condition of health.

Article XXXIX. Medical intervention is limited to a visit (inspection) with the taking of temperature of travelers, and the succor to be given to those actually sick. If this visit is made, it should be combined as much as possible with the customhouse inspection to the end that travelers may be detained as short a time as possible. Only persons evidently sick should be subjected to a searching medical examination.

Article XL. As soon as travelers, coming from an infected locality, shall have arrived at their destination, it would be of the greatest utility to submit them to a surveillance which should not exceed ten or five days, counting from the date of departure, the time depending upon whether it is a question of plague or cholera. In case of yellow fever the period should be six days.

Article XLI. Governments may reserve to themselves the right to take particular measures in regard to certain classes of persons, notably vagabonds, emigrants and persons traveling or passing the frontier in bands.

Article XLII. Coaches intended for the transportation of passengers and mails should not be retained at frontiers.

In order to avoid this retention a system of relays ought to be established at frontiers, with transfer of passengers, baggage and mails. If one of these carriages be infected or shall have been occupied by a person suffering from plague, cholera or yellow fever, it shall be detached from the train for disinfection at the earliest possible moment.

Article XLIII. Measures concerning the passing of frontiers by the personnel of railroads and of the Post Office are a matter for agreement of the sanitary authorities concerned. These measures should be so arranged as not to hinder the service.

Article XLIV. The regulation of frontier traffic, as well as the adoption of exceptional measures of surveillance should be left to special arrangement between contiguous countries.

Article XLV. The power rests with governments of countries bordering upon rivers to regulate by special arrangement the sanitary régime of river routes.

Article XLIX. All persons who can prove their immunity to yellow fever, to the satisfaction of the health authorities, shall be permitted to land at once.

Article L. It is agreed that in the event of a difference of interpretation of the English and Spanish texts, the interpretation of the English text shall prevail.

OFFICIAL DOCUMENTS

AGREEMENT BETWEEN THE UNITED STATES AND AUSTRIA AND HUNGARY FOR THE DETERMINATION OF THE AMOUNTS TO BE PAID BY AUSTRIA AND BY HUNGARY IN SATISFACTION OF THEIR OBLIGATIONS UNDER THE TREATIES CONCLUDED BY THE UNITED STATES WITH AUSTRIA ON AUGUST 24, 1921, AND WITH HUNGARY ON AUGUST 29, 1921¹

Signed at Washington, November 26, 1924; ratifications exchanged, December 12, 1925

The United States of America and the Republic of Austria, hereafter described as Austria, and the Kingdom of Hungary, hereafter described as Hungary, being desirous of determining the amounts to be paid by Austria and by Hungary in satisfaction of their obligations under the treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921, which secure to the United States and its nationals rights specified under a Joint Resolution of the Congress of the United States of July 2, 1921, including rights under the Treaties of St. Germain-en-Laye and Trianon, respectively, have resolved to submit the questions for decision to a commissioner and have appointed as their plenipotentiaries to sign an agreement for that purpose:

The President of the United States of America, Charles Evans Hughes, Secretary of State of the United States of America,

The President of the Federal Republic of Austria, Mr. Edgar L. G. Prochnik, Chargé d'Affaires of Austria in Washington, and

The Governor of Hungary, Count László Széchenyi, Envoy Extraordinary and Minister Plenipotentiary of Hungary to the United States,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

The three governments shall agree upon the selection of a Commissioner who shall pass upon all claims for losses, damages or injuries suffered by the United States or its nationals embraced within the terms of the Treaty of August 24, 1921, between the United States and Austria and/or the Treaty of August 29, 1921, between the United States and Hungary, and/or the Treaties of St. Germain-en-Laye and/or Trianon, and shall determine the amounts to be paid to the United States by Austria and by Hungary in satisfaction of all such claims (excluding those falling within paragraphs 5, 6 and 7 of Annex I to Section I of Part VIII of both the Treaty of St. Germain-en-Laye and the Treaty of Trianon) and including the following categories:

¹ U. S. Treaty Series, No. 730.

(1) Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of their property, rights and interests, including any company or association in which they are interested, within the territories of either the former Austrian Empire or the former Kingdom of Hungary as they respectively existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to or death of persons, or with respect to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals.

ARTICLE II

Should the Commissioner for any cause be unable to discharge his functions, a successor shall be chosen in the same manner that he was selected. The Commissioner shall hold a session at Washington within two months after the coming into force of the present agreement. He may fix the time and the place of subsequent sessions according to convenience. All claims shall be presented to the Commissioner within one year from the date on which he holds the first session required by the foregoing provision.

ARTICLE III

The Commissioner shall cause to be kept an accurate record of the questions and cases submitted and correct minutes of proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries and shall be subject to the direction of the Commissioner.

ARTICLE IV

The three Governments may designate agents and counsel who may present oral or written arguments to the Commissioner under such conditions as he may prescribe.

The Commissioner shall receive and consider all written statements or documents which may be presented to him, in accordance with rules which he may prescribe, by or on behalf of the respective Governments in support of or in answer to any claim.

The Governments of Austria and Hungary shall be notified of all claims filed with the Commissioner and shall be given such period of time as the Commissioner shall by rule determine in which to answer any claim filed.

The decisions of the Commissioner shall be accepted as final and binding upon the three Governments.

ARTICLE V

Each Government shall pay its own expenses, including the compensation of the secretary appointed by it and that of its agent and counsel. All other expenses which by their nature are a charge on the three Governments, including the compensation of the Commissioner and such employees as he may appoint to assist him in the performance of his duties, shall be borne one-half by the Government of the United States and one-half by the Governments of Austria and Hungary in equal moieties.

ARTICLE VI

This agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall come into force on the date of the exchange of ratifications.

In faith whereof, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in triplicate at the City of Washington this twenty-sixth day of November, one thousand nine hundred and twenty-four.

CHARLES EVANS HUGHES [SEAL]

EDGAR PROCHNIK [SEAL]

LÁSZLÓ SZÉCHÉNYI [SEAL]

CONVENTION OF RATIFICATION BETWEEN THE UNITED STATES AND THE
DOMINICAN REPUBLIC AS CONTAINED IN THE AGREEMENT OF EVACUATION
OF JUNE 30, 1922¹

*Signed at Santo Domingo, June 12, 1924; ratifications exchanged
December 4, 1925*

Whereas, in the month of May, 1916, the territory of the Dominican Republic was occupied by the forces of the United States of America, during which occupation there was established, in substitution of the Dominican Government, a Military Government which issued governmental regulations under the name of Executive Orders and Resolutions and Administrative Regulations, and also celebrated several contracts by virtue of said Executive Orders or by virtue of some existing laws of the Republic;

Whereas, the Dominican Republic has always maintained its right to self-government, the disoccupation of its territory and the integrity of its sovereignty and independence; and the Government of the United States has declared that, on occupying the territory of the Dominican Republic, it never had, nor has at present, the purpose of attacking the sovereignty and independence of the Dominican Nation; and these rights and declarations gave rise to a Plan or *Modus Operandi* of Evacuation signed on June 30, 1922, by Monseñor A. Nouel, General Horacio Vasquez, Don Federico

¹ U. S. Treaty Series, No. 729.

Velasquez y H., Don Elías Brache, hijo, and Don Francisco J. Peynado, and the Department of State, represented by the Honorable William W. Russell, Envoy Extraordinary and Minister Plenipotentiary of the United States in the Dominican Republic, and the Honorable Sumner Welles, Commissioner of the President of the United States, which met with the approval of the Dominican people, and which approval was confirmed at the elections that took place on March 15, of the present year;

Whereas, although the Dominican Republic has never delegated authority to any foreign power to legislate for it, still, it understands that the internal interests of the Republic require the validation or ratification of several of the Executive Orders and Resolutions, published in the Official Gazette, as well as the Administrative Regulations and Contracts of the Military Government celebrated by virtue of said Orders or of any Law of the Republic; and, on its part, the United States considers that it is also to its interest that said acts be validated or ratified; for these reasons one of the stipulations in the above-mentioned Plan of Evacuation provides for the celebration of a Treaty or Convention of Ratification or Validation of said Orders, Resolutions, Regulations and Contracts;

Therefore, the United States of America and the Dominican Republic, desirous of celebrating the above-mentioned Treaty or Convention, have named for this purpose their Plenipotentiaries as follows:

The President of the United States, William W. Russell, Envoy Extraordinary and Minister Plenipotentiary of the United States in Santo Domingo, and,

The Provisional President of the Dominican Republic, Don Horacio Vasquez, Don Federico Velasquez y H., and Don Francisco J. Peynado, who, after having exchanged their full powers, and after having found them in due and proper form, have agreed upon the following:

I. The Dominican Government hereby recognizes the validity of all the Executive Orders and Resolutions, promulgated by the Military Government and published in the Official Gazette, which may have levied taxes, authorized expenditures, or established rights on behalf of third persons, and the administrative regulations issued, and contracts which may have been entered into, in accordance with those Orders or with any law of the Republic. Those Executive Orders and Resolutions, Administrative Regulations and Contracts are those listed below:

EXECUTIVE ORDERS

2, 8, 9, 14, 17, 19, 23, 27, 28, 31, 34-38 inclusive, 43, 44, 46, 48, 52, 53, 55, 58, 60, 61, 64, 65, 68, 69, 71, 75, 79, 81-85 inclusive, 88, 89, 91, 92, 94, 95, 97, 104, 106, 108, 110-112 inclusive, 114, 116, 118, 119, 121, 126, 128-130 inclusive, 133-136 inclusive, 139, 142, 143, 145, 146, 148-151 inclusive, 153-163 inclusive, 166, 168, 169, 171, 173, 174, 176-178 inclusive, 183, 185-187 inclusive, 190-195 inclusive, 197-203 inclusive,

205-212 inclusive, 214, 215, 218, 220, 223-225 inclusive, 229-231 inclusive, 233-243 inclusive, 245-250 inclusive, 252, 254-260 inclusive, 262-266 inclusive, 269-277 inclusive, 280-282 inclusive, 285-298 inclusive, 300-302 inclusive, 304-307 inclusive, 311, 312, 314-318 inclusive, 320-322 inclusive, 324-326 inclusive, 328-336 inclusive, 338-367 inclusive, 369-375 inclusive, 377-391 inclusive, 393, 395, 396, 398, 400, 402-413 inclusive, 415-433 inclusive, 435-443 inclusive, 445, 447, 449, 451, 454-461 inclusive, 463-489 inclusive, 491-498 inclusive, 500, 502, 504-506 inclusive, 509, 510, 513-517 inclusive, 519-526 inclusive, 530, 532-547 inclusive, 549, 550, 552-556 inclusive, 558-563 inclusive, 566, 569, 570, 574-577 inclusive, 579-590 inclusive, 593, 594, 596, 597, 599-610 inclusive, 612-615 inclusive, 617-629 inclusive, 634-643 inclusive, 645, 647-651 inclusive, 653-656 inclusive, 658, 660-668 inclusive, 670-685 inclusive, 687, 689, 690, 692-697 inclusive, 699, 701-703 inclusive, 706-710 inclusive, 712-719 inclusive, 721, 723-733 inclusive, 735-738 inclusive, 741-748 inclusive, 750, 752-759 inclusive, 761-764 inclusive, 766, 768-775 inclusive, 777-779 inclusive, 782, 783, 784, 785, 786, 787, 789, 790, 791, 792, 793, 794, 795, 796, 799, 800.

RESOLUTIONS

Fomento and Communications

Resolution Official Gazette, No. 2790 Barahona Company.
Resolution Official Gazette, No. 2821 Santa Fe Plantation Sugar Co.
Resolution Official Gazette, No. 2845 Central Romana.
Resolution Official Gazette, No. 2849 Central Romana.
Resolution Official Gazette, No. 2850 Santa Fe Plantation Sugar Co.
Resolution Official Gazette, No. 2861 Central Boca Chica Co.
Resolution Official Gazette, No. 2862 Installation of a telephone line.
Resolution Official Gazette, No. 2911 Installation of a telephone line.
Resolution Official Gazette, No. 2911 Santa Fe Plantation Sugar Co.
Resolution Official Gazette, No. 2929 Ingenio Cristobal Colon.
Resolution Official Gazette, No. 2967 Cancellation.
Resolution Official Gazette, No. 2993 Cía. Anónima de Explotaciones Industriales.
Resolution Official Gazette, No. 2993 San Cristobal Mining Co.
Resolution Official Gazette, No. 3008 Bentz Hnos.
Resolution Official Gazette, No. 3015 Bentz Hnos.
Resolution Official Gazette, No. 3036 Barahona Company.
Resolution Official Gazette, No. 3037 Julio V. Abreu.
Resolution Official Gazette, No. 3076 Central Romana.
Resolution Official Gazette, No. 3076 Barahona Company.
Resolution Official Gazette, No. 3093 Luis del Monte.
Resolution Official Gazette, No. 3093 Jose Mota Rancho.

Resolution Official Gazette, No. 3106 Central Romana.
Resolution Official Gazette, No. 3106 Central Romana.
Resolution Official Gazette, No. 3106 Castillo Hnos.
Resolution Official Gazette, No. 3106 Barahona Company.
Resolution Official Gazette, No. 3106 Barahona Company.
Resolution Official Gazette, No. 3121 Consuelo Sugar Co.
Resolution Official Gazette, No. 3126 Sres. Noboa Hnos.
Resolution Official Gazette, No. 3129 Barahona Company.
Resolution Official Gazette, No. 3129 Consuelo Sugar Co.
Resolution Official Gazette, No. 3159 Barahona Company.
Resolution Official Gazette, No. 3159 Central Romana.
Resolution Official Gazette, No. 3160 Barahona Company.
Resolution Official Gazette, No. 3162 Pardo y Ely Dorsey.
Registered 1, 2 and 3.
Resolution Official Gazette, No. 3162 J. Amando Bermudez.
Resolution Official Gazette, No. 3196 Lorenzo Gautier Olives.
Resolution Official Gazette, No. 3203 Barahona Company.
Resolution Official Gazette, No. 3235 Barahona Company.
Resolution Official Gazette, No. 3242 Central Romana.
Resolution Official Gazette, No. 3243 Manuel Bermudez.
Resolution Official Gazette, No. 3274 Cía Anónima de Inversiones Inmobiliarias.
Resolution Official Gazette, No. 3243 Cía. Anónima de Inversiones Inmobiliarias.
Resolution Official Gazette, No. 3354 Barahona Company.
Resolution Official Gazette, No. 3313 Ingenio Santa Fe de San Pedro de Macoris.
Resolution Official Gazette, No. 2786 Central Romana.
Resolution Official Gazette, No. 2787 L. E. Alvarez.
Resolution Official Gazette, No. 3358 Barahona Company.

Agriculture and Immigration

Resolution No. 61, Official Gazette No. 2838—Declaración de Zonas Agrícolas en la Provincia de Barahona.
Resolution No. 64, Official Gazette Nos. 2853 and 2854—Declaración de Zonas Agrícolas en la Provincia de Barahona.
Resolution No. 66, Official Gazette No. 3003—Declaración de Zonas Agrícolas en la Provincia de Barahona.
Resolution No. 86, Official Gazette No. 3089—Luis Holguer. Todos los permisos de inmigración y ordenes de deportación expedidos por esta Secretaría.
Resolution No. 88, Official Gazette No. 3133—Declaración de Zonas Agrícolas en Barahona.

Resolution No. 89, Official Gazette No. 3145—Declaración de Zonas Agrícolas en la Provincia de Barahona.

Resolution No. 91, Official Gazette No. 3167—Declaración de Zonas Agrícolas en la Provincia de Santo Domingo.

Resolution No. 92, Official Gazette No. 3180—Industrial Alcohol Cía.

Resolution No. 93, Official Gazette No. 3180—Declaración de Zonas Agrícolas en la Provincia de Santo Domingo.

Resolution No. 94, Official Gazette No. 3197—Declaración de Zonas Agrícolas en la Provincia de Santo Domingo.

Resolution No. 95, Official Gazette No. 3219—Declaración de Zonas Agrícolas en la Provincia de Monte Cristi.

Resolution No. 96, Official Gazette No. 3242—Alvaro Fernández.

Resolution No. 97, Official Gazette No. 3243—Rectificación Límites Mencionados en Resolución No. 94 referente a Baní.

Resolution No. 98, Official Gazette No. 3301—Cancelando Resolución No. 97.

Resolution No. 99, Official Gazette No. 3332—Asociación de Regantes.

Water titles issued by the Secretariat of State for Agriculture by virtue of Executive Order No. 318, to the following:

Domingo Rodríguez—Agua del Río San Juan, Azua.

Jesus M. Vargas—Agua del Río el Caño de Boña, Neiba, Barahona.

Alberto Perdomo—Agua del Río Plaza Cacique.

Santiago J. Rodríguez—Agua del Río Macasía, Matas de Farfan.

J. Julio Coiscou—Agua del Río Birán, Barahona.

Asociación La Altagracia—Agua del Río El Manguito, Neiba.

Arbaje Hnos—Agua del Río Macasía, Matas de Farfan.

A. Santiago—Agua del Río Macasía, Matas de Farfan.

Manuel de Pérez—Agua del Río Camana, Neiba.

Sociedad de Irrigación Los Tres—Agua del Río San Juan, San Juan, Azua.

Joaquín Bracia—Agua del Río Yaque del Sur, Barahona.

Sociedad de Irrigación Amantes de las Agricultura—Agua del Río San Juan, San Juan, Azua.

Ismael Mateo—Agua del Río de Jacahueque, Matas de Farfan.

Inomina Palmer—Agua del Río Jacahueque, Matas de Farfan.

Sociedad de Irrigación La Unión—Agua del Río San Juan, San Juan, Azua.

Sociedad de Irrigación La Unión—Agua del Río Macasía, Matas de Farfan.

Sociedad de Irrigación La Competencia—Agua del Río María Chiquita, Neiba.

Francisco Tomillo—Agua del Río San Juan, San Juan, Azua.

Sociedad de Irrigación El Porvenir—Río Las Marías, Neiba.

Sociedad de Irrigación El Esfuerzo—Agua del Río Bani.

Sociedad de Irrigación El Progreso—Agua del Río Bani.

Sociedad de Irrigación La Voluntad—Agua del Río Bani.

Sociedad de Irrigación La Legalidad—Agua del Río Bani.

Sociedad de Irrigación El Adelanto—Agua del Río Bani.

Wenceslao Ramirez—Agua del Río Mijo, San Juan, Azua.

Resolution No. 74—Official Gazette No. 3355—Luis L. Bogaert.

All letters of naturalization and permits to establish residence granted for the purpose of naturalization, in accordance with Article 11 of the Constitution.

All permits issued to establish legal residence in the Republic in accordance with Article 14 of the Civil Code.

Resolution regarding the sale of the Cruiser *Independencia*, under date of February 20, 1918, and the tugboat *Aguila*, under date of June 6, 1918. (Not yet published)

Resolution—Official Gazette No. 3203, approving the increase in the tariff tax of the municipal aqueduct (Puerto Plata).

All the resolutions passed by the Ayuntamientos and approved by the Military Government.

Sanitation and Charity

Sanitary Code published in the Official Gazette No. 3181, December 29, 1920.

Treasury

Circular E-105, December 8, 1919.

INTERNATIONAL CONVENTIONS ENTERED INTO DURING THE PERIOD OF THE MILITARY GOVERNMENT

Fomento and Communications

Spanish-American Postal Convention of Madrid of November 2, 1920.

Resolution No. 7, of March 12, 1921.

Universal Postal Convention of Madrid of November 30, 1920. Resolution No. 21 of December 31, 1921.

Universal Parcel Post Convention of Madrid of November 30, 1920. Resolution No. 32 of December 31, 1921.

Dominican-Spanish Postal Convention of November 17, 1921. Resolution No. 13 of April 29, 1922.

Pan-American Convention of Buenos Aires dated September 15, 1921. Resolution No. 25 of July 26, 1922.

Resolution approving the Postal Convention between the Dominican Republic and the United States of America, under date of May 19, 1917.

ADMINISTRATIVE REGULATIONS

Fomento and Communications

Departmental Order—Official Gazette No. 2801—Department of Fomento Order No. 1.

Departmental Order—No. 6—Official Gazette No. 2841.
Departmental Order—No. 8—Official Gazette No. 2852.
Departmental Order—No. 10—Official Gazette No. 2856.
Departmental Order—No. 12—Official Gazette No. 2861.
Departmental Order—No. 11—Official Gazette No. 2862.
Departmental Order—No. 14—Official Gazette No. 2863.
Departmental Order—No. 15—Official Gazette No. 2868 B.
Departmental Order—No. 16—Official Gazette No. 2923.
Departmental Order—No. 19—Official Gazette No. 2933.
Departmental Order—No. 21—Official Gazette No. 2960.
Departmental Order—No. 22—Official Gazette No. 2988.
Departmental Order—No. 23—Official Gazette No. 2998.
Departmental Order—No. 24—Official Gazette No. 3026.
Departmental Order—No. 25—Official Gazette No. 3035.
Departmental Order—No. 27—Official Gazette No. 3124.
Departmental Order—No. 28—Official Gazette No. 3159.
Departmental Order—No. 29—Official Gazette No. 3192.

Agriculture and Immigration

Departmental Order No. 2—Official Gazette No. 2992.
Departmental Order No. 5—Official Gazette No. 3084.
Departmental Order No. 13—Official Gazette No. 3124.
Departmental Order No. 20—Official Gazette No. 3128.
Departmental Order No. 21—Official Gazette No. 3128.
Departmental Order No. 27—Official Gazette No. 3152.
Departmental Order No. 31—Official Gazette No. 3355.
Departmental Order No. 36—Official Gazette No. 3153.
Departmental Order No. 38—Official Gazette No. 3159.
Departmental Order No. 57—Official Gazette No. 3203.
Departmental Order No. 60—Official Gazette No. 3211.
Departmental Order No. 85—Official Gazette No. 3291.
Departmental Order No. 89—Official Gazette No. 3328.
Departmental Order No. 92—Official Gazette No. 3346.

Interior and Police

Departmental Order No. 13 granting authorization to the Junta de Caridad "Padre Billini" in order that it might contract a loan of 15,000.
(Not yet published)

Justice and Public Instruction

Departmental Order No. 1 of 1921, under date of February 19 of the same year. (Division of "comunero" lands)

All the Departmental orders of the Department of Justice and Public Instruction relative to public instruction, with the exception of Orders Nos.

5, 9, and 16 of 1917; No. 97 of 1918; and Special Order No. 1 of 1919, until the installation of the Provisional Government.

CONTRACTS

Treasury

Contracts entered into between the Military Government and the persons listed below for the rental of urban properties of the Republic:

Contract No. 58 with A. Humberto Aybar, under date of March 7, 1918. (one lot)

Contract with Selidonia Petitón Vda. Parisiën, under date of December 12, 1918. (one lot)

Contract with Elías José, under date of December 4, 1918. (one lot)

Contract with Justiniano Acosta, under date of December 6, 1918. (one lot)

Contract with Donato Pérez, under date of December 2, 1918. (one lot)

Contract with Anita Buenrostro, under date of December 4, 1918. (one lot)

Contract with Urbano Acosta, under date of December 2, 1918. (one lot)

Contract with Celestino Fontana, under date of December 20, 1918. (one lot)

Contract with Ulises Cuello, under date of May 26, 1919. (one lot)

Contract with Alejandro Defío, under date of May 26, 1919. (one lot)

Contract No. 59 with Agustín Hernández, under date of July 21, 1919. (one house)

Contract No. 60 with R. O. Galvan, under date of October 31, 1919. (one lot)

Contract No. 61 with Pablo Gobaira, under date of November 11, 1919. (one lot)

Contract No. 62 with Abelardo José Romano, under date of November 11, 1919. (one lot)

Contract No. 63 with Jorge Bazil, under date of November 11, 1919. (one lot)

Contract with Earle T. Fiddler for the extraction of sand and other products.

Contract No. 1 with Francisco J. Peynado, under date of December 14, 1917: Rental of house No. 33 de la Calle José Reyes.

Contract No. 2 with Felix Gonzalez, under date of January 1, 1918: Transfer service in the Port of Macoris.

Contract with Francisco J. Peynado, No. 4, under date of April 12, 1918: Rental of house No. 46 de la Calle Mercedes.

Contract No. 5 with Alej. Penso, under date of December 17, 1918: Rental of house No. 15 Calle Beler and the upper floors of house No. 13/36 de la Calle Beler, corner of Comercio, both in Santiago.

Contract No. 6 with J. L. Manning, under date of July 12, 1919: (Designating International Banking Corporation as depositary of Government funds)

- Contract No. 8 with the La Fé Lodge, under date of September 29, 1919: Rescinding a rental contract covering the building known by the name of "Logia La Fé".
- Contract No. 9 with Ig. Cat. Apostólica Romana, under date of September 25, 1919: Establishing an agreement pending the determination of ownership of the buildings annexed to the Iglesia de Regina.
- Contract No. 26 with Suc. Juan Nieves Reyes, under date of June 4, 1920: Transfer of rights to a tract of land in Nigua.
- Contract No. 27 with Agapito, Lorenzo and Mercedes Ant. Reyes, under date of June 27, 1920: Purchase of land in Nigua for the National Leper Colony of Nigua.
- Contract No. 29 with Alberto Ascensio, under date of October 1, 1920: Rental of a piece of land located in Santiago in Bella Vista which measures 96 tareas. (The Government is the renter)
- Contract No. 30 with Junta Fábrica Iglesia del Rosario in Moca, under date of September 30, 1920: Payment of \$32,315.52 in order that the Board might relieve the Government of all responsibility occasioned by Executive Order No. 420 and its amendments.
- Contract No. 31 with Junta Fábrica Iglesia Salcedo, under date of October 5, 1920: Payment of \$26,400.00 in order to relieve the Government of all claims by reason of Executive Order No. 420.
- Contract No. 32 with Melendez y Godoy, under date of March 14, 1921: Payment of \$85,891.00 in order that the Government might be relieved of all claims by reason of Executive Order No. 513.
- Contract No. 35 with R. M. Lepervanche, under date of March 16, 1921: Printing stamps.
- Contract No. 34 with R. M. Lepervanche, under date of February 11, 1922: Printing stamps.
- Contract with Divanna-Grisolia & Compañía, under date of November 18, 1920: Purchase and sale of Tobacco.
- Contract with Grace & Co., under date of November 18, 1920: Purchase and sale of Tobacco in Europe.
- Contract with Grace & Co., under date of September 29, 1919: Purchasing Agency.
- Contract with Frank L. Mitchell, under date of September 19, 1921: Construction of a pump and installation of piping for pumping salt water.
- Contract with Frank L. Mitchell, under date of March 16, 1921: Construction of a railroad bridge.
- Contract with Gaetan Bucher y Nicolas Cortina, under date of March 4, 1921: Construction of warehouses.
- Contract with Frank L. Mitchell, under date of March 16, 1921: Construction of a wharf.
- Contract with G. H. Lippitt, under date of September 3, 1920: Installation of a pipe line for molasses.

Contract with Lee, Higginson & Co., under date of April 4, 1922: Loan of \$6,700,000.

Contract with the Compañía de Mieles Dominicana C. por A., under date of March 25, 1922: Extension of the concessions and for a pipe line for molasses.

Fomento and Communications

All the contracts existing between the Department of Fomento and Communications and other persons for the rental of buildings for postoffices in force on the date of the installation of the Provisional Government.

Marck Engineering & Contracting Co.—Contract dated August 23, 1921, for "Construction Barahona Market".

Chief of Surveyors—(Land Survey) Four contracts which have been made for the advance of funds as follows:

(a) *Central Romana, Inc.*, June 29, 1921.

(b) *Barahona and allied companies*: December 31, 1921.

(c) *Ingenio Santa Fé*—March 3, 1922.

(d) *Ingenio Santa Fé*, May 16, 1920.

Interior and Police

Contract between the Military Government and the Commune of Azua for a loan of 20,000.00 (veinte mil pesos) at a rate of interest of 5%, under date of December 31, 1919.

Contract between the Commune of Azua and the International Banking Corporation for a loan of \$15,000.00 (quince mil pesos), under date of December 31, 1919.

Cancellation, under date of June 8, 1920, of the loan of \$15,000.00 (quince mil pesos) with the International Banking Corporation mentioned above.

Loan of the Military Government to the Commune of Azua of \$15,000.00 (quince mil pesos) at a rate of interest of 5%, under date of June 8, 1920.

Contract between the Commune of Barahona and the Military Government for a loan of \$25,000.00 (veinticinco mil pesos) at a rate of interest of 5%, under date of April 8, 1920.

Contract between the Commune of Villa Mella and the Military Government for a loan of \$14,650.00 (catorce mil seis cientos cincuenta pesos) at a rate of interest of 5% under date of May 25, 1920.

The Dominican Government likewise agrees that those Executive orders, those resolutions, those administrative regulations, and those contracts shall remain in full force and effect unless and until they are abrogated by those bodies which, in accordance with the Dominican Constitution, can legislate. But, this ratification, in so far as concerns those of the above mentioned Executive Orders, resolutions, administrative regulations, and contracts, which have been modified or abrogated by other Executive Orders, resolu-

tions, or administrative regulations of the Military Government, only refers to the legal effects which they created while they were in force.

The Dominican Government further agrees that neither the subsequent abrogation of those Executive Orders, resolutions, administrative regulations, or contracts, or any other law, Executive Order, or other official act of the Dominican Government, shall affect the validity or security of rights acquired in accordance with those orders, those resolutions, those administrative regulations and those contracts of the Military Government; the controversies which may arise related with those rights acquired will be determined solely by the Dominican Courts, subject, however, in accordance with the generally accepted rules and principles of international law, to the right of diplomatic intervention if those Courts should be responsible for cases of notorious injustice or denial of justice. The determination of such cases in which the interests of the United States and the Dominican Republic only are concerned shall, should the two Governments disagree, be by arbitration. In the carrying out of this agreement, in each individual case, the High Contracting Parties, once the necessity of arbitration is determined, shall conclude a special agreement defining clearly the scope of the dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure. It is understood that on the part of the United States, such special agreements will be made by the President of the United States, by and with the advice and consent of the Senate thereto, and on the part of the Dominican Republic shall be subject to the procedure required by the Constitution and laws thereof.

II. The Dominican Government, in accordance with the provisions of Article I, specifically recognize the bond issue of 1918 and the twenty-year five and one-half per cent Customs Administration Sinking Fund Gold Bond Issue authorized in 1922, as legal, binding, and irrevocable obligations of the Republic, and pledges its full faith and credit to the maintenance of the service of those bond issues. With reference to the stipulation contained in Article 10 of the Executive Order No. 735, in accordance with which the loan of five and one-half per cent authorized in 1922 was issued, which provides:

"That the present customs tariff will not be changed during the life of this loan without previous agreement between the Dominican Government and the Government of the United States;"

the two Governments concerned agree in interpreting this stipulation in the sense that, in accordance with article 3 of the Convention of 1907, a previous agreement between the Dominican Government and the United States shall be necessary to modify the import duties of the Dominican Republic, it being an indispensable condition for the modification of such duties that the Dominican Executive demonstrate and that the President of

the United States recognize that, on the basis of exportations and importations to the like amount and the like character during the two years preceding that in which it is desired to make such modification, the total net customs receipts would at such altered rates of duties have been, for each of such two years, in excess of the sum of \$2,000,000 United States gold.

III. The Dominican Government and the Government of the United States agree that the Convention signed on February 8, 1907, between the United States and the Dominican Republic, shall remain in force so long as any bonds of the issues of 1918 and 1922 shall remain unpaid, and that the duties of the General Receiver of Dominican Customs appointed in accordance with that Convention shall be extended to include the application of the revenues pledged for the service of those bond issues in accordance with the terms of the Executive Orders and of the contracts under which the bonds were issued.

IV. This arrangement shall take effect after its approval by the Senate of the United States and the Congress of the Dominican Republic.

Done in four originals, two in the English language, and two in the Spanish, and the representatives of the High Contracting Powers signing them in the City of Santo Domingo, this twelfth day of June, nineteen hundred and twenty-four.

[SEAL] WILLIAM W. RUSSELL.

[SEAL] HORACIO VASQUEZ.

[SEAL] FED^{co} VELÁSQUEZ Y H.

[SEAL] FRAN^o J. PEYNADO.

AGREEMENT BETWEEN THE UNITED STATES AND FINLAND RESPECTING
TONNAGE DUES AND OTHER CHARGES ¹

Effected by exchange of notes between the Minister of Finland and the Secretary of State at Washington, December 21, 1925

I have the honor to make the following statement of my understanding of the agreement reached through recent conversations held at Washington on behalf of the Government of the United States and the Government of Finland with reference to the treatment respecting tonnage dues and other charges which the United States shall accord to the vessels of Finland and their cargoes in the ports of the United States, and which Finland shall accord to vessels of the United States and their cargoes in the ports of Finland.

These conversations have disclosed a mutual understanding between the two Governments, as follows:

On and after February 1, 1926, Finland will impose no tonnage duties, light, harbor or port dues, or other charges on vessels of the United States in the ports of Finland which are not imposed on vessels of Finland, and

¹ U. S. Treaty Series, No. 731.

Finland will levy no higher or other duties or charges on goods imported into its ports in vessels of the United States than are levied on like goods imported in vessels of Finland.

It is understood that, without altering the above stipulations insofar as the amount of pilotage dues is concerned, the duty of employing pilots by vessels of the United States shall be governed by the stipulations of the Finnish law in this respect about foreign vessels in general. It is also understood that the United States of America shall not, on the ground of the above stipulations, claim any privileges which Finland has conceded or will concede to Russian fishing or sealing vessels in the Arctic waters.

The United States will impose no discriminating duties of tonnage on vessels of Finland in the ports of the United States and no discriminating imposts on the goods imported into the United States in vessels of Finland. This undertaking on the part of the United States will be effected by a proclamation to be issued by the President of the United States on the receipt of notification by him from the Government of Finland that the undertaking on the part of Finland stated in the preceding paragraphs has been brought into force.

The present arrangement, unless sooner terminated by mutual agreement, shall continue in force until thirty days after notice of its termination shall have been given by either party; or, should either party be prevented by future action of its legislature from carrying out the terms of this arrangement the obligations thereof shall thereupon lapse.

CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN
RESPECTING RIGHTS IN PALESTINE ¹

*Signed at London, December 3, 1924: ratifications
exchanged, December 3, 1925*

WHEREAS by the Treaty of Peace concluded with the Allied Powers, Turkey renounces all her rights and titles over Palestine; and

Whereas article 22 of the Covenant of the League of Nations in the Treaty of Versailles provides that in the case of certain territories which, as a consequence of the late war, ceased to be under the sovereignty of the States which formerly governed them, mandates should be issued, and that the terms of the mandate should be explicitly defined in each case by the Council of the League; and

Whereas the Principal Allied Powers have agreed to entrust the mandate for Palestine to His Britannic Majesty; and

Whereas the terms of the said mandate have been defined by the Council of the League of Nations, as follows:—

The Council of the League of Nations:

Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of article 22 of the Covenant of the League of Nations, to entrust to a Mandatory

¹ U. S. Treaty Series, No. 728.

selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on the 2nd November, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country; and

Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country; and

Whereas the Principal Allied Powers have selected His Britannic Majesty as the Mandatory for Palestine; and

Whereas the mandate in respect of Palestine has been formulated in the following terms and submitted to the Council of the League for approval; and

Whereas His Britannic Majesty has accepted the mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions; and

Whereas by the aforementioned article 22 (paragraph 8), it is provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations;

Confirming the said mandate, defines its terms as follows:—

ARTICLE 1

The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.

ARTICLE 2

The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

ARTICLE 3

The Mandatory shall, so far as circumstances permit, encourage local autonomy.

ARTICLE 4

• An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country.

The Zionist organisation, so long as its organisation and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency. It shall take steps in consultation with His Britannic Majesty's Government to secure the co-operation of all Jews who are willing to assist in the establishment of the Jewish national home.

ARTICLE 5

The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.

ARTICLE 6

The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

ARTICLE 7

The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.

ARTICLE 8

The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by Capitulation or usage in the Ottoman Empire, shall not be applicable in Palestine.

Unless the Powers whose nationals enjoyed the aforementioned privileges and immunities on the 1st August, 1914, shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the mandate, be immediately re-established in their entirety or with such modifications as may have been agreed upon between the Powers concerned.

ARTICLE 9

The Mandatory shall be responsible for seeing that the judicial system established in Palestine shall assure to foreigners, as well as to natives, a complete guarantee of their rights.

Respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular, the control and administration of Wakfs shall be exercised in accordance with religious law and the dispositions of the founders.

ARTICLE 10

Pending the making of special extradition agreements relating to Palestine, the extradition treaties in force between the Mandatory and other foreign Powers shall apply to Palestine.

ARTICLE 11

The Administration of Palestine shall take all necessary measure to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. It shall introduce a land system appropriate to the needs of the country, having regard, among other things, to the desirability of promoting the close settlement and intensive cultivation of the land.

The Administration may arrange with the Jewish agency mentioned in article 4 to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration. Any such arrangements shall provide that no profits distributed by such agency, directly or indirectly, shall exceed a reasonable rate of interest on the capital, and any further profits shall be utilised by it for the benefit of the country in a manner approved by the Administration.

ARTICLE 12

The Mandatory shall be entrusted with the control of the foreign relations of Palestine and the right to issue exequaturs to consuls appointed by foreign Powers. He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits.

ARTICLE 13

All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory, who shall be responsible solely to the League of Nations in all matters connected herewith, provided that nothing in this article shall prevent the Mandatory from entering into such arrangements as he may deem reasonable with the Administration for the purpose of carrying the provisions of this article into effect; and provided also that nothing in this mandate shall be construed as conferring upon the Mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed.

ARTICLE 14

A special Commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council.

ARTICLE 15

The Mandatory shall see that complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, are ensured to all. No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief.

The right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the Administration may impose, shall not be denied or impaired.

ARTICLE 16

The Mandatory shall be responsible for exercising such supervision over religious or eleemosynary bodies of all faiths in Palestine as may be required for the maintenance of public order and good government. Subject to such supervision, no measures shall be taken in Palestine to obstruct or interfere with the enterprise of such bodies or to discriminate against any representative or member of them on the ground of his religion or nationality.

ARTICLE 17

The Administration of Palestine may organise on a voluntary basis the forces necessary for the preservation of peace and order, and also for the defence of the country, subject, however, to the supervision of the Mandatory, but shall not use them for purposes other than those above specified save with the consent of the Mandatory. Except for such purposes, no military, naval or air forces shall be raised or maintained by the Administration of Palestine.

Nothing in this article shall preclude the Administration of Palestine from contributing to the cost of the maintenance of the forces of the Mandatory in Palestine.

The Mandatory shall be entitled at all times to use the roads, railways and ports of Palestine for the movement of armed forces and the carriage of fuel and supplies.

ARTICLE 18

The Mandatory shall see that there is no discrimination in Palestine against the nationals of any State member of the League of Nations (including companies incorporated under its laws) as compared with those of the Mandatory or of any foreign State in matters concerning taxation, commerce or navigation, the exercise of industries or professions, or in the treatment of merchant vessels or civil aircraft. Similarly, there shall be no discrimination in Palestine against goods originating in or destined for any of the said States, and there shall be freedom of transit under equitable conditions across the mandated area.

Subject as aforesaid and to the other provisions of this mandate, the Administration of Palestine may, on the advice of the Mandatory, impose such taxes and customs duties as it may consider necessary, and take such steps as it may think best to promote the development of the natural resources of the country and to safeguard the interests of the population. It may also, on the advice of the Mandatory, conclude a special customs agreement with any State the territory of which in 1914 was wholly included in Asiatic Turkey or Arabia.

ARTICLE 19

The Mandatory shall adhere on behalf of the Administration of Palestine to any general international conventions already existing, or which may be concluded hereafter with the approval of the League of Nations, respecting the slave traffic, the traffic in arms and ammunition, or the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation and postal, telegraphic and wireless communication or literary, artistic or industrial property.

ARTICLE 20

The Mandatory shall co-operate on behalf of the Administration of Palestine, so far as religious, social and other conditions may permit, in the execution of any common policy adopted by the League of Nations for preventing and combating disease, including diseases of plants and animals.

ARTICLE 21

The Mandatory shall secure the enactment within twelve months from this date, and shall ensure the execution of a Law of Antiquities based on the following rules. This law shall ensure equality of treatment in the matter of excavations and archaeological research to the nationals of all States members of the League of Nations.

(1)

"Antiquity" means any construction or any product of human activity earlier than the year A. D. 1700.

(2)

The law for the protection of antiquities shall proceed by encouragement rather than by threat.

Any person who, having discovered an antiquity without being furnished with the authorisation referred to in paragraph 5, reports the same to an official of the competent Department, shall be rewarded according to the value of the discovery.

(3)

No antiquity may be disposed of except to the competent Department, unless this Department renounces the acquisition of any such antiquity.

No antiquity may leave the country without an export licence from the said Department.

(4)

Any person who maliciously or negligently destroys or damages an antiquity shall be liable to a penalty to be fixed.

(5)

No clearing of ground or digging with the object of finding antiquities shall be permitted, under penalty of fine, except to persons authorized by the competent Department.

(6)

Equitable terms shall be fixed for expropriation, temporary or permanent, of lands which might be of historical or archaeological interest.

(7)

Authorisation to excavate shall only be granted to persons who show sufficient guarantees of archaeological experience. The Administration of Palestine shall not, in granting these authorizations, act in such a way as to exclude scholars of any nation without good grounds.

(8)

The proceeds of excavations may be divided between the excavator and the competent Department in a proportion fixed by that Department. If division seems impossible for scientific reasons, the excavator shall receive a fair indemnity in lieu of a part of the find.

ARTICLE 22

English, Arabic and Hebrew shall be the official languages of Palestine. Any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew, and any statement or inscription in Hebrew shall be repeated in Arabic.

ARTICLE 23

The Administration of Palestine shall recognize the holy days of the respective communities in Palestine as legal days of rest for the members of such communities.

ARTICLE 24

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council as to the measures taken during the year to carry out the provisions of the mandate. Copies of all laws and regulations promulgated or issued during the year shall be communicated with the report.

ARTICLE 25

In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of articles 15, 16 and 18.

ARTICLE 26

The Mandatory agrees that if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by article 14 of the Covenant of the League of Nations.

ARTICLE 27

The consent of the Council of the League of Nations is required for any modification of the terms of this mandate.

ARTICLE 28

In the event of the termination of the mandate hereby conferred upon the Mandatory, the Council of the League of Nations shall make such arrangements as may be deemed necessary for safeguarding in perpetuity, under guarantee of the League, the rights secured by articles 13 and 14, and shall use its influence for securing, under the guarantee of the League, that the Government of Palestine will fully honor the financial obligations legitimately incurred by the Administration of Palestine during the period of the mandate, including the rights of public servants to pensions or gratuities.

The present instrument shall be deposited in original in the archives of the League of Nations, and certified copies shall be forwarded by the Secretary-General of the League of Nations to all members of the League.

Done at London, the 24th day of July, 1922;

and

Whereas the mandate in the above terms came into force on the 29th September, 1923; and

Whereas the United States of America, by participating in the war against Germany, contributed to her defeat and the defeat of her Allies, and to the renunciation of the rights and titles of her Allies in the territory transferred by them but has not ratified the Covenant of the League of Nations embodied in the Treaty of Versailles; and

Whereas the Government of the United States and the Government of His Britannic Majesty desire to reach a definite understanding with respect to the rights of the two Governments and their respective nationals in Palestine;

The President of the United States of America and His Britannic Majesty have decided to conclude a convention to this effect, and have named as their plenipotentiaries:—

The President of the United States of America:

His Excellency the Honorable Frank B. Kellogg, Ambassador Extraordinary and Plenipotentiary of the United States at London:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India:

The Right Honorable Joseph Austen Chamberlain, M.P., His Majesty's Principal Secretary of State for Foreign Affairs:

who, after having communicated to each other their respective full powers, found in good and due form, have agreed as follows:—

ARTICLE 1

Subject to the provisions of the present convention the United States consents to the administration of Palestine by His Britannic Majesty, pursuant to the mandate recited above.

ARTICLE 2

The United States and its nationals shall have and enjoy all the rights and benefits secured under the terms of the mandate to members of the League

of Nations and their nationals, notwithstanding the fact that the United States is not a member of the League of Nations.

ARTICLE 3

Vested American property rights in the mandated territory shall be respected and in no way impaired.

ARTICLE 4

A duplicate of the annual report to be made by the Mandatory under article 24 of the mandate shall be furnished to the United States.

ARTICLE 5

Subject to the provisions of any local laws for the maintenance of public order and public morals, the nationals of the United States will be permitted freely to establish and maintain educational, philanthropic and religious institutions in the mandated territory, to receive voluntary applicants and to teach in the English language.

ARTICLE 6

The extradition treaties and conventions which are, or may be, in force between the United States and Great Britain, and the provisions of any treaties which are, or may be, in force between the two countries which relate to extradition or consular rights shall apply to the mandated territory.

ARTICLE 7

Nothing contained in the present convention shall be affected by any modification which may be made in the terms of the mandate; as recited above, unless such modification shall have been assented to by the United States.

ARTICLE 8

The present convention shall be ratified in accordance with the respective constitutional methods of the High Contracting Parties. The ratifications shall be exchanged in London as soon as practicable. The present convention shall take effect on the date of the exchange of ratifications.

In witness whereof, the undersigned have signed the present convention, and have thereunto affixed their seals.

Done in duplicate at London, this 3rd day of December, 1924.

[SEAL]

FRANK B. KELLOGG.

[SEAL]

AUSTEN CHAMBERLAIN.

RESOLUTION OF U. S. SENATE ADVISING AND CONSENTING TO THE ADHERENCE
OF THE UNITED STATES TO THE PERMANENT COURT OF INTERNATIONAL
JUSTICE¹

January 16 (calendar day, January 27), 1926

Whereas the President, under date of February 24, 1923, transmitted a message to the Senate, accompanied by a letter from the Secretary of State, dated February 17, 1923, asking the favorable advice and consent of the Senate to the adherence on the part of the United States to the protocol of December 16, 1920, of signature of the statute for the Permanent Court of International Justice, set out in the said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adherence: Therefore be it

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the adherence on the part of the United States to the said protocol of December 16, 1920, and the adjoined statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said statute),² and that the signature of the United States be affixed to the said protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the council and assembly of the League of Nations, in any and all proceedings of either the council or the assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the court as determined and appropriated from time to time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said protocol and that the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

5. That the court shall not render any advisory opinion except publicly after due notice to all States adhering to the court and to all interested States

¹ Senate Resolution 5, 69th Cong. 1st Sess.

² The resolution concerning the establishment of the Permanent Court of International Justice passed by the Assembly of the League of Nations on Dec. 13, 1920, the Protocol of Signature of Dec. 16, 1920, the Optional Clause, and the Statute for the Court, are printed in the Supplement to the JOURNAL for April, 1923 (Vol. 17), pp. 55-69.

and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

The signature of the United States to the said protocol shall not be affixed until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said protocol.

Resolved further, As a part of this act of ratification that the United States approve the protocol and statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other State or States can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and

Resolved further, That adherence to the said protocol and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall adherence to the said protocol and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

SIGNATURES AND RATIFICATIONS OF THE PROTOCOL OF SIGNATURE OF THE
PERMANENT COURT OF INTERNATIONAL JUSTICE ¹

<i>Signatures</i>	<i>Ratifications</i>
UNION OF SOUTH AFRICA	August 4, 1921
ALBANIA	July 13, 1921
AUSTRALIA	August 4, 1921
AUSTRIA	July 23, 1921
BELGIUM	August 29, 1921
BOLIVIA	—
BRAZIL	November 1, 1921
BRITISH EMPIRE	August 4, 1921
BULGARIA	August 12, 1921
CANADA	August 4, 1921
CHILE	—
CHINA	May 13, 1922
COLOMBIA	—
COSTA RICA	—
CUBA	January 12, 1922

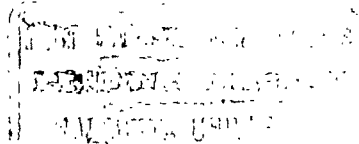
¹ For the text of the Protocol of Signature, see Supplement to the JOURNAL for April, 1923 (Vol. 17), p. 55.

CZECHOSLOVAKIA	September 2, 1921
DENMARK	June 13, 1921
DOMINICAN REPUBLIC	-----
ESTHONIA	May 2, 1923
FINLAND	April 6, 1922
FRANCE	August 7, 1921
GREECE	October 3, 1921
HAITI	September 7, 1921
HUNGARY	November 20, 1925
INDIA	August 4, 1921
ITALY	June 20, 1921
JAPAN	November 16, 1921
LATVIA	February 12, 1924
LIBERIA	-----
LITHUANIA	May 16, 1922
LUXEMBURG	-----
THE NETHERLANDS	August 6, 1921
NEW ZEALAND	August 4, 1921
NORWAY	August 20, 1921
PANAMA	-----
PARAGUAY	-----
PERSIA	-----
POLAND	August 26, 1921
PORTUGAL	October 8, 1921
ROUMANIA	August 8, 1921
SALVADOR	-----
KINGDOM OF THE SERBS, CROATS AND SLOVENES	August 12, 1921
SIAM	February 27, 1922
SPAIN	August 30, 1921
SWEDEN	February 21, 1921
SWITZERLAND	July 25, 1921
URUGUAY	September 27, 1921
VENEZUELA	December 2, 1921

LIST OF STATES WHICH HAVE ACCEPTED THE OPTIONAL CLAUSE CONCERNING
THE COMPULSORY JURISDICTION OF THE PERMANENT COURT OF INTERNA-
TIONAL JUSTICE, SHOWING THE CONDITIONS OF ACCEPTANCE ¹

AUSTRIA	Reciprocity, 5 years.
BELGIUM	Reciprocity, 15 years. In any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to

¹ For the text of the Optional Clause, see Supplement to the JOURNAL for April, 1923 (Vol. 17), p. 56.



	this ratification, except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement.
BRAZIL	Reciprocity, 5 years. On condition that compulsory jurisdiction is accepted by at least two of the Powers permanently represented on the Council of the League of Nations.
BULGARIA	Reciprocity.
CHINA	Reciprocity, 5 years.
COSTA RICA	Reciprocity.
DENMARK	Reciprocity, 5 years.
DOMINICAN REPUBLIC	Subject to ratification. Reciprocity, 5 years.
ESTHONIA	Reciprocity, 5 years. Except in cases where some other method of pacific settlement has already been agreed upon.
FINLAND	Reciprocity, 5 years.
FRANCE	Subject to ratification. Reciprocity, 15 years. With the faculty of denunciation in the event of the Protocol of Arbitration, Security and Reduction of Armaments, signed this day, becoming ineffective, and also subject to the observations made in the First Committee of the Fifth Assembly of the effect that "one of the Parties to a dispute may summon the other before the Council of the League of Nations, with a view to an attempt to effect a pacific settlement as provided in paragraph 3 of Article 15 of the Covenant and, during this attempt to settle the dispute by conciliation, neither Party may summon the other before the Court of Justice."
HAITI	
LATVIA	Subject to ratification. Reciprocity, 5 years. Except in cases where some other method of pacific settlement has already been agreed upon.
LIBERIA	Subject to ratification. Reciprocity.
LITHUANIA	5 years.
LUXEMBURG	Subject to ratification. Reciprocity, 5 years.
NETHERLANDS	Reciprocity, 5 years. Except in cases where some other method of pacific settlement has already been agreed upon.
NORWAY	Reciprocity, 5 years.
PANAMA	Reciprocity.
PORTUGAL	Reciprocity.
SALVADOR	Reciprocity.

SWEDEN	Reciprocity, 5 years.
SWITZERLAND	Reciprocity, 5 years.
URUGUAY	Reciprocity.

OFFICIAL DOCUMENTS

EXTRADITION TREATY BETWEEN THE UNITED STATES AND CZECHOSLOVAKIA ¹

Signed at Prague, July 2, 1925; ratifications exchanged, March 29, 1926

The United States of America and Czechoslovakia desiring to promote the cause of justice, have resolved to conclude a treaty for the extradition of fugitives from justice, between the two countries and have appointed for that purpose the following plenipotentiaries:

The President of the United States of America: Lewis Einstein, Envoy extraordinary and Minister plenipotentiary of the United States of America, and

The President of the Czechoslovak Republic: Dr. Eduard Beneš, Minister for Foreign Affairs of the Czechoslovak Republic,

Who, after having communicated to each other their respective full powers, found to be in good and due form, have agreed upon and concluded the following articles:

ARTICLE I

It is agreed that the Government of the United States and the Government of Czechoslovakia shall, upon requisition duly made as herein provided, deliver up to justice any person, who may be charged with, or may have been convicted of any of the crimes or offenses specified in Article II of the present treaty committed within the jurisdiction of one of the high contracting parties, and who shall seek an asylum or shall be found within the territories of the other; provided that such surrender shall take place only upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed.

ARTICLE II

Persons shall be delivered up according to the provisions of the present treaty, who shall have been charged with or convicted of any of the following crimes or offenses:

1. Murder, comprehending the crimes designated by the term parricide, assassination, manslaughter when voluntary, poisoning or infanticide.
2. Rape, abortion, carnal knowledge of children under the age of fourteen years.
3. Abduction or detention of women or girls for immoral purposes.
4. Bigamy.
5. Arson.

¹U. S. Treaty Series No. 734.

6. Wilful and unlawful destruction or obstruction of railroads, which endangers human life.

7. Crimes committed at sea:

(a) Piracy, as commonly known and defined by the law of nations, or by statute.

(b) Wrongfully sinking or destroying a vessel at sea.

(c) Mutiny or conspiracy of two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the captain or commander of such vessel, or by fraud or violence taking possession of such vessel.

(d) Assault on board ship upon the high seas with intent to do bodily harm.

8. Burglary, defined to be the act of breaking into and entering the house of another in the night time with intent to commit a felony therein.

9. The act of breaking into and entering the offices of the government and public authorities or the offices of banks, banking houses, savings banks, trust-companies, insurance and other companies, or other buildings not dwellings with intent to commit a felony therein.

10. Robbery, defined to be the act of feloniously and forcibly taking from the person of another goods or money by violence or by putting him in fear.

11. Forgery or the utterance of forged papers.

12. The forgery or falsification of the official acts of the governments, or public authority, including courts of justice, or the uttering or fraudulent use of any of the same.

13. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, created by national, state, provincial, territorial, local or municipal governments, bank notes or other instruments of public credit, counterfeit seals, stamps, dies and marks of state or public administrations, and the utterance, circulation or fraudulent use of the above mentioned objects.

14. Embezzlement or criminal malversation committed within the jurisdiction of one or the other party by public officers or depositaries, where the amount embezzled exceeds one hundred dollars or the Czechoslovak equivalent.

15. Embezzlement by any person or persons, hired, salaried or employed, to the detriment of their employers or principals, when the crime or offense is punishable by imprisonment or other corporal punishment by the laws of both countries, and where the amount embezzled exceeds one hundred dollars or the Czechoslovak equivalent.

16. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons, in order to exact money from them, their families or any other person or persons, or for any other unlawful end.

17. Larceny, defined to be the theft of effects, personal property, or

money, of the value of twenty-five dollars or more or the Czechoslovak equivalent.

18. Obtaining money, valuable securities or other property by false pretences or receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of the property so obtained or received exceeds one hundred dollars or the Czechoslovak equivalent.

19. Perjury or subornation of perjury.

20. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administrator, guardian, director or officer of any company or corporation, or by any one in any fiduciary position, where the amount of money or the value of the property misappropriated exceeds one hundred dollars or the Czechoslovak equivalent.

21. Crimes and offenses against the laws of both countries for the suppression of slavery and slave trading.

22. Wilful desertion or wilful non-support of minor or dependent children.

The extradition is also to take place for participation in any of the aforesaid crimes as an accessory before or after the fact or in any attempt to commit any of the aforesaid crimes; provided such participation or attempt be punishable by imprisonment by the laws of both contracting parties.

ARTICLE III

The provisions of the present treaty shall not import a claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses; and no person surrendered by or to either of the high contracting parties in virtue of this treaty shall be tried or punished for a political crime or offense committed before his extradition.

The state applied to or courts of that state shall decide whether the crime or offense is of a political character or not.

When the offense charged comprises the act either of murder or assassination or of poisoning, either consummated or attempted, the fact that the offense was committed or attempted against the life of the sovereign or head of any state or against the life of any member of his family, shall not be deemed sufficient to sustain that such crime or offense was of a political character; or was an act connected with crimes or offenses of a political character.

ARTICLE IV

No person shall be tried for any crime or offense committed before his extradition other than that for which he was surrendered.

ARTICLE V

A fugitive criminal shall not be surrendered under the provisions hereof, when, from lapse of time or other lawful cause, according to the laws of either of the countries within the jurisdiction of which the crime or offense was

committed, the criminal is exempt from prosecution or punishment for the offense for which the surrender is asked.

ARTICLE VI

If the person claimed should be under examination or under punishment in the state applied to for other crime or offense, his extradition shall be deferred until the conclusion of the trial or, in case of his conviction, until the full execution of any punishment imposed upon him.

Yet this circumstance shall not be a hindrance to deciding the request for the extradition in the shortest time possible.

ARTICLE VII

If a fugitive criminal claimed by one of the parties hereto, shall be also claimed by one or more powers pursuant to treaty provisions, on account of crimes or offenses committed within their jurisdiction, such criminal shall be delivered to that state whose demand is first received unless its demand is waived. This article shall not affect such treaties as have already previously been concluded by one of the contracting parties with other states.

ARTICLE VIII

Under the stipulations of this treaty, neither of the high contracting parties shall be bound to deliver up its own citizens.

ARTICLE IX

The expense of arrest, detention, examination and transportation of the accused shall be paid by the government which has preferred the demand for extradition (see Article XI.).

ARTICLE X

Everything found in the possession of the fugitive criminal at the time of his arrest, whether being the proceeds of the crime or offense, or which may be material as evidence in making proof of the crime, shall so far as practicable, according to the laws of either of the high contracting parties, be delivered up with his person at the time of surrender. Nevertheless, the rights of a third party with regard to the articles referred to, shall be duly respected.

ARTICLE XI

The stipulations of the present treaty shall be applicable to all territory wherever situated, belonging to either of the high contracting parties or in the occupancy and under the control of either of them, during such occupancy or control.

Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the high contracting parties. In the event of the absence of such agents from the country or its seat of government, or where extradition is sought from territory included in the preceding paragraph, other than the United States or Czechoslovakia, requisitions may be made by superior consular officers.

In case of urgency, the application for arrest and detention may be addressed directly to the competent magistrate in conformity to the statutes in force.

The person provisionally arrested shall be released, unless within two months from the date of commitment in the United States—or from the date of arrest in Czechoslovakia, the formal requisition for surrender, with the documentary proofs hereinafter described, be made as aforesaid by the diplomatic agent of the demanding government, or in his absence, by a consular officer thereof.

If the fugitive criminal shall have been convicted of the crime or offense for which his extradition is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced. If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case.

ARTICLE XII

In every case of a request made by either of the high contracting parties, for the arrest, detention or extradition of fugitive criminals, the appropriate legal officers of the country where the proceedings of extradition are had, shall assist the officers of the government demanding the extradition before the respective judges and magistrates, by every legal means within their power.

ARTICLE XIII

The present treaty of which the English and Czechoslovak texts are equally authentic shall be ratified by the high contracting parties in accordance with their respective constitutional methods and shall take effect on the date of the exchange of ratifications which shall take place at Washington as soon as possible.

ARTICLE XIV

The present treaty shall remain in force for a period of ten years and in case neither of the high contracting parties shall have given notice one year before the expiration of that period of its intention to terminate the treaty, it shall continue in force until the expiration of one year from the date on which such notice of termination shall be given by either of the high contracting parties.

In witness whereof the above named plenipotentiaries have signed the present treaty and have hereunto affixed their seals.

Done in duplicate at Prague this second day of July, nineteen hundred and twenty five.

[SEAL] LEWIS EINSTEIN.

[SEAL] Dr. EDUARD BENEŠ.

TREATY OF COMMERCE AND NAVIGATION BETWEEN THE UNITED KINGDOM AND GERMANY, AND ADDITIONAL PROTOCOL¹

Signed at London, December 2, 1924; ratifications exchanged, September 8, 1925

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the President of the German Reich being desirous of further facilitating and extending the commercial relations already existing between their respective countries, have determined to conclude a Treaty of Commerce and Navigation with this object, and have appointed their plenipotentiaries, that is to say:

His Britannic Majesty:

The Right Honourable Joseph Austen Chamberlain, M.P., His Majesty's Principal Secretary of State for Foreign Affairs; and

His Excellency the Right Honourable Lord D'Abernon, G.C.M.G., His Majesty's Ambassador Extraordinary and Plenipotentiary at Berlin;

The President of the German Reich:

His Excellency Dr. Freidrich Sthamer, Ambassador Extraordinary and Plenipotentiary of the German Reich in London; and

Dr. Carl von Schubert, Director in the German Ministry of Foreign Affairs;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE 1

There shall be between the territories of the two contracting parties reciprocal freedom of commerce and navigation.

The subjects or citizens of each of the two contracting parties shall have liberty freely to come, with their ships and cargoes, to all places and ports in the territories of the other to which subjects or citizens of that contracting party are or may be permitted to come, and shall enjoy the same rights, privileges, liberties, favours, immunities and exemptions in matters of commerce and navigation as are or may be enjoyed by subjects or citizens of that contracting party.

ARTICLE 2

The subjects or citizens of each of the two contracting parties in the territories of the other shall enjoy, in respect of their persons, their property, rights and interests, and in respect of their commerce, industry, business, profession, occupation or any other matter, in every way the same treatment and legal protection as the subjects or citizens of that party or of the most favoured foreign country, in as far as taxes, rates, customs, imposts, fees which are substantially taxes, and other similar charges are concerned.

¹British Treaty Series No. 45 (1925).

ARTICLE 3

The two contracting parties agree that in all matters relating to commerce, navigation and industry, any privilege, favour or immunity which either of the two contracting parties has actually granted or may hereafter grant to the ships and subjects or citizens of any other foreign country shall be extended simultaneously and unconditionally, without request and without compensation, to the ships and subjects or citizens of the other, it being their intention that the commerce, navigation and industry of each of the two contracting parties shall be placed in all respects on the footing of the most favoured nation.

ARTICLE 4

The provisions of the present treaty with regard to the grant of the treatment of the most favoured nation do not extend to:

1. Favours granted by one of the two contracting parties to an adjoining state to facilitate traffic for certain frontier districts, as a rule not extending beyond 15 kilometres on each side of the frontier, and for residents in such districts.

2. Favours granted by one of the two contracting parties to a third state in virtue of a customs union which has already been or may hereafter be concluded.

3. Favours which one of the two contracting parties had granted or may hereafter grant to a third state in agreements for the avoidance of double taxation, and the mutual protection of the revenue.

4. Favours which Germany has granted or may hereafter grant, directly or indirectly, by virtue of treaties to which His Britannic Majesty is a party, concluding the World War, unless those favours have been extended to a state which has no right to claim them, directly or indirectly, by reason of such treaties.

ARTICLE 5

The subjects or citizens of each of the two contracting parties in the territories of the other shall be at full liberty to acquire and possess every description of property, movable and immovable, which the laws of the other contracting party permit, or shall permit, the subjects or citizens of any other foreign country to acquire and possess. They may dispose of the same by sale, exchange, gift, marriage, testament, or in any other manner, or acquire the same by inheritance, under the same conditions as are or shall be established with regard to subjects or citizens of the other contracting party.

The subjects or citizens of each of the two contracting parties shall also be permitted, on compliance with the laws of the other contracting party, freely to export the proceeds of the sale of their property and their goods in general without being subjected as foreigners to other or higher duties than

those to which subjects or citizens of such party would be liable under similar circumstances.

ARTICLE 6

The subjects or citizens of either of the two contracting parties shall be entitled to enter and reside in the territories of the other so long as they satisfy and observe the conditions and regulations applicable to the entry and residence of all foreigners, and they shall enjoy in respect of the exercise of their trades, professions or industries the same rights as the subjects or citizens of the most favoured foreign country.

ARTICLE 7

The subjects or citizens of each of the two contracting parties in the territories of the other shall be exempted from all compulsory military service whatsoever, whether in the army, navy, air force, national guard or militia. They shall similarly be exempted from all judicial, administrative and municipal functions whatever, other than those imposed by the laws relating to juries, as well as from all contributions, whether pecuniary or in kind, imposed as an equivalent for personal service, and finally from any military exaction or requisition. The charges connected with the possession by any title of landed property are, however, excepted, as well as compulsory billeting and other special military exactions or requisitions to which all subjects or citizens of the other contracting party may be liable as owners or occupiers of buildings or land.

In so far as either of the two contracting parties may levy any military exactions or requisitions on the subjects or citizens of the other, it shall accord the same compensation in respect thereof as is accorded to its own subjects or citizens.

In the above respects the subjects or citizens of one of the two contracting parties shall not be accorded in the territories of the other less favourable treatment than that which is or may be accorded to subjects or citizens of the most favoured foreign country.

ARTICLE 8

Articles produced or manufactured in the territories of one of the two contracting parties, imported into the territories of the other, from whatever place arriving, shall not be subjected to other or higher duties or charges than those paid on the like articles produced or manufactured in any other foreign country.

Subject to the provisions of Article 10, no prohibition or restriction shall be maintained or imposed on the importation of any article, produced or manufactured in the territories of either of the two contracting parties, into the territories of the other, from whatever place arriving, which shall not equally extend to the importation of the like articles produced or manufactured in any other foreign country.

ARTICLE 9

Articles produced or manufactured in the territories of either of the two contracting parties exported to the territories of the other, shall not be subjected to other or higher duties or charges than those paid on the like articles exported to any other foreign country. Subject to the provisions of Article 10 no prohibition or restriction shall be imposed on the exportation of any article from the territories of either of the two contracting parties to the territories of the other which shall not equally extend to the exportation of the like articles to any other foreign country.

ARTICLE 10

Trade and traffic between the territories of the two contracting parties shall, as far as possible, not be impeded by any kind of import or export prohibitions or restrictions.

The two contracting parties agree to limit their right to impose prohibitions or restrictions upon import or export as far as possible to the following cases, it being understood that such prohibitions or restrictions are extended at the same time and in the same way to other foreign countries in which similar conditions prevail:

- (a) Public safety;
- (b) Sanitary grounds or for protection of animals and plants against diseases and pests;
- (c) In respect of weapons, ammunition and war material and, under exceptional circumstances, also in respect of other materials needed in war;
- (d) For the purpose of prohibiting the importation of articles where such prohibition is imposed under the patent laws of the respective parties;
- (e) For the purpose of extending to foreign goods prohibitions and restrictions which are or may hereafter be imposed by internal legislation upon the production, sale, consumption or forwarding within the territories of the party concerned of goods of the same kind produced within those territories, including, in particular, goods which are the subject of a state monopoly or similar arrangement.

Nothing in this article shall preclude either of the two contracting parties from prescribing, in pursuance of general legislation, reasonable regulations as to the manner, form or place of importation, or the marking of imported goods, or of enforcing such regulations by prohibiting the importation of goods which do not comply with them.

ARTICLE 11

The two contracting parties agree that no prohibitions or restrictions on traffic in transit through the territories of either of the two contracting parties from or to the territories of the other shall be imposed under the provisions of Article 17 of this treaty which are not extended at the same time and in the same way to other countries in which similar conditions prevail.

ARTICLE 12

In so far as, having regard to the provisions of the two preceding articles, prohibitions and restrictions may be enforced, the two contracting parties undertake as regards import and export licences to do everything in their power to ensure:

(a) That the conditions to be fulfilled and the formalities to be observed in order to obtain such licences should be brought immediately in the clearest and most definite form to the notice of the public;

(b) That the method of issue of the certificates of licences should be as simple and stable as possible;

(c) That the examination of applications and the issue of licences to the applicants should be carried out with the least possible delay;

(d) That the system of issuing licences should be such as to prevent the traffic in licences. With this object, licences, when issued to individuals, should state the name of the holder and should not be capable of being used by any other person;

(e) That, in the event of the fixing of rations, the formalities required by the importing country should not be such as to prevent an equitable allocation of the quantities of goods of which the importation is authorised.

ARTICLE 13

The two contracting parties agree to take the most appropriate measures by their national legislation and administration both to prevent the arbitrary or unjust application of their laws and regulations with regard to customs and other similar matters, and to ensure redress by administrative, judicial or arbitral procedure for those who have been prejudiced by such abuses.

ARTICLE 14

No internal duties shall be levied within the territories of either of the two contracting parties for the benefit of the state or local authorities or corporations on goods the produce or manufacture of the territories of the other party which are other or greater than the duties levied in similar circumstances in the like goods of national origin or of any other foreign origin.

ARTICLE 15

The stipulations of the present treaty with regard to the mutual grant of the treatment of the most favoured nation apply unconditionally to the treatment of commercial travellers and their samples. In this matter the two contracting parties agree to carry out the provisions of the International Convention relating to the Simplification of Customs Formalities signed at Geneva on the 3rd November, 1923.

ARTICLE 16

Limited liability and other companies, partnerships and associations formed for the purpose of commerce, insurance, finance, industry, transport or any other business and established in the territories of either party shall, provided that they have been duly constituted in accordance with the laws in force in such territories, be entitled, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other party.

Limited liability and other companies, partnerships and associations of either party which shall have been admitted in accordance with the laws and regulations in force in the territories of the other party shall enjoy in those territories the same treatment in regard to taxation as is accorded to the limited liability and other companies, partnerships and associations of that party.

Furthermore each of the two contracting parties undertakes to place no obstacle in the way of such companies, partnerships and associations which may desire to carry on in its territories, whether through the establishment of branches or otherwise, any description of business, which the companies, partnerships and associations or subjects or citizens of any other foreign country are or may be permitted to carry on.

In no case shall the treatment accorded by either of the two contracting parties to companies, partnerships and associations of the other be less favourable in respect of any matter whatever than that accorded to companies, partnerships and associations of the most favoured foreign country.

It is understood that the foregoing provisions are applicable to companies, partnerships and associations constituted before the signature of the present treaty as well as to those which may be constituted subsequently.

Nothing in this article shall prejudice the right of either party to impose or maintain laws and regulations governing the disposal of immovable property, provided that in regard to this matter the treatment of the most favoured nation is applied.

ARTICLE 17

The measures taken by the two contracting parties for regulating and forwarding traffic across their territories shall facilitate free transit by rail or waterway on routes in use convenient for international transit. No distinction shall be made which is based on the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit or destination or on any circumstances relating to the ownership of goods or of vessels, coaching or goods stock, or other means of transport.

In order to ensure the application of the foregoing provisions the two contracting parties will allow transit across their territorial waters in accordance with the customary conditions and reserves.

Traffic in transit shall not be subject to any special dues in respect of

transit (including entry and exit). Nevertheless, on such traffic in transit there may be levied dues intended solely to defray expenses of supervision and administration entailed by such transit. The rate of any such dues must correspond as nearly as possible with the expenses which they are intended to cover, and the dues must be imposed under the conditions of equality laid down in the first paragraph of this article, except that on certain routes such dues may be reduced or even abolished on account of differences in the cost of supervision.

Neither of the two contracting parties shall be bound by this article to afford transit for passengers whose admission into its territories is forbidden, or for goods of a kind of which the importation is prohibited either on grounds of public health or security or as a precaution against diseases of animals or plants.

Each of the two contracting parties shall be entitled to take reasonable precautions to ensure that persons, baggage and goods, particularly goods which are the subject of monopoly and also vessels, coaching and goods stock and other means of transport are really in transit, as well as to ensure that passengers in transit are in a position to complete their journey, and to prevent the safety of the routes and means of communication being in danger.

Nothing in this article shall affect the measures which either of the two contracting parties may feel called upon to take in pursuance of general international conventions to which it is a party or which may be concluded hereafter, particularly conventions concluded under the auspices of the League of Nations relating to the transit, export or import of particular kinds of articles such as opium or other dangerous drugs or the produce of fisheries or in pursuance of general conventions intended to prevent any infringement of industrial, literary or artistic property, or relating to false marks, false indications of origin or other methods of unfair competition.

Any haulage service established as a monopoly on waterways used for transit must be so organised as not to hinder the transit of vessels.

For the purposes of this treaty persons, baggage and goods and also vessels, coaching and goods stock and other means of transport, shall be deemed to be in transit across the territories of one of the two contracting parties, when the passage across such territories, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey, beginning and terminating beyond the frontier of the party across whose territory the transit takes place. Traffic of this nature is termed in this article "traffic in transit."

ARTICLE 18

Each of the two contracting parties shall permit the importation or exportation of all merchandise which may be legally imported or exported, and also the carriage of passengers from or to their respective

territories, upon the vessels of the other; and such vessels, their cargoes and passengers shall enjoy the same privileges as, and shall not be subjected to any other or higher duties or charges than national vessels and their cargoes and passengers or the vessels of any other foreign country and their cargoes and passengers.

It is agreed that the foregoing provisions preclude either of the two contracting parties from imposing differential flag duties or charges on goods or passengers carried in vessels of the other.

The two contracting parties further agree, in regard to facilities for international railway traffic and to the rates and conditions of their application, to refrain from all discrimination of an unfair nature directed against the goods, nationals, or vessels of the other.

Tariffs, reductions in rates or other railway facilities, the application of which is dependent upon previous or subsequent carriage of the goods upon vessels of a certain state-owned or private shipping undertaking, or which are made conditional upon a given sea or river connection, shall unconditionally apply in the same direction and on the same routes to the goods carried in the vessels of one of the two contracting parties and arriving at or departing from a harbour of the other contracting party.

ARTICLE 19

In all that regards the stationing, loading and unloading of vessels in the ports, docks, roadsteads and harbours of the territories of the two contracting parties, no privilege or facility shall be granted by either party to vessels of any other foreign country or to national vessels which is not equally granted to vessels of the other party from whatsoever place they may arrive and whatever may be their place of destination.

ARTICLE 20

In regard to duties of tonnage, harbour, pilotage, lighthouse, quarantine or other analogous duties or charges of whatever denomination levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind, the vessels of each of the two contracting parties shall enjoy in the ports of the territories of the other treatment at least as favourable as that accorded to national vessels or the vessels of any other foreign country.

All dues and charges levied for the use of maritime ports shall be duly published before coming into force. The same shall apply to the by-laws and regulations of the ports. In each maritime port the port authority shall keep open for inspection by all persons concerned a table of the dues and charges in force, as well as a copy of the by-laws and regulations.

ARTICLE 21

The provisions of this treaty relating to the mutual concession of national treatment in matters of navigation do not apply to the coasting trade, in

respect of which the subjects or citizens and vessels of each of the contracting parties shall enjoy most-favoured-nation treatment in the territories of the other, provided that reciprocity be assured.

The vessels of either contracting party may, nevertheless, proceed from one port to another, either for the purpose of landing the whole or part of their cargoes or passengers brought from abroad, or of taking on board the whole or part of their cargoes or passengers for a foreign destination.

It is also understood that in the event of the coasting trade of either party being exclusively reserved to national vessels, the vessels of the other party, if engaged in trade to or from places not within the limits of the coasting trade so reserved, shall not be prohibited from the carriage between two ports of the territories of the former party of passengers holding through tickets or merchandise consigned on through bills of lading to or from places not within the above-mentioned limits, and while engaged in such carriage these vessels and their passengers and cargoes shall enjoy the full privileges of this treaty.

ARTICLE 22 •

The provisions of this treaty shall not be applicable to the special treatment which is, or may hereafter be, accorded by either party to fish caught by vessels of that party. Fish caught by vessels of either party shall not be treated less favourably in any respect on importation into the territories of the other than fish caught by the vessels of any other foreign country.

ARTICLE 23

Any vessels of either of the two contracting parties which may be compelled, by stress of weather or by accident, to take shelter in a port of the territories of the other, shall be at liberty to refit therein, to procure all necessary stores and to put to sea again, without paying any dues other than such as would be payable in a similar case by a national vessel. In case, however, the master of a merchant vessel should be under the necessity of disposing of a part of his merchandise in order to defray his expenses, he shall be bound to conform to the regulations and tariffs of the place to which he may have come.

If any vessel of one of the two contracting parties shall run aground or be wrecked upon the coasts of the territories of the other, such vessel and all parts thereof and all furniture and appurtenances belonging thereto, and all goods and merchandise saved therefrom, including any which may have been cast into the sea, or the proceeds thereof, if sold, as well as all papers found on board such stranded or wrecked vessel, shall be given up to the owners of such vessel goods, merchandise, &c., or to their agents when claimed by them. If there are no such owners or agents on the spot, then the vessel, goods, merchandise, &c., referred to shall, in so far as they are the property of a subject or citizen of the second contracting party, be delivered to the consular officer of that contracting party in whose district the wreck or

stranding may have taken place upon being claimed by him within the period fixed by the laws of the contracting party, and such consular officer, owners, or agents shall pay only the expenses incurred in the preservation of the property, together with the salvage or other expenses which would have been payable in the like case of a wreck or stranding of a national vessel.

The two contracting parties agree, however, that merchandise saved shall not be subjected to the payment of any customs duty unless cleared for internal consumption.

In the case of a vessel being driven in by stress of weather, run aground or wrecked, the respective consular officer shall, if the owner or master or other agent of the owner is not present or is present and requires it, be authorised to interpose, in order to afford the necessary assistance to his fellow-countrymen.

ARTICLE 24

The vessels of each of the two contracting parties, together with their cargoes and passengers, shall receive on the natural and artificial inland waterways and in the public inland harbours of the other, treatment in respect of navigation, particularly as regards dues and other charges, not less favourable than that accorded to national vessels and their cargoes and passengers or the vessels of the most favoured foreign country and their cargoes and passengers.

ARTICLE 25

Each of the two contracting parties will within the limits permitted by its laws and subject to the conditions of equivalence and reciprocity accept the regulations prescribed by the other relating to the measurements, fittings, equipment or safety of ships.

ARTICLE 26

The provisions of this treaty with regard to the vessels of the two contracting parties shall not extend to vessels registered in any part of their territories to which the treaty is not, or is not made, applicable.

ARTICLE 27

It shall be free to each of the two contracting parties to appoint consuls-general, consuls, vice-consuls and consular agents to reside in the towns and ports of the territories of the other to which such representatives of any other nation may be admitted by the respective governments. Such consuls-general, consuls, vice-consuls and consular agents, however, shall not enter upon their functions until after they shall have been approved and admitted in the usual form by the government to which they are sent.

The consular officials of one of the two contracting parties shall enjoy in the territories of the other the same official rights, privileges and exemptions,

provided reciprocity be granted, as are or may be accorded to similar officials of any other foreign country.

ARTICLE 28

When a subject or citizen of one of the two contracting parties dies within the territories of the other, leaving non-resident heirs, the consular representative of the other party is entitled without express authorisation from such non-resident heirs to represent them so far as the laws of the country do not expressly prohibit such representation, in all matters pertaining to administration of the property and settlement of the estate with the right to collect the distributive shares of such heirs, provided that the general laws of the country do not expressly demand the personal presence of the heirs or provided that an executor has not been appointed.

The consular officers of one of the two contracting parties residing in the territories of the other shall receive from the local authorities such assistance as can by law be given to them for the recovery of deserters from the vessels of the former party. Provided that this stipulation shall not apply to subjects or citizens of the contracting party in whose territories the desertion takes place.

ARTICLE 29

The subjects or citizens of each of the two contracting parties shall have in the territories of the other the same rights as subjects or citizens of that contracting party in regard to patents for inventions, trade marks, and designs, upon fulfilment of the formalities prescribed by law.

ARTICLE 30

The two contracting parties agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present treaty shall, at the request of either party, be referred to arbitration.

The court of arbitration to which disputes shall be referred shall be the Permanent Court of International Justice at The Hague, unless in any particular case the two contracting parties agree otherwise.

ARTICLE 31

The stipulations of the present treaty shall not be applicable to India or to any of His Britannic Majesty's self-governing dominions, colonies, possessions or protectorates unless notice is given by His Britannic Majesty's representative at Berlin of the desire of His Britannic Majesty that the said stipulations shall apply to any such territory.

Nevertheless, goods produced or manufactured in India or in any of His Britannic Majesty's self-governing dominions, colonies, possessions or

protectorates shall enjoy in Germany complete and unconditional most-favoured-nation treatment so long as goods produced or manufactured in Germany are accorded in India or such self-governing dominion, colony, possession or protectorate treatment as favourable as that accorded to goods produced or manufactured in any other foreign country.

As regards India, or any of His Britannic Majesty's self-governing dominions, colonies, possession or protectorates to which the provisions of the present treaty shall not have been applied by the 1st September, 1926, the provisions of the second paragraph of this article shall cease to operate three months after notice has been given, at any time after that date, to His Britannic Majesty's representative at Berlin on behalf of the President of the German Reich.

ARTICLE 32

The terms of the preceding article relating to India and to His Britannic Majesty's self-governing dominions, colonies, possessions and protectorates shall apply also to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty.

ARTICLE 33

The present treaty shall be ratified and the ratifications shall be exchanged at London as soon as possible. It shall come into force immediately upon ratification and shall be binding during five years from the date of its coming into force. In case neither of the two contracting parties shall have given notice to the other twelve months before the expiration of the said period of five years of its intention to terminate the present treaty, it shall remain in force until the expiration of one year from the date on which either of the two contracting parties shall have denounced it.

As regards, however, India or any of His Britannic Majesty's self-governing dominions, colonies, possessions or protectorates or any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty to which the stipulations of the present treaty shall have been made applicable under Articles 31 and 32, either of the two contracting parties shall have the right to terminate it separately at any time on giving twelve months' notice to that effect.

In witness whereof the respective plenipotentiaries have signed the present treaty and have affixed thereto their seals.

Done at London in duplicate in English and German texts, the 2nd December, 1924.

(L.S.) AUSTEN CHAMBERLAIN.

(L.S.) D'ABERNON.

(L.S.) STHAMER.

(L.S.) C. V. SCHUBERT.

PROTOCOL

(1)

The Treaty of Commerce and Navigation signed this day being based on the principle of the most favoured nation, both parties to the treaty undertake to give the widest possible interpretation to that principle. In particular while retaining their right to take appropriate measures to preserve their own industries they undertake to abstain from using their respective customs tariffs or any other charges as a means of discrimination against the trade of the other, and to give sympathetic consideration to any cases that may be brought to their notice in which, whether as a result of the rates of customs duties or charges themselves or of arbitrary or unreasonable customs classification any such discrimination can be shown to have arisen.

(2)

Within the limits of this undertaking each party agrees not to impose, reimpose or prolong any duties or charges which are specially injurious to the other party. Each party further agrees, when modifying its existing customs tariff and fixing future rates of customs duty as far as they specially affect the interests of the other party to take due regard to reciprocity and to the development on fair and equitable terms of the commerce of the two countries, the German Government taking into full account the favourable treatment at present accorded to goods the produce or manufacture of Germany on importation into the United Kingdom. The parties will also have regard to the same considerations in applying any special prohibitions or restrictions which may be notified under Article 3 of this protocol.

Should either of the two contracting parties be of the opinion that particular rates of customs duty fixed by the other party are not in accordance with the above undertaking both parties agree to enter immediately into verbal negotiations.

(3)

Both contracting parties agree to remove at the earliest possible opportunity, but not later than six months from the coming into force of the treaty signed this day, all forms of prohibition or restriction of importation or exportation, except in those special cases mentioned in Article 10 of the treaty, or in such other special cases as may be notified by either party to the other party before the ratification of the treaty.

(4)

His Britannic Majesty's Government undertake—

(a) To recommend to Parliament the necessary legislation for the removal of the disabilities imposed by the legislation specified below affecting German citizens and German companies in the United Kingdom which do

not extend to the subjects or citizens or companies of the most favoured foreign country, viz.:

Non-Ferrous Metal Industries Act, 1918.

Aliens Restriction (Amendment) Act, 1919. (Section 12.)

Trading with the Enemy (Amendment) Act, 1918. (Section 2.)

(b) In the administration of the Overseas Trade Acts, 1920 to 1924, and the Trade Facilities Acts, 1921 to 1924, not to exclude trade between the United Kingdom and Germany from any benefits to which trade between the United Kingdom and any other foreign country is admitted.

(5)

The German Government undertake—

(a) That insurance companies constituted in accordance with the laws in force in the United Kingdom shall be admitted to carry on business in all parts of Germany, subject to the provisions of the German Insurance Law, and that the section regulating the admittance of foreign insurance companies will be interpreted in the most liberal way as far as insurance companies of the United Kingdom are concerned. The German Government will also give all necessary facilities compatible with German law for the work carried on by the agents in Germany on behalf of the underwriters of the United Kingdom.

(b) That banking companies constituted in accordance with the laws in force in the United Kingdom shall in the pursuance of their business be subjected only to the general German law; that new regulations against the flight of capital shall be so framed that the right to open accounts and to receive deposits may be conferred upon foreign banks; and that they will use their influence with the State Governments to secure that United Kingdom banks shall be treated in a liberal way with regard to the permission to open branch offices and the right to deal in exchange, without prejudice to the right of making the grant of such privileges to foreign banks subject to general reservations.

(6)

In pursuance of the general principle of the mutual accord of national treatment in matters of navigation which is embodied in the treaty signed this day, both parties agree that in regard to the carriage from their respective territories of emigrants (including transmigrants) and to the establishment of agencies by companies engaged in the business of emigration, the vessels and shipping companies of either party shall be placed, in the territories of the other, on exactly the same footing in every respect as national vessels and national shipping companies.

(7)

Both parties hereby place on record their intention to adopt (in so far as they have not already done so) the provisions of—

- (1) The conventions and statutes concluded at Barcelona in 1921 respecting freedom of transit and navigable waterways of international commerce;
- (2) The conventions and statutes concluded at Geneva in 1923 respecting customs formalities, maritime ports and railways;
- (3) The protocol on arbitration clauses drawn up at Geneva in 1923.

(8)

It is agreed that the treaty signed this day shall come into force only after the necessary legislative or administrative measures have been passed by the appropriate authorities in the respective countries.

Done at London in duplicate in English and German texts, the 2nd December, 1924.

AUSTEN CHAMBERLAIN.
D'ABERNON.
STHAMER.
C. V. SCHUBERT.

Minutes of a Meeting between British and German Representatives, held at 4 p. m., on the 2nd December, 1924, at the Foreign Office, London, for the purpose of signing a Treaty of Commerce and Navigation between Great Britain and Germany.

Plenipotentiaries present:

GREAT BRITAIN	GERMANY
The Right Honourable Austen Chamberlain, M.P., His Majesty's Principal Secretary of State for Foreign Affairs.	His Excellency the German Ambassador, Dr. Sthamer.
The Right Honourable Lord D'Abernon, G.C.M.G., His Majesty's Ambassador Extraordinary and Plenipotentiary at Berlin.	Dr. Carl von Schubert, Director in the German Ministry for Foreign Affairs.

The Secretary of State for Foreign Affairs announced that the negotiation of the Treaty of Commerce and Navigation between Great Britain and Germany was now concluded and that the treaty was ready for signature.

The German Ambassador, on behalf of the German delegation, drew attention to the terms of Sir Otto Niemeyer's letter to Herr von Schubert of the 28th November, 1924, and desired that a copy thereof should form an annex to the minutes of this meeting.

The Secretary of State for Foreign Affairs agreed, and stated that the treaty was signed on either side without reservation and upon the understanding that it would not prejudice in any way rights enjoyed under or in virtue of the Treaty of Versailles.

The German Ambassador concurred in this view.

The plenipotentiaries (the Secretary of State for Foreign Affairs and Lord D'Abernon for Great Britain, and the German Ambassador and Herr von Schubert for Germany) then

proceeded to the signature of the treaty and of the protocol attached thereto, and the proceedings terminated.

AUSTEN CHAMBERLAIN.
D'ABERNON.
STHAMER.
C. V. SCHUBERT.

ANNEX

Sir Otto Niemeyer to Herr von Schubert

November 28, 1924.

Dear Herr von Schubert,

I have now been able to consult the Chancellor of the Exchequer, and am in a position to give to you our reply with regard to the Reparation Recovery Act. In the first place, I can repeat my assurance that we have no desire to retain the Act for its own sake, and that the only object of any stipulations which we may make is to secure that by departing from the procedure under the Act, as it at present exists, the British Government does not lose the share of reparation receipts to which it is entitled.

The difficulty which we see in adopting any procedure on the lines of that suggested in the memorandum which you gave to me yesterday, is that the Reparation Recovery Act has a recognised position, and that we must make sure that if we alter the procedure we do not sacrifice the rights which we enjoy in respect of the Act as it stands, in which form the German Government agreed to facilitate its working by reimbursing the amount of the levy to German exporters by Article IX of the Schedule of Payments and by their acceptance of the Dawes plan. We hold, as I told you, that it was the intention of the Dawes Report that the annuities for the first two years should be received in the form of deliveries in kind and local expenditure of the armies of occupation. The Dawes Report explicitly states that where there is reference to deliveries in kind in the report: "We have intended to include therein payments in Germany arising through the operation of the Reparation Recovery Acts." Before, therefore, we could consider any alternative procedure, it would be necessary to ascertain whether the agent-general, the Transfer Committee and the other Governments which signed the London agreements take the view that the annuities for the first two years must be received in deliveries in kind (including payments under the Reparation Recovery Act), and, if so, whether they would take the view that payments under the system which you propose could, for this purpose, be considered as being payments under the Reparation Recovery Act. As I explained to you, the scheme which you propose would necessarily entail the repeal or suspension of the Reparation Recovery Act, and there is, therefore, clearly great doubt how far payments received under an alternative plan would be accepted by all the parties concerned as being subject to the same conditions as payments under the Act as it now exists.

Moreover, under existing inter-Allied agreements our receipts under the Recovery Act are exempt from the charge for Belgian priority and for the United States of America arrears of cost of occupation, and if our position is to be the same under the alternative procedure as under the existing procedure, it would clearly be necessary to obtain an extension of these privileges to our receipts under the new procedure.

It appears to the Chancellor of the Exchequer that the first step must necessarily be to ascertain what view of the matter would be taken by the Agent-General, the Transfer Committee and other parties concerned. It rests with the German Government to ascertain whether it will be possible to get the consent of the Agent-General and the Transfer Committee to a proposal on the lines put forward or on similar lines which would protect the British rights referred to above, and, at the same time, not involve payments by individual merchants. The British Government cannot give any formal assurance, but they are quite ready to use their good offices to secure such a result.

As soon as the necessary consents have been obtained, the British Government will enter into negotiations with the German Government with a view to the introduction of the new procedure.¹

I am, &c.

O. E. NIEMEYER.

AGREEMENT BETWEEN GREAT BRITAIN AND GERMANY FOR AMENDING THE
METHOD OF ADMINISTERING "THE GERMAN REPARATION
(RECOVERY) ACT, 1921"²

Signed at Berlin, April 3, 1925

Whereas it is desired to reduce the burden and to remove the disabilities which the present method of administering "The German Reparation (Recovery) Act, 1921"³ (hereinafter referred to as "the Recovery Act"), places upon trade and commerce between Germany and Great Britain; and

Whereas it is also desired to assure to the Transfer Committee the jurisdiction over payments under the Recovery Act contemplated by the plan of the First Committee of Experts (hereinafter referred to as "the Dawes Plan") and the London Protocol executed on the 30th August, 1924;

Now, therefore, it is agreed between the Government of His Britannic Majesty and the Government of the German Reich that the present method of administration shall be suspended and replaced, as from a date not later than the 1st May, 1925, to be mutually agreed, by a procedure substantially as follows:

(1) The present procedure under the Recovery Act by which a proportion of the value of German goods imported into Great Britain is collected by the British customs from the British importers will be replaced by a system under which an equivalent amount of sterling will be surrendered, of their free consent, by the German exporters in accordance with the provisions of paragraph (2) of this agreement.

The amount of sterling to be surrendered by the German exporters during each month shall be equivalent to 26 per cent (or such other proportion as may from time to time be in force) of the value of German imports into Great Britain during the preceding month.

The value of German imports shall be calculated on the basis of the statistics supplied by the British customs and established on the same principles as are at present in force in regard to the definition of German goods to which the Recovery Act applies.

(2) Out of the sterling proceeds accruing from German exports to Great Britain, the principal German exporting firms, to a number of not less than eight hundred (800) whose names and designations will be communicated to the British Government and to the Agent-General for Reparation Pay-

¹ See agreement, *infra*.

² British Treaty Series No. 20 (1925).

³ 11 and 12 Geo. 5, Chap. 5 (Public General Acts, 1921, p. 15).

ments within fifteen days of the putting into force of this agreement, will each give an individual declaration to the Reich Minister of Finance, in the terms of the specimen declaration annexed hereto, undertaking to surrender in sterling to the Reichsbank each month, beginning with the 1st May, 1925, thirty per cent (30 per cent) of the invoice value of the exports of the firm in question to Great Britain during the previous month. (It is estimated that 30 per cent of the value of the exports consigned by these firms should be approximately equivalent to 26 per cent of the value of the total exports from Germany to Great Britain.)

(3) Out of the sterling sums thus surrendered, the Reichsbank will deposit during each month, at such intervals as may be agreed, to the account of the Agent-General at the Bank of England an amount in sterling equivalent to the Reichsmark credit held by him for account of the British Government and available for payments under the Recovery Act in accordance with the programme established by the Reparation Commission for the particular month after consultation with the Transfer Committee as contemplated by the Dawes Plan.

(4) It is understood that, against telegraphic advice that the sums referred to in paragraph (3) have been duly deposited to his account at the Bank of England, the Agent-General will reimburse the German exporters through the Reichsbank with the equivalent in Reichsmarks of the sterling thus deposited. The equivalent in Reichsmarks will be calculated at the average rate of exchange in Berlin on the date of such deposit.

(5) It is further understood that, subject to the approval of the Transfer Committee, the Agent-General will pay over to the British Government the sterling sums deposited under paragraph (3) above.

(6) If during the first or any subsequent month after the coming into force of this agreement the sterling sums surrendered by the German exporters are in excess of the amounts deposited by the Reichsbank to the account of the Agent-General under paragraph (3) above, the Reichsbank will transfer the surplus sterling (*Überschuss devisen*) surrendered to the Devisenbeschaffungsstelle G.m.b.H.⁴ to be placed in a special reserve fund up to an amount equivalent to 10 million Reichsmarks. On the coming into force of this agreement, the Devisenbeschaffungsstelle G.m.b.H. shall forthwith pay into this fund the above-mentioned sum in sterling, out of the sterling accruing from exports already in its hands, and it will undertake to secure that the fund is maintained at this level as provided below. The fund shall be under the supervision of the Reichs Finance Ministry, and it shall be open to the British Government and to the Agent-General to ask and obtain at all times any information regarding this fund which they may desire.

If in any month the sterling surrendered by the German exporters is less than the amount which should be deposited to the account of the Agent-

⁴The Devisenbeschaffungsstelle G.m.b.H. is the agency through which the German Government obtains the foreign currencies it requires.

General at the Bank of England under paragraph (3) above, the Devisenbeschaffungsstelle G.m.b.H. shall draw the sum necessary to cover the deficiency out of the Special Reserve Fund and deposit it to the credit of the Agent-General at the Bank of England, being reimbursed by him with the equivalent in Reichsmarks. Further, in that event, it will take steps to expedite the surrender by the German exporters of the sterling accruing from exports (*Uberschuss devisen*), so as to make up the fund again in sterling to the original level of 10 million Reichsmarks.

It is understood that the surplus sterling surrendered by the exporters to the Devisenbeschaffungsstelle G.m.b.H. and deposited in the Special Reserve Fund shall not be reimbursed by the Agent-General nor be credited on account of the Dawes annuity, except as and to the extent that such sterling shall actually be drawn upon and used by the Agent-General for payments to the British Government under paragraph (5).

(7) It is understood and agreed that this agreement merely provides for amending the method of collection of the levy on exports prescribed by the Recovery Act, that the payments made according to its terms shall accordingly be regarded for all purposes as a delivery pursuant to the terms of that Act, and that its provisions are without prejudice to any rights which may be enjoyed by the British Government in respect of that Act under the Dawes Plan, the London Protocol of the 30th August, 1924, or otherwise.

(8) The British and German Governments both recognize the desirability of relieving trade and commerce from the burden of collecting a 26 per cent levy from each transaction and of substituting for the system at present in force a method of administration which will permit the collection of the levy on a statistical basis. If the present agreement should not prove satisfactory in its operation, both governments agree that in order to avoid reverting to the system at present in force, they will appoint a joint committee of experts to explore and report on any other available and practical solutions which will meet the defects which may be revealed.⁵ Both governments agree to use their best endeavors to overcome the difficulties which may arise on the introduction of the new system during 1925.

• (9) This agreement shall not come into force unless and until appropriate resolutions, giving effect to its provisions, have been passed by the Transfer Committee and by the Reparation Commission.⁶ Subject to the adoption of such resolutions, the British and German Governments will immediately take the necessary steps to put it into effect.

⁵When informing the German Secretary of State of the receipt of authority from his government to sign the agreement, the British Ambassador in a note dated April 3, 1925, stated: "Should, contrary to expectation, difficulties of execution present themselves, which make the new plan unsatisfactory or unworkable, His Majesty's Government reserve the right, as set forth in the agreement, to revert to the existing procedure." (British Treaty Series No. 20 (1925), p. 5.)

⁶See following extract from report of Agent General for reparation payments, p. 103.

In witness whereof the undersigned, duly authorized to that effect by their respective governments, have signed the present agreement.

Done at Berlin, the 3rd April, 1925.

C. v. SCHUBERT,
*Secretary of State in German
Ministry of Foreign Affairs.*

D'ABERNON,
*His Britannic Majesty's Ambassador Extraordinary
and Plenipotentiary to the German Republic.*

ANNEX

Draft Declaration by the German Exporter

The undersigned firm undertakes herewith to surrender immediately to the Reichsbank in sterling, against reimbursement of the counter-value in Reichsmarks, 30 per cent of the amount of the invoice arising from every export transaction to Great Britain and upon delivery of such sterling proceeds to fill in a form whereon there is to be found the name of the firm surrendering the foreign currencies, the date of the surrender and the amount in question.

THE REPARATION RECOVERY ACTS

*Extract from the Report of the Agent-General for Reparation Payments, May 30, 1925*¹

The Experts provided in their Report that wherever they referred to payments for deliveries in kind they "intended to include therein payments in Germany arising through the operation of the Reparation Recovery Acts." One of the first problems of the Transfer Committee, therefore, was to bring the administration of the Reparation Recovery Acts into harmony with the rest of the Plan and to put the payments under the Recovery Acts under the same effective control that it was exercising over deliveries in kind.

The Reparation Recovery Act was first introduced by Great Britain in March, 1921, in the form of a law which put a levy on imports into Great Britain from Germany. The law authorized the levy of a tax at a rate not to exceed 50 per cent. This rate was actually put in force at the outset, but it was subsequently reduced, on May 17, 1921, to 26 per cent, and again on February 25, 1924, to 5 per cent. This last reduction was due to the inability of the German Government to make effective reimbursement to its exporters of the amounts collected, but as soon as it became apparent that the Plan would come into operation the old rate of 26 per cent was restored on August 29, 1924. The levy, in fact, depended for its effective operation on reimbursement to the German exporter, in Germany, in the equivalent of the amount withdrawn in England, for otherwise the rate tended to become prohibitive and to shut off trade completely.

¹Official Documents, Reparation Commission, X, pages 21-25 (London: H. M. Stationery Office, 1925).

Shortly after the British Act was passed, to be exact, in April 1921, the French Government enacted a similar Reparation Recovery Act, but the decree making it operative was not issued until September 18, 1924, and it did not go into actual operation until October 1, 1924. Under the French decree the levy also involved a tax of 26 per cent on imports from Germany, and was administered in substantially the same way as the British Act.

The Plan accepted the view that the Reparation Recovery Act payments were to be treated the same as deliveries in kind, and it assimilated them to the same procedure, including the provisions for the formulation of programmes after consultation with the Transfer Committee and the jurisdiction of the Transfer Committee to suspend payments at any time in order to prevent difficulties arising with the foreign exchange. It provided, furthermore, in the all-inclusive paragraph, that the annuity included all payments "for the costs arising out of the war," thus leaving the Agent-General rather than the German Government to make the reimbursement to the German exporter. The Plan, therefore clearly enough recognized the jurisdiction of the Transfer Committee, but there remained the practical difficulty of making its control effective. The existing methods of collection meant, in effect, that the governments imposing the levy confronted the Transfer Committee with an accomplished fact, or, in other words, that by direct action of their own, and without consultation with the Committee, these governments were taking the tax each month out of German exports, leaving the Agent-General with a resulting obligation to reimburse the German exporter out of the annuity with the equivalent sum in Reichsmarks. This tended to make extremely difficult the control of the Transfer Committee over this particular portion of the reparation payments. It also created difficulties with the distribution of the annuity among the Powers, for there was no inherent relation between the Recovery Act levy and the shares to which the respective governments were entitled. The British Recovery Act, for example, was yielding somewhat more each month than the proper monthly share of the British Government in the annuity.

The question of the Recovery Acts accordingly engaged the attention of the Transfer Committee at its first meeting, on October 31, 1924. It was clear that the Committee's jurisdiction could best be enforced through its control over the reimbursements to the German exporter. The Agent-General for Reparation Payments, on November 14, 1924, took the first step to make this practically effective by sending a formal notification to the Finance Minister of the Reich that on and after December 1, 1924, he would repay the German Government for the reimbursements which it made to German exporters under the Recovery Acts only if and to the extent that the Transfer Committee authorized him to do so. For the time being the Transfer Committee gave this authorization, and on this basis the Agent-General proceeded to reimburse to the German Government what it had paid out to the exporters.

At the same time, however, negotiations were begun in an effort to find a more satisfactory method of handling the matter, and particularly one that would give the Transfer Committee more effective control over the payments. It was also desired, if possible, to find a method of collection that would be less burdensome to trade. The system in force meant that every invoice covering a shipment from Germany had to be handled in two sections, 74 per cent being paid to the German exporter in the regular way and 26 per cent being paid to the British or French Government, as the case might be, against a voucher or receipt which the German exporter used in collecting his reimbursement in Germany. The result was great inconvenience to both exporters and importers, and a heavy burden to trade. This was particularly true as between Great Britain and Germany, where the volume of trade was much larger than between France and Germany.

The first negotiations, therefore, related to the British Reparation Recovery Act, and were actively begun in December, 1924, between the British and the German Governments and the Agent-General. A suggestion which at first seemed practicable, developed during the negotiations which were being conducted at that time for the commercial treaty between Great Britain and Germany. It was to the effect that the sum which the British Government might be entitled to receive each month on account of the Reparation Recovery Act might be calculated on a lump-sum basis from the reported figures of exports from Germany to Great Britain and be carried as a credit in Reichsmarks on the books of the Agent-General. This credit, it was suggested, could be made available to the British Government, subject to the control of the Transfer Committee, through the sale of Reichsmark drafts in London, the use of which would be restricted to paying for German goods imported into England. It soon became apparent, however, that this would not work well in practice, because the German exporters themselves were still invoicing their exports to England largely in sterling rather than in Reichsmarks, and there would be little or no market for restricted drafts of this character.

The problem was then approached from the other point of view, on the theory that the German exporters, by their own voluntary action might deliver enough sterling each month to cover the amount which Great Britain was entitled to receive on account of the Recovery Act, and that the sterling bills thus delivered could be used as the medium for making the Recovery Act payments to Great Britain. On March 25, 1925, negotiations were concluded upon this basis and a draft protocol providing for amending the method of administering the British Reparation Recovery Act was duly initialled by representatives of the British and German Governments. The Transfer Committee passed resolutions on the same day giving effect to its provisions, and on April 1st the Reparation Commission also took the necessary action. The protocol was finally signed by the authorized representatives of the two governments on April 3rd, and on April 7th the Brit-

ish Parliament, on the recommendation of the Chancellor of the Exchequer, passed a bill suspending as from midnight on April 9th the collection in Great Britain of the 26 per cent levy.

As from May 1, 1925, the new method of administering the Act has been in effect. Instead of 800 German exporting firms, as provided in the agreement, 1200, representing about 90 per cent of the German export trade with England, have already given undertakings to deliver to the Reichsbank each month 30 per cent of the sterling proceeds accruing to each one of them from exports to Great Britain. Out of the sterling so surrendered, the Reichsbank at agreed intervals each month makes deposits at the Bank of England for credit to the account of the Agent-General for Reparation Payments, representing the sterling equivalent to the Reichsmark credit held by the Agent-General for the British Government and available for payments to it under the Recovery Act in accordance with the programme established by the Reparation Commission after consultation with the Transfer Committee. The Agent-General, in turn, against advice of the deposits to his account with the Bank of England, reimburses the German exporters, through the Reichsbank, with the equivalent in Reichsmarks of the sterling thus deposited, and, subject to the approval of the Transfer Committee, pays over the sterling to the British Government.

It is expected that the aggregate surrenders of sterling by the exporters will be sufficient to cover the requirements of the Recovery Act but the agreement also provides for the creation and maintenance of a reserve fund in the sterling equivalent of 10,000,000 Reichsmarks with the *Devisenbeschaffungsstelle*¹ for use in the event that the sterling surrendered should ever be inadequate.

Operations under the new system began promptly on May 1, 1925, and the sterling necessary to cover its requirements through the month of May has already been surrendered to the Agent-General and paid over to the Bank of England according to the terms of the agreement.

From the point of view of the Transfer Committee the new method of administering the British Recovery Act is entirely satisfactory. It assures to the Committee the full control contemplated by the Plan, first through the fact that it is consulted in the formulation of the programmes, and then through the power of the Committee to suspend payments whenever necessary in its judgment to prevent difficulties arising with the foreign exchange. The new system also has the advantage of adjusting itself automatically to the British Government's share in the available funds in the annuity. Throughout the negotiations leading up to the agreement the Agent-General and the Transfer Committee found both the British Government and the German Government most ready to recognize the jurisdiction of the Transfer Committee and most desirous of arranging an acceptable settlement; and

¹The *Devisenbeschaffungsstelle* is an office of the German Government which is charged with the purchase of foreign exchange.

it was conceded from the outset that any excess over its proper share that might be collected by the British Government under the old system would be promptly refunded to the Agent-General by way of reimbursement to the annuity. Within the past few weeks, in fact, an adjustment of this character has been completed covering the period up to May 1, 1925, and a repayment of about £335,000 has been made by the British Treasury to the Agent-General on this account.

Satisfactory arrangements have also been concluded with the French Government for bringing the administration of the French Reparation Recovery Act into harmony with the Plan and under the jurisdiction of the Transfer Committee. As a result the French Government, beginning with the month of May, 1925, is depositing to the credit of the Agent-General's Account with the Bank of France, the proceeds of collections under the Reparation Recovery Act in force in France. The sums thus deposited will be paid over to the French Treasury, subject to the approval of the Transfer Committee, within the limits of the French share of the available funds in the annuity. The Transfer Committee, on this basis, has authorized the Agent-General to make continued reimbursement to German exporters in respect to the French Recovery Act.

*Extract from Report of the Agent-General for Reparation Payments,
November 30, 1925*¹

The previous Report set forth in detail the new arrangements made during the first months of the operation of the Plan for the purpose of bringing the administration of the British and French Reparation Recovery Acts into harmony with the general provisions of the Plan, and assuring to the Transfer Committee the full control over Reparation Recovery Act payments contemplated by the Plan. It is unnecessary here to review these arrangements, except to record that they are proving satisfactory in operation and are providing the expected payments. During the first annuity year, the British Government collected in sterling, through the operation of the Reparation Recovery Act, the equivalent of about 155 million gold marks, and the French Government received, in French francs, the equivalent of about 25 million gold marks. •

CONVENTION BETWEEN THE UNITED STATES AND MEXICO TO PREVENT
SMUGGLING AND FOR OTHER PURPOSES².

*Signed at Washington, December 23, 1925; ratifications exchanged,
March 18, 1926*

The Government of the United States of America and the Government of the United Mexican States being desirous of coöperating to prevent the

¹Official Documents, Reparation Commission, XI, page 27 (London, H. M. Stationery Office, 1926).

²U. S. Treaty Series No. 732.

smuggling into their respective territories of merchandise, narcotics and other commodities the importation of which is prohibited by the laws of either country, and of aliens, as well as to promote human health and to protect animal and plant life and to conserve and develop the marine life resources off certain of their coasts, have resolved for these purposes to conclude a convention, and to that end have named as their plenipotentiaries:

The President of the United States of America: Frank B. Kellogg, Secretary of State of the United States of America, and

The President of the United Mexican States: Don Manuel C. Tellez, Ambassador Extraordinary and Plenipotentiary of Mexico at Washington.

Who, having communicated to each other their respective full powers, which were found to be in due and proper form, have agreed upon the following articles:

SECTION I—SMUGGLING

ARTICLE I

The high contracting parties agree that all shipments of merchandise crossing the international boundary line between the United States and Mexico, originating in and consigned from either of the two countries, shall be covered by a shipper's export declaration, and a copy of same, verified by the appropriate officials of the country of origin, shall be furnished to the customs officials of the country of destination. It is agreed also that the appropriate officials of either country shall give such information as the appropriate officials of the other country may request concerning the transportation of cargoes or the shipment of merchandise crossing the international boundary line.

ARTICLE II

The high contracting parties agree that clearance of shipments of merchandise by water, air or land from any of the ports of either country to a port of entrance of the other country shall be denied if such shipment comprises articles the introduction of which is prohibited or restricted for whatever cause in the country to which such shipment is destined, provided, however, that such clearance shall not be denied on shipments of restricted merchandise when there has been complete compliance with the conditions of the laws of both countries.

It shall also be deemed to be the obligation of both of the high contracting parties to prevent by every possible means, in accordance with the laws of each particular country, the clearance of any vessel or other vehicle laden with merchandise destined to any port or place when there shall be reasonable cause to believe that such merchandise or any part thereof, whatever may be its ostensible destination, is intended to be illegally introduced into the territory of the other party.

ARTICLE III

The high contracting parties reciprocally agree to exchange promptly all available information concerning the names and activities of all persons known or suspected to be engaged in violations of the laws of the United States of Mexico with respect to smuggling or the introduction of prohibited or restricted articles.

ARTICLE IV

The high contracting parties agree that no merchandise of property of any character shall be authorized to be cleared or despatched out of either country, across the international boundary line, except through ports or places duly authorized to clear such merchandise or property, and to or through duly authorized ports or places on the opposite side of said boundary line; provided, that merchandise or property may be transported across said boundary line at any convenient place under special circumstances and after permits by both countries have been issued therefor.

ARTICLE V

The high contracting parties agree that they will exchange all available information concerning the existence and extent of contagious and infectious diseases of persons, animals, birds or plants, and the ravages of insect pests and the measures being taken to prevent their spread. The parties will also exchange information relative to the study and use of the most effective scientific and administrative means for the suppression and eradication of such diseases and insect pests.

SECTION II—MIGRATION OF PERSONS

ARTICLE VI

Each of the high contracting parties agrees to employ all reasonable measures to prevent the departure of persons destined to territory of the other, except at or through regular ports or places of entry or departure established by the high contracting parties.

ARTICLE VII

In all cases in which a national of one of the high contracting parties is to be deported or expelled from the territory of the other, and in the cases in which a national of either country subject to deportation is allowed voluntarily to depart for the country of his nationality in lieu of deportation, due notice will be given the proper consular representative of the country of such national.

ARTICLE VIII

In all cases in which either of the high contracting parties may suspend or waive its regulations relating to the contracting of laborers in the territory of the other, or in cases where either of the high contracting parties may grant special permits for contract labor, the country granting such permits

or so suspending or waiving its regulations will give due notice thereof to the other.

ARTICLE IX :

The high contracting parties mutually agree that they will exchange information regarding persons proceeding to the country of the other and regarding activities of any persons on either side of the border, when there is reasonable ground to believe that such persons are engaged in unlawful migration activities or in conspiracies against the other government or its institutions, when not incompatible with the public interest.

SECTION III—FISHERIES

Preamble

For the three following purposes, namely:

- (1) To facilitate the labors of the corresponding authorities in conserving and developing the marine life resources in the ocean waters off certain coasts of each nation;
- (2) To prevent smuggling in all kinds of marine products;
- (3) And to consider and to make recommendations with respect to the collection of the revenue from fish and other marine products.

The Government of the United States of America and Government of the United Mexican States agree as follows:

ARTICLE X

The high contracting parties agree that the waters dealt with under this convention shall be the waters off the Pacific coasts of California, United States of America, and Lower California, Mexico, including both territorial and extra-territorial waters, the latter being the westward extension of the former.

ARTICLE XI

The high contracting parties agree to establish within two months after the exchange of ratifications of this convention a commission, to be known as the International Fisheries Commission—United States and Mexico, that shall consist of four members, two to be appointed by each party.¹ This

¹The membership of the commission was announced by the Department of State on April 27, 1926, as follows:

For the United States:

Henry O'Malley, Chief, Commission of Fisheries, Department of Commerce, Washington, D. C.

Norman B. Scofield, in charge of the Department of Commercial Fisheries, for the Fish and Game Commission of the State of California, San Francisco, Calif.

For Mexico:

Engineer José R. Alcaraz, Director of Forests, Game and Fisheries.

Señor Carlos E. Bernstein, Chief of the Inspection Service and of Game and Fisheries in the North and on the West Coast of Lower California.

commission shall continue to exist so long as this convention shall remain in force. Each party shall pay the salaries and expenses of its own members and the joint expenses incurred by the commission shall be paid by the two high contracting parties in equal moieties.

The commission is hereby empowered to organize, to appoint its staff, and to fulfill the requirements of this section.

The commission shall make a thorough study of whatever subjects are necessary for carrying out the purposes of this section and shall submit recommendations unanimously approved by the commission to each government for consideration and approval covering whatever the commission deems necessary for the accomplishment of the purposes of this section. This study shall be undertaken within two months after appointment of the commission and the recommendations shall be submitted as soon as practicable.

ARTICLE XII

The high contracting parties agree that if, after its study of conditions, the International Fisheries Commission recommends the adoption of regulations regarding the subjects set forth in the preamble and such regulations are approved by each government, they shall become binding upon the authorities of both countries and shall be enforced by them.

The high contracting parties agree that the authorities of their respective ports shall refuse to permit any and all fish or marine products to enter the ports if brought into port from the waters specified in Article X and if the port authorities have reasonable grounds to believe that the master has obtained his cargo in violation of the laws of either of the high contracting parties, the regulations which may be adopted, or the provisions of this convention. Fines may be imposed in such cases or such cargoes thus illegally obtained may be declared forfeited and sold at auction to the highest bidder. Any proceeds therefrom shall be regarded as belonging to the high contracting parties in equal moieties and to the extent that may be determined by the high contracting parties to be necessary shall be made available for use in payment of the salaries and expenses of the commission as provided for in Article XI of this convention.

The International Fisheries Commission will inform and will keep informed all port authorities of both nations concerning any and all regulations which may have been established.

SECTION IV—GENERAL PROVISIONS

ARTICLE XIII

It is agreed that when compatible with the public interest the officers and employees of the respective Governments of the United States and Mexico shall, upon request, be directed to furnish such available records and files, or certified copies thereof, as may be considered essential to the trial of civil

or criminal cases. The costs of transcripts of records, depositions, certificates and letters rogatory in civil or criminal cases shall be paid by the nation requesting them. Letters rogatory and commissions shall be executed with all possible despatch and copies of official records or documents shall be certified promptly by the appropriate officials in accordance with the provisions of the laws of the respective countries.

This article shall apply only to cases involving matters covered by this treaty.

ARTICLE XIV

The high contracting parties agree to enact and enforce such legislation as may be necessary to make effective the provisions of this convention with appropriate penalties for the violation thereof.

ARTICLE XV

This convention shall be ratified and the ratifications shall be exchanged at the City of Washington as soon as possible.

The convention shall come into effect at the expiration of ten days from the date of its publication in conformity with the laws of the high contracting parties, and it shall remain in force for one year. If upon the expiration of one year after the convention shall have been in force no notice is given by either party of a desire to terminate the same, it shall continue in force until thirty days after either party shall have given notice to the other of a desire to terminate the convention.

In witness whereof the respective plenipotentiaries have signed the present convention both in the English and Spanish languages, and have thereunto affixed their seals.

Done in duplicate at the City of Washington this twenty-third day of December, one thousand nine hundred and twenty-five.

[SEAL] FRANK B. KELLOGG.

[SEAL] MANUEL C. TÉLLEZ.

AGREEMENT BETWEEN POLAND (INCLUDING THE FREE CITY OF DANZIG) AND THE UNITED STATES ACCORDING MOST-FAVORED-NATION- TREATMENT IN CUSTOMS MATTERS¹

*Exchange of notes between Charles E. Hughes, Secretary of State, and Ladislas Wroblewski, Minister of Poland, Washington, D. C., Feb. 10, 1925;
ratified by Poland, September 14, 1925*

SIR:

I have the honor to make the following statement of my understanding of the agreement reached through recent conversations held at Washington on behalf of the Government of the United States and the Government of the

¹U. S. Treaty Series No. 727.

Republic of Poland with reference to the treatment which the United States shall accord to the commerce of Poland and which Poland shall accord to the commerce of the United States pending the negotiation of a comprehensive treaty of friendship, commerce and consular rights to which the governments of both countries have given careful attention and in favor of which both governments have informally expressed themselves.

These conversations have disclosed a mutual understanding between the two governments which is that, in respect to import, export and other duties and charges affecting commerce, as well as in respect to transit, warehousing and other facilities and the treatment of commercial travelers' samples, the United States will accord to Poland and Poland will accord to the United States, its territories and possessions, unconditional most-favored-nation treatment; and that in the matter of licensing or prohibitions of imports or exports, the United States and Poland, respectively, so far as they at any time maintain such a system, will accord to the commerce of the other treatment as favorable, with respect to commodities, valuations and quantities, as may be accorded to the commerce of any other country.

It is understood that—

No higher or other duties shall be imposed on the importation into or disposition in the United States, its territories or possessions, of any articles the produce or manufacture of Poland than are or shall be payable on like articles the produce or manufacture of any foreign country;

No higher or other duties shall be imposed on the importation into or disposition in Poland of any articles the produce or manufacture of the United States, its territories or possessions, than are or shall be payable on like articles the produce or manufacture of any foreign country;

Similarly, no higher or other duties shall be imposed in the United States, its territories or possessions, or in Poland on the exportation of any articles to the other or to any territory or possession of the other, than are payable on the exportation of like articles to any foreign country;

Every concession with respect to any duty, charge or regulation affecting commerce now accorded or that may hereafter be accorded by the United States or by Poland, by law, proclamation, decree or commercial treaty or agreement, to any foreign country will become immediately applicable without request and without compensation to the commerce of Poland and of the United States and its territories and possessions, respectively:

Provided that this understanding does not relate to

(1) The treatment which the United States accords or may hereafter accord to the commerce of Cuba or any of the territories or possessions of the United States or the Panama Canal Zone, or to the treatment which is or may hereafter be accorded to the commerce of the United States with any of its territories or possessions or to the commerce of its territories or possessions with one another.

(2) The treatment which Poland may accord, in order to facilitate strictly

border traffic, to the products of a zone not exceeding fifteen kilometers in width beyond its frontiers or to the products of the German portions of Upper Silesia under the régime at present existing.

(3) Prohibitions or restrictions of a sanitary character or designed to protect human, animal or plant life or regulations for the enforcement of police or revenue laws.

The Polish Government, which is entrusted with the conduct of the foreign affairs of the Free City of Danzig under Article 104 of the Treaty of Versailles and Articles 2 and 6 of the treaty signed in Paris on November 9, 1920, between Poland and the Free City, declares that the Free City becomes a contracting party to this agreement and assumes the obligations and acquires the rights laid down therein. The above declaration does not relate to those stipulations of this agreement which are accepted by the Republic of Poland with regard to the Free City of Danzig on the basis of rights acquired by treaties.

The present arrangement shall become operative on the day of signature and, unless sooner terminated by mutual agreement, shall continue in force until thirty days after notice of its termination shall have been given by either party; but should either party be prevented by future action of its legislature from carrying out the terms of this arrangement, the obligations thereof shall thereupon lapse.

It is understood that this agreement is subject to ratification by the Polish Diet.

AGREEMENT BETWEEN RUMANIA AND THE UNITED STATES ACCORDING MOST-FAVORED-NATION-TREATMENT IN CUSTOMS MATTERS¹

Exchange of notes between I. G. Duca, Minister for Foreign Affairs, and W. S. Culbertson, American Minister, Bucharest, February 26, 1926

February 26, 1926.

MR. MINISTER:

I have the honor to make the following statement of my understanding of the agreement reached through recent conversations held at Bucharest on behalf of the Government of the United States and the Government of Rumania with reference to the treatment which the United States shall accord to the commerce of Rumania and which Rumania shall accord to the commerce of the United States.

These conversations have disclosed a mutual understanding between the two governments which is that in respect of import and export duties and other duties and charges affecting commerce, as well as in respect of transit,

¹ U. S. Treaty Series No. 733.

warehousing and other facilities, and the treatment of commercial travelers' samples, the United States will accord to Rumania, and Rumania will accord to the United States, its territories and possessions, unconditional most-favored-nation treatment; and that in the matter of licensing or prohibitions of imports and exports, each country, so far as it at any time maintains such a system, will accord to the commerce of the other treatment as favorable, with respect to commodities, valuations and quantities, as may be accorded to the commerce of any other country.

It is understood that

No higher or other duties shall be imposed on the importation into or disposition in the United States, its territories or possessions, of any articles the produce or manufacture of Rumania than are or shall be payable on like articles the produce or manufacture of any foreign country;

No higher or other duties shall be imposed on the importation into or disposition in Rumania of any articles the produce or manufacture of the United States, its territories or possessions, than are or shall be payable on like articles the produce or manufacture of any foreign country;

Similarly, no higher or other duties shall be imposed in the United States, its territories or possessions, or in Rumania, on the exportation of any articles to the other or to any territory or possession of the other, than are payable on the exportation of like articles to any foreign country;

Every concession with respect to any duty, charge or regulation affecting commerce now accorded or that may hereafter be accorded by the United States or by Rumania, by law, proclamation, decree or commercial treaty or agreement, to the products of any third country will become immediately applicable without request and without compensation to the commerce of Rumania and of the United States and its territories and possessions, respectively;

Provided that this understanding does not relate to

(1) The treatment which the United States accords or may hereafter accord to the commerce of Cuba or any of the territories or possessions of the United States or the Panama Canal Zone, or to the treatment which is or may hereafter be accorded to the commerce of the United States with any of its territories or possessions or to the commerce of its territories or possessions with one another.

(2) Prohibitions or restrictions of a sanitary character or designed to protect human, animal or plant life or regulations for the enforcement of police or revenue laws.

The present arrangement shall become operative on the day of signature, and, unless sooner terminated by mutual agreement, shall continue in force until thirty days after notice of its termination shall have been given by either party; but should either party be prevented by future action of its legislature from carrying out the terms of this arrangement, the obligations thereof shall thereupon lapse.

THE RUSSO-GERMAN TREATY¹

*Signed at Rapallo, April 16, 1922; ratifications exchanged at Berlin
January 31, 1923*

The German Government, represented by Reichsminister Dr. Walther Rathenau, and the Government of the Russian Socialist Federal Soviet Republic, represented by People's Commissary Tchitcherin, have agreed upon the following provisions:

ARTICLE I

The two governments agree that all questions resulting from the state of war between Germany and Russia shall be settled in the following manner:

(a) Both governments mutually renounce repayment for their war expenses and for damages arising out of the war, that is to say, damages caused to them and their nationals in the zone of war operations by military measures, including all requisitions effected in a hostile country. They renounce in the same way repayment for civil damages inflicted on civilians, that is to say, damages caused to the nationals of the two countries by exceptional war legislation or by violent measures taken by any authority of the state of either side.

(b) All legal relations concerning questions of public or private law resulting from the state of war, including the question of the treatment of merchant ships which fell into the hands of the one side or the other during the war, shall be settled on the basis of reciprocity.

(c) Germany and Russia mutually renounce repayment of expenses incurred for prisoners of war. The German Government also renounces repayment of expenses for soldiers of the Red Army interned in Germany. The Russian Government, for its part, renounces repayment of the sums Germany has derived from the sale of Russian Army material brought into Germany by these interned troops.

ARTICLE II

Germany renounces all claims resulting from the enforcement of the laws and measures of the Soviet Republic as it has affected German nationals or their private rights or the rights of the German State itself, as well as claims resulting from measures taken by the Soviet Republic or its authorities in any other way against subjects of the German State or

¹ German text in the *Reichsgesetzblatt*, Teil II, 1922, p. 677. An English translation of the articles, from which the reprint here has been made, appeared in the *Russian Information and Review*, May 15, 1922, Vol. I, No. 16, p. 379. The same *Review* for March 24, 1923, Vol. II, No. 25, p. 397, states that a supplementary understanding to Article I of the Treaty of Rapallo provides that both governments "agree to recognize the findings of the prize courts of both countries during the War of 1914-1918. They agree mutually to return all vessels that were detained, and to support one another's claims for the return of vessels in the possession of other states."

their private rights, provided that the Soviet Republic shall not satisfy similar claims made by any third state.

ARTICLE III

Consular and diplomatic relations between Germany and the Federal Soviet Republic shall be resumed immediately. The admission of consuls to both countries shall be arranged by special agreement.

ARTICLE IV

Both governments agree, further, that the rights of the nationals of either of the two parties on the other's territory as well as the regulation of commercial relations shall be based on the most-favored-nation principle. This principle does not include rights and facilities granted by the Soviet Government to another Soviet State or to any State that formerly formed part of the Russian Empire.

ARTICLE V

The two governments undertake to give each other mutual assistance for the alleviation of their economic difficulties in the most benevolent spirit. In the event of a general settlement of this question on an international basis, they undertake to have a preliminary exchange of views. The German Government declares itself ready to facilitate, as far as possible, the conclusion and the execution of economic contracts between private enterprises in the two countries.

ARTICLE VI

Article 1, paragraph (b), and Article 4 of this agreement will come into force after the ratification of this document. The other articles will come into force immediately.

Done in duplicate at Rapallo, April 16, 1922.

(Signed) RATHENAU.

(Signed) TCHITCHERIN.

AGREEMENT SUPPLEMENTARY TO THE RUSSO-GERMAN TREATY OF RAPALLO¹

*Signed at Berlin, November 5, 1922; ratifications exchanged at Berlin, •
October 26, 1923*

The plenipotentiary of the German Government, namely, the Secretary of the Ministerial Department of the Foreign Office, Baron von Maltzan; and .

The plenipotentiary of the Government of the Socialist Soviet Republic of the Ukraine, namely, Mr. Waldemar Aussem, member of the All-Ukrainean Central Executive Committee; as well as

The plenipotentiary of the Governments of the Socialist Soviet Republic of White Russia, Socialist Soviet Republic of Georgia, Socialist Soviet

¹ Translated from the *Reichsgesetzblatt*, 1923, Teil II, p. 315.

Republic of Azerbaijan, Socialist Soviet Republic of Armenia, the Republic of the Far East, namely, the accredited representative and ambassador of the Russian Socialist Federal Soviet Republic to Berlin, Mr. Nicolaus Krestinski,

Having exchanged their full powers, found to be in good and due form, have agreed on the following provisions:

ARTICLE 1

The treaty concluded at Rapallo, April 12, 1922, between the German Reich and the Russian Socialist Federal Soviet Republic shall also apply correspondingly to the relations between the German Reich, on the one part, and the Socialist Soviet Republics (1) Ukraine, (2) White Russia, (3) Georgia, (4) Azerbaijan, (5) Armenia, (6) the Republic of the Far East (hereafter called the R. S. F. S. R.), on the other part. As regards Article 2 of the Treaty of Rapallo, this provision shall apply to the laws and measures mentioned therein and applied up to April 16, 1922.

ARTICLE 2

The German Government and the Government of the Socialist Soviet Republic of the Ukraine have agreed to reserve the question of determining and settling those claims which might have accrued to the advantage of the German Government or the Government of the Ukraine after the termination of the state of war between Germany and the Ukraine, and particularly during the period in which the German troops remained in the Ukraine.

ARTICLE 3

The citizens of one of the contracting parties residing in the territory of the other party shall enjoy there complete legal protection of their persons, according to the provisions of international law and the general laws of the state of their residence.

The German citizens who, observing the passport provisions, may go into the territory of the states allied with the R. S. F. S. R., or are there at present, are guaranteed the inviolability of their entire property which they carried along, as well as of that acquired in the territory of the states allied with the R. S. F. S. R. provided the acquisition and use of the same correspond to the laws of the state of residence, or to the specially concluded agreements with competent organs of that state. The laws and regulations of the states allied with the R. S. F. S. R. shall govern exportation of the property acquired in the states allied with the R. S. F. S. R., in so far as no special agreements may be made.

ARTICLE 4

The governments of the states allied with the R. S. F. S. R. shall have the right to establish public commercial bureaus (*Handelsstellen*) in Germany

in those places where they have diplomatic representatives or consular offices; these bureaux shall enjoy the same legal status as the Russian commercial representation in Germany. In that event it shall be their duty to recognize as binding for them all legal actions undertaken either by the chief of their commercial bureau, or by those charged with authority by him, the latter acting within the limits of the powers conferred upon them.

ARTICLE 5

In order to facilitate the economic relations between the German Reich on the one part, and the states allied with the R. S. F. S. R., on the other part, the following principles are agreed upon:

(1) The treaties concluded between German subjects, German juridical persons or German firms, on the one part, and between the governments of the states allied with the R. S. F. S. R., or their public commercial bureaux mentioned in Article 4, or the natural or juridical persons, or firms belonging to these states, on the other part, as well as the economic results of these treaties, shall be treated according to the laws of the state in which the treaties are concluded and shall be subject to the jurisdiction of this state. This provision does not apply to the treaties concluded before the enforcement of this present treaty.

(2) The treaties mentioned under number (1) may be provided with an arbitral clause. They may also contain an agreement regarding the submission to jurisdiction (*Gerichtsbareit*) of one of the contracting states.

ARTICLE 6

The states allied with the R. S. F. S. R. shall permit those persons, who are of German nationality, but have lost it, as well as their wives and children, to depart, provided that with it [this departure] the moving to Germany is provably connected.

ARTICLE 7

The representation of both parties and their personnel shall be obliged to refrain from agitation or propaganda directed against the government or public institutions of their state of residence.

ARTICLE 8

This treaty may, in consideration of the preceding Articles 3-6 and the corresponding application of Article 4 of the Treaty of Rapallo, be abrogated within a period of three months.

The abrogation may be announced by Germany to any individual state allied with the R. S. F. S. R., effecting only its [Germany's] relation with this state. And *vice versa*, the abrogation may be announced by any individual state to Germany, effecting only the relation between this individual state and Germany.

If the abrogated treaty is not replaced by a commercial treaty, the gov-

ernments concerned shall have the right to establish, after the expiration of the period allowed for the abrogation, a commission consisting of five members for settling the business transactions which had already been started. The members of the commission shall be considered as agents without diplomatic privileges and must settle the business transactions at the utmost within six months after the expiration of this treaty.

ARTICLE 9

This treaty shall be ratified. Special documents of ratifications shall be exchanged between Germany on the one part, and every individual state allied with the R. S. F. S. R. on the other part.¹ With this exchange the treaty becomes in force between the states which take part in the exchange.

Done in seven originals.

Berlin, November 5, 1922.

(Sig.) MALTZAN.

(Sig.) W. AUSSEM.

(Sig.) N. KRESTINSKI.

AGREEMENT BETWEEN GERMANY AND THE UNION OF SOVIET SOCIALIST REPUBLICS, WITH EXCHANGE OF NOTES²

Signed at Berlin, April 24, 1926

The German Government and the Government of the Union of Soviet Socialist Republics, prompted by the desire to do everything in their power that would contribute to the preservation of general peace, and being convinced that the interests of the German people and of the peoples of the U. S. S. R. demand a continuous collaboration that is based upon full confidence, have agreed to consolidate the friendly relations existing between them by the conclusion of a special agreement and have appointed for this purpose as their plenipotentiaries:

The German Government—Mr. Gustav Stresemann, Minister of Foreign Affairs;

The Government of the U. S. S. R.—Mr. Nicholas Krestinsky, Plenipotentiary Representative of the U. S. S. R. in Germany,

¹ The exchange of ratifications between Germany and the Soviet Republics of Ukraine, White Russia, Georgia, Azerbaijan, and Armenia, took place in Berlin, October 26, 1923, between the accredited representatives of the German Reich and the Union of the Socialist Soviet Republics, in which are now united the Russian Socialist Federal Soviet Republic and the states of Ukraine, White Russia, Georgia, Azerbaijan, and Armenia. At the exchange of documents, the accredited representative of the Union of the Socialist Soviet Republics declared that an exchange of ratifications with the Republic of the Far East was not necessary since this republic, by a decision of its national assembly of November 15, 1922, has become dissolved and is now a part of the Russian Socialist Federal Soviet Republic, so that the treaty of Rapallo of April 16, 1922, applies forthwith also to the territory of the former Republic of the Far East. (*Reichsgesetzblatt*, 1923, Teil II, p. 409.)

² Russian Review, Washington, June, 1926, pp. 145-147.

Who, having communicated to each other their respective full powers, found to be in good and due form, have agreed upon the following articles:

ARTICLE I

The Rapallo Treaty¹ remains the basis of the mutual relations between Germany and the U. S. S. R.

The German Government and the Government of the U. S. S. R. will maintain friendly contact for the purpose of coördination on all questions of a political or economic nature concerning equally both parties.

ARTICLE II

If, notwithstanding its peaceful attitude, one of the contracting parties is attacked by a third party or a combination of third parties, the second contracting party will observe neutrality during the entire duration of the conflict.

ARTICLE III

If in connection with a conflict such as mentioned in Article II, or if at a time when neither of the contracting parties will be involved in an armed conflict, a coalition will be formed among third countries for the purpose of submitting one of the contracting parties to an economic or financial boycott, the second contracting party will not join such a coalition.

ARTICLE IV

The present agreement is subject to ratification, and the exchange of ratifications will take place in Berlin.

The agreement will come into force on the day of the exchange of ratifications, and will remain in force for five years. In due time, before the expiration of that term, both contracting parties will come to an understanding as to the subsequent forms of their mutual political relations.

Signatures: G. STRESEMANN.
N. KRESTINSKY.

Berlin, April 24, 1926.

Note of the German Government

On the basis of the negotiations concerning the conclusion of the agreement signed today between the German Government and the Government of the Soviet Union, I take the liberty to make the following statement in the name of the German Government:

1. During the negotiations concerning the conclusion of the agreement and in signing it, both governments, in agreement with each other, were proceeding from the opinion that the principle, stipulated by them in Article I, Paragraph 2, of the agreement, concerning coördination on all questions of a political and economic character in which both countries are interested, will

¹Printed, *supra*, pp. 116-117.

essentially contribute to the preservation of general peace. At any rate, both governments, in their negotiations, will be guided by the point of view of the necessity of preserving general peace.

2. In this spirit both governments were also discussing questions of principle connected with Germany's entrance into the League of Nations. The German Government is convinced that its membership in the League of Nations cannot be an obstacle to the friendly development of German-Soviet relations. In accordance with its fundamental idea, the League of Nations is called upon to settle international differences in a peaceful and just manner. The German Government has decided to collaborate with all its might in the carrying out of this idea. Should, nevertheless—a possibility which the German Government does not admit—The League of Nations ever develop tendencies which in contradiction to this fundamental idea of peace would be directed solely against the U. S. S. R., the German Government will counteract such tendencies with all its power.

3. The German Government proceeds from the point of view that this fundamental line of German policy with regard to the U. S. S. R. cannot be prejudiced by a loyal observation of the duties incumbent on Germany after her entrance into the League of Nations under Articles 16 and 17 of the Constitution of the League of Nations concerning the application of sanctions. According to these articles, the question of applying sanctions against the U. S. S. R. irrespective of other considerations could arise only in the case that the U. S. S. R. would start an aggressive war against a third country. In this connection it must be borne in mind that the question as to whether in an armed conflict with a third country the Soviet Union is the attacking party, could be decided with binding power with regard to Germany only with Germany's agreement, and that thus an accusation brought forth in this respect against the U. S. S. R. by the other countries, if considered as unfounded by Germany, will not bind Germany to take part in the measures undertaken on the basis of Article 16. With regard to the question whether Germany can in general take part in the application of sanctions and to what extent it can do so in a concrete case, the German Government refers to the note of December 1, 1925, concerning the interpretation of Article 16, which was handed to the German delegation simultaneously with the signing of the Locarno pact.¹

4. In order to create a solid basis for the smooth settlement of all questions arising between them, both governments consider it convenient to start immediately negotiations concerning the conclusion of a general agreement for the peaceful settlement of conflicts which might arise between the two parties, particular attention being directed to the possibility of applying arbitration and mediation methods.

G. STRESEMANN.

Berlin, April 24, 1926.

¹Printed in Supplement to this JOURNAL, Vol. 20, p. 32 (January, 1926).

Note of the Government of the U. S. S. R. to the German Minister of Foreign Affairs

'In acknowledging the receipt of the note which you sent me on the basis of the negotiations concerning the conclusion of the agreement, signed today, between the Government of the U. S. S. R. and the German Government, I beg to inform you, in the name of the Government of the U. S. S. R., as follows:

1. In the negotiations concerning the conclusion of the agreement, and in signing it, both governments were in mutual agreement proceeding from the opinion that the principle—laid down in Article 1, Paragraph 2, of the agreement—relating to the coördination on all questions of a political or an economic character concerning both countries, will contribute essentially to the preservation of general peace. At any rate both governments will in their negotiations be guided by the point of view of the necessity of the preservation of general peace.

2. As regards the questions of principle connected with Germany's entrance into the League of Nations, the Government of the Union of S. S. R. takes cognizance of the statements made in paragraphs 2 and 3 of your note.

3. In order to create a solid basis for the smooth settlement of all questions arising between them, both governments consider it convenient to start immediately negotiations for the conclusion of a general agreement for the peaceful settlement of the conflicts that might arise between both parties, particular attention being directed to the possibility of applying arbitration and mediation methods.

N. KRESTINSKY.

Berlin, April 24, 1926.

AGREEMENT BETWEEN NORWAY AND SWEDEN RELATING TO AIR NAVIGATION ¹

*Signed at Stockholm, May 26, 1923; ratifications exchanged
July 30, 1923*

His Majesty the King of Sweden, and His Majesty the King of Norway, having agreed to conclude an agreement relating to air navigation between Sweden and Norway, have for this purpose named as their authorized representatives:

His Majesty the King of Sweden: His Minister for Foreign Affairs, His Excellency Carl Fredrik Wilhelm Hederstierna;

His Majesty the King of Norway: His Envoy Extraordinary and Minister Plenipotentiary in Stockholm, Johan Herman Wollebaek,

Who, duly authorized thereto, have agreed as follows:

¹Sweden's Agreements with Foreign Powers, 1923, No. 10. Translation furnished by the American Legation at Stockholm, through the courtesy of the Department of State.

ARTICLE 1

The contracting states mutually acknowledge each other's sovereignty over the entire air space above their land and sea territory.

ARTICLE 2

Each of the two contracting states undertakes in time of peace to allow the private and commercial aircraft of the other state liberty of innocent passage above its territory in accordance with the conditions set forth in this agreement, and to accord the other state every privilege in connection with admittance to its territory which is granted to any non-contracting state.

ARTICLE 3

The regulations of one of the contracting states governing the aërial navigation of its own aircraft shall also apply to the aircraft of the other state seeking admittance to the territory of the first named state, unless otherwise stipulated in this agreement.

The contracting states will endeavor to arrive at the greatest possible uniformity in the establishment of these regulations.

ARTICLE 4

Each of the two contracting states binds itself to issue regulations, which in a satisfactory manner will assure that, in the event of its aircraft finding itself within the territory of the other state, there will be sufficient insurance to cover compensation claims for damages, which in accordance with the laws of the said other state may accrue to anyone suffering injury to person or property outside the aircraft.

The insurance shall be of such amount and character as that required by the state, in whose territory the air navigation takes place, of its own aircraft while engaged in domestic traffic.

Should one of the contracting states not require insurance of its own aircraft while engaged in domestic traffic, the aircraft of the other state when flying over the territory of the first named state shall nevertheless be covered by the same insurance required for domestic services.

As legitimate insurance the contracting states mutually acknowledge insurance for the purpose issued by a recognized domestic insurance concern, provided the said insurance concern settles claims for compensation in case of damage through a representative in the other state.

ARTICLE 5

Each of the two contracting states shall have the right, for military reasons or for the public security, to forbid or limit the possibility of flight over certain areas of its territory under the penalty provided by its laws, but subject to the reservation that in this respect the same regulations shall

apply to the private aircraft of both states. The other state shall be notified of such regulations.

ARTICLE 6

Any aircraft of one of the two contracting states, which finds itself over a prohibited area of the other state, shall immediately give the distress signal prescribed in the air navigation rules (Regulation D), and shall land as soon as possible outside the prohibited territory at one of the aërodromes in that state. The state authorities may, however, demand immediate landing at another place if such landing can take place without danger.

ARTICLE 7

Any aircraft bears the nationality of the state in whose air navigation register it is entered according to Regulation A. I.e.

Certificate of registry issued by the proper authority in the home country shall be recognized as legitimate evidence of the aircraft's nationality.

ARTICLE 8

For admittance of aircraft to the aircraft register of one of the contracting states, domestic ownership is required. If the owner is a domestic corporation of a state, its headquarters must be in that state, and 23 [*sic*, two-thirds] of its directors shall be resident citizens thereof and be shareholders in the corporation, which shall further fulfill all requirements of the said state.

Air craft, which no longer fulfill these demands, shall be removed from the register without delay.

ARTICLE 9

No aircraft can legitimately be registered in more than one of the contracting states.

ARTICLE 10

The contracting states shall, through the proper registration authorities, exchange monthly notices of aircraft entered on or removed from their air navigation registers.

ARTICLE 11

Aircraft employed in traffic between the two contracting states shall, for the purpose of identification while en route, be equipped with the necessary nationality and registry symbols as well as other signs and posters prescribed in accordance with Regulation A.¹

ARTICLE 12

Aircraft employed in traffic between the two contracting states shall be equipped with a certificate of air-worthiness, issued or approved by the state

¹ Omitted from this SUPPLEMENT.

whose nationality symbol the aircraft bears, in accordance with Regulation B.¹

ARTICLE 13

The crews of aircraft employed in traffic between the two contracting states shall, in accordance with Regulation E,¹ be equipped with certificates issued or approved by the state whose nationality symbol the aircraft carry.

ARTICLE 14

The certificates of air-worthiness and crew certificates issued in accordance with Regulations B and E by one of the contracting states shall be recognized as legitimate by the other state.

Either of the two contracting states may, however, in case of traffic over its own territory, refuse to recognize a certificate held by one of its own citizens which has been issued or approved by the other state.

ARTICLE 15

No aircraft of either of the contracting states may carry radio equipment without special permission from the state of its registry. Radio apparatus may only be used by a member of the crew in possession of a special certificate issued by the state of registry. Aircraft fulfilling these regulations may carry radio equipment when traveling over territory of the other contracting state.

Each of the contracting states may decide that certain kinds of aircraft shall carry radio equipment. Regulations to this effect shall be the same for aircraft of both contracting states.

Regulations governing the use of radio equipment shall as far as possible be the same in both of the contracting states.

The air navigation authorities in the contracting states may enter into agreement in regard to mutual regulations in this connection.

ARTICLE 16

Aircraft of one of the contracting states may travel without landing over the territory of the other state. In such travel, aircraft shall follow the route indicated by the state over whose territory the travel takes place. If it is necessary for the public safety, or if there are sufficient grounds to suspect that the laws of the state over which the travel takes place are being violated, the aircraft may be ordered by means of the signals prescribed in the air navigation rules (Regulation D) ¹ to land at an aërodrome, or, elsewhere, if this is possible.

Aircraft traveling from the territory of one of the contracting states to that of the other shall likewise follow the route indicated by the state in question, and shall land at one of the aërodromes, which are specified in the tariff supplement attached to this agreement.

¹Omitted from this SUPPLEMENT.

The designation of specific international air routes by ground markings requires the sanction of the state over which air travel is to take place. For the use without landing of once established international air routes no fee can be demanded by one of the contracting states of aircraft belonging to the other.

ARTICLE 17

For the establishment of regular passenger and freight traffic between the contracting states, the permission of the state with which it is intended to establish such connection is required.

The contracting states bind themselves, however, reciprocally to grant such permission to each others' aircraft, provided that the aircraft of both states be admitted on an equal footing to the use of the connection established.

The transmission of mail will be arranged for by separate agreement between the contracting states.

ARTICLE 18

Each of the two contracting states shall have the right to reserve to its own aircraft all passenger and freight traffic between two points within its own territory. If permission to engage in such traffic is granted to aircraft of any other country, the two contracting states agree to assure each other treatment as most-favored-nation in this respect.

If one of the contracting states institutes modifications of the kind in question, which also affect the other state, its own aircraft may be subject to the same modifications in the other state even though that state does not impose corresponding modifications upon other foreign aircraft.

Modifications and reservations of the character here mentioned shall be made public and the other state notified thereof.

ARTICLE 19

While on transit travel, including landings and necessary delays within the territory of one of the contracting states, any aircraft of the other contracting state may avoid confiscation for infringement of patent rights by furnishing bond, the size of which, in the absence of mutual agreement, shall be determined without delay by the proper authorities of the district in question.

ARTICLE 20

Aircraft of either of the contracting states shall upon travel between the two countries be equipped with:

- (a) Certificate of registry, according to Regulation A;
- (b) Certificate of air-worthiness, according to Regulation B;
- (c) Crew certificate, according to Regulation E;
- (d) List of names of passengers;

- (e) List of goods carried, etc., according to tariff supplement attached to this agreement;
 - (f) Log-books etc., according to Regulation C;
 - (g) Certificate issued by the domestic air navigation authorities to the effect that insurance has been taken out in accordance with Article 4;
 - (h) Possibly a special permit to carry radio equipment.
- The aircraft's documents shall indicate who is in command on board.

ARTICLE 21

The log-books shall be kept for a period of two years after the date of the last entry.

ARTICLE 22

Upon the departure or landing of aircraft the proper authorities in the contracting states shall have the right to inspect the aircraft and determine the character of the documents carried.

ARTICLE 23

The aircraft of one of the contracting states shall enjoy the same right to assistance in landing or in case of distress in the other country that domestic aircraft enjoy.

With respect to the rescue at sea of damaged aircraft, the contracting states shall, to the greatest possible extent, apply the existing regulations for saving of shipwrecked vessels.

ARTICLE 24

Every aërodrôme in the contracting states commercially open for public use by domestic aircraft shall likewise be open to the aircraft of the other contracting state.

Tariff rates, as well as other stipulations for using such aërodromes, shall be the same in both of the contracting states.

ARTICLE 25

Each of the two contracting states binds itself to cause arrangements to be made to assure that every aircraft traveling within its territory and every aircraft bearing its national symbol, whether traveling within the territory of the other state or within international territory, shall observe the air navigation rules (Regulation D), and to prosecute violations of such rules.

ARTICLE 26

Transportation of explosives, military arms or ammunition by aircraft between the contracting states is forbidden.

ARTICLE 27

Each of the contracting states may forbid or regulate the carriage or use of photographic apparatus on aircraft.

The contracting states shall notify each other of such regulations.

ARTICLE 28

Each of the contracting states may, in consideration for the public safety, impose limiting regulations upon the transportation of other goods than those mentioned in Articles 26 and 27.

The contracting states shall notify each other of such regulations.

ARTICLE 29

All limiting regulations of the nature mentioned in Article 28 shall be equally effective with respect to the private aircraft of both of the contracting states.

ARTICLE 30

All other than military aircraft or aircraft used exclusively in the service of the state as customs, mail or police aircraft, shall be considered private aircraft and are, therefore, subject to all the regulations contained in this agreement.

ARTICLE 31

Every aircraft, which is under the command of a military personage commissioned thereto, shall be considered as military.

ARTICLE 32

The military aircraft of one of the contracting states may neither fly over nor land on the territory of the other contracting state without special permission. If such permission is given, the military aircraft in question shall, in the absence of any other agreement, enjoy the extraterritorial rights usually accorded foreign men-of-war. A military aircraft lacking such a permit, which is forced to land or requested or ordered to land, cannot claim extraterritorial rights on such grounds.

ARTICLE 33

Further agreements shall be concluded between the contracting states mutually with respect to the question of when customs and police aircraft may cross the borders. Extraterritorial rights cannot in any case be granted such aircraft.

ARTICLE 34

This agreement is completed by Regulations A-E,¹ which become effective simultaneously with the agreement and continue in effect for the same period of time.

¹ Omitted from this SUPPLEMENT.

The above-mentioned regulations may be altered or completed by agreement between the air navigation authorities of the two contracting states.

ARTICLE 35

The contracting states shall, in so far as circumstances permit, endeavor to coöperate with respect to:

- (a) Meterological investigations;
- (b) Publishing of similar air navigation maps and the establishing of a common principle governing orientation marks on the ground;
- (c) The use of radio connections in air service and the establishing of necessary radio stations.

The air navigation authorities in the contracting states may make agreements concerning mutual rules in connection with subjects mentioned under (a) and (b).

ARTICLE 36

The air navigation authorities of the contracting states shall, except in so far as they are vested with decisive authority by this agreement, receive and prepare proposals for alterations in this agreement, and in general handle all questions relating to air traffic between the contracting states.

ARTICLE 37

Each of the contracting states binds itself to accord the aircraft of the other contracting state arriving in, departing from or traveling within its territory, as well as the cargoes carried by them, the same treatment accorded to its own aircraft.

Each of the contracting states binds itself to extend to the other contracting state every privilege extended to a third state with respect to the above.

General rules concerning the relation of the customs authorities to aircraft are specified in a supplement to this agreement,¹ which shall be considered a part of the agreement itself.

ARTICLE 38

Aircraft and their crews, passengers, goods, necessities and provisions shall in observance of the regulations of this agreement, be subject to the existing laws of the country of their sojourn relating to air traffic, customs or other fees and transportation of goods or passengers, as well as to any other pertinent laws or ordinances there in force.

ARTICLE 39

In time of war the regulations of this agreement shall not limit the freedom of action of the contracting states as belligerents or neutrals.

¹*Infra*, pp. 131-133.

ARTICLE 40

Disputes between the contracting states regarding the interpretation or application of this agreement and the regulations annexed thereto shall, unless they can be settled by direct negotiation between the two states, be decided by the Permanent Court of International Justice of the League of Nations.

ARTICLE 41

This agreement shall be ratified and the ratifications exchanged in Stockholm as soon as possible.

The agreement shall be effective from the day upon which ratifications are exchanged. It may be cancelled upon six months' notice given by either of the contracting states.

ARTICLE 42

In witness whereof the authorized representatives of the two contracting states have hereunto affixed their names and seals.

Executed in duplicate in Stockholm, May 26, 1923.

CARL HEDERSTIERNA (Sweden) (SEAL.)

J. H. WOLLEBAEK (Norway) (SEAL.)

TARIFF SUPPLEMENT

Par. 1. Unless otherwise stipulated in *Par. 8*, each aircraft of one of the contracting states shall, upon arrival in the other state, land at, and, upon departure from that state, leave from one of the following names placed, called customs aërodromes:

- (1) All aircraft with the exception of seaplanes:
 - (a) in Sweden: Stockholm, Östersund, Karlstad, Göteborg and Malmö;
 - (b) in Norway: Kjeller's aërodrome and Vernez' drilling field.
- (2) Seaplanes:
 - (a) In Sweden: Stockholm, Östersund, Karlstad, Strömstad, Göteborg, Hälsingborg and Malmö;
 - (b) In Norway: All harbors having customs authorities with the exception of those coming under the regulations regarding prohibited territories.

Par. 2. The Swedish border shall be crossed by Norwegian aircraft in the neighborhood of the customs aërodromes mentioned in *Par. 1*, with the exception of those coming under the regulations regarding prohibited territories. After the border has been passed, aircraft when arriving from a westerly direction, at such a height that signals can be observed, pass over the nearest of the following places: Östersund, Karlstad, Strömstad, Göteborg, Hälsingborg or Malmö; and when arriving from an easterly direction, Stockholm, or, if landing does not take place there, they shall continue along the route which may be indicated.

The Norwegian border may be crossed by Swedish aircraft at any point not included under the regulations regarding prohibited territories. Aircraft

shall follow the route indicated when traveling within Norwegian territory.

Par. 3. Each of the contracting states reserves the right to change or complete the regulations mentioned in *Pars. 1* and *2* upon giving three months' notice of such action to the other state.

Par. 4. Aircraft crossing the border from necessity at other than the designated places, shall land at the next customs aërodrome on its way. Should aircraft be forced to land before reaching a customs aërodrome, the pilot shall notify the nearest customs authorities either direct or by reporting to the nearest police.

The pilot shall be required to describe in detail the necessity of such entry or forced landing.

The aircraft may again proceed only upon the approval of the customs authorities in question. After inspection by them or by the police authorities for them, the log-book shall be stamped and notations made on the cargo list mentioned in *Par. 6* of any divergencies from regulations found. The pilot shall be notified of the customs aërodrome to which he must apply for customs inspection.

Par. 5. Before departure to, and immediately after arrival from, a foreign country the pilot shall show his log-book, as well as the cargo list mentioned in *Par. 6*, to the authorities of the aërodrome.

Par. 6. The pilot shall be required to furnish a detailed cargo list (Form No. 1, attached)¹ covering goods, necessities and provisions carried.

The senders shall be required to furnish detailed advices (Form No. 2, attached)¹ of goods sent. Cargo lists shall correspond with advices.

Moreover, all the special regulations in each country relating to the issuance of custom papers for aircraft and cargo shall be observed.

Par. 7. Before the departure of aircraft the customs authorities shall inspect the cargo lists and advices, conduct the prescribed visits and search and sign the log-books and cargo lists. Signatures shall be accompanied by seals. Goods requiring it shall be sealed and notation made on the cargo lists.

Advices made by senders shall be kept on file in the country of departure for future control of the cargo lists in case of necessity.

Upon arrival the customs authorities shall make sure that the seals are unbroken, receive the goods to be unloaded there for inspection and sign the log-books. In case of aircraft proceeding further to other stations, the cargo lists are returned to the pilots after being signed, otherwise they are kept. Should the seals be found broken and there is cause to believe that they were broken in the other state, the proper authorities shall be notified.

Necessaries and provisions shall be exempt from duty at the discretion of the customs authorities.

Goods or other articles may not be loaded or unloaded without the permission of the customs authorities.

¹Omitted from this SUPPLEMENT.

Par. 8. An exception to the general rules may be made in the case of certain aircraft, especially mail-carrying aircraft, aircraft belonging to air transportation companies, and aircraft belonging to a recognized domestic air navigation society that does not conduct general passenger and freight traffic, which may be exempt from the necessity of landing at the customs aërodromes and be allowed instead to proceed from one given station to another where customs inspection will take place.

Such aircraft may be required to cross the borders within given territories and to exhibit signals of identification agreed upon.

Par. 9. Aircraft of one of the contracting states landing within the territory of the other state is in principle subject to the payment of duty if that state imposes such a duty.

If such aircraft is to be taken out of the country again, exemption from or refund of duty shall be decided in accordance with the laws of the said state in this respect.

As soon as a combination of air navigation societies has been effected between the contracting states, their aircraft shall have the privilege of existing decrees relating to the use of special pass cards (*Triptyques*).

Par. 10. Goods, necessities and provisions carried by aircraft shall be subject to the same customs regulations that apply to articles transported by other means than aircraft.

Par. 11. If goods are exported by aircraft from customs' stores, or under claim for refund of or exemption from duty or other import or domestic fees, the sender shall upon request furnish proof that the goods have arrived in the other state. The exemptions applicable in similar cases with respect to goods transported by rail or water shall, however, apply here also. If upon arrival the goods do not correspond with the cargo list, the proper authorities in the country of exportation shall be notified thereof.

Par. 12. Aircraft of one of the contracting states in transit over the territory of the other state in order to reach its destination, without intention of landing, shall be exempt from the customs landing regulations, provided it follows the prescribed route in accordance with Article 16, par. 1, and, if required to do so, gives proper signals of identification.

If a landing within the other territory is planned, the aircraft shall be required to land at one of the given customs aërodromes, the name of which shall be inserted in the log-book before departure.

Par. 13. When penalty is imposed for violation of prescribed regulations, notice of such violation shall be given the customs authorities of the state to which the aircraft belongs.

Par. 14. The regulations contained in this supplement do not apply to military aircraft visiting the other contracting state because of the special permission clause of Article 32 of the agreement, nor to customs and police aircraft (Article 33 of the agreement).

OFFICIAL DOCUMENTS

ADDITIONAL EXTRADITION TREATY BETWEEN THE UNITED STATES AND CUBA¹
signed at Habana, January 14, 1926; ratifications exchanged, June 18, 1926

The United States of America and the Republic of Cuba, being desirous of enlarging the list of crimes on account of which extradition may be granted with regard to criminal acts committed in the United States of America or in the Republic of Cuba under the treaty concluded between both nations for the extradition of fugitives from justice, signed April 6, 1904, and the protocol amending the Spanish text of said treaty, signed on December 6, 1904, with a view to the better administration of justice and the prevention of crime, have resolved to conclude the present additional treaty and have appointed for this purpose as their respective plenipotentiaries:

The President of the United States of America: Mister Enoch H. Crowder, Ambassador Extraordinary and Plenipotentiary of the United States of America in Cuba; and

The President of the Republic of Cuba: Señor Carlos Manuel de Céspedes de Quesada, Secretary of State of the Republic of Cuba.

Who, after having communicated to each other their respective full powers, which were found to be in good and proper form, have agreed to the following articles:

ARTICLE I

Number 10 of the list of crimes contained in Article II of the extradition treaty concluded between the Republic of Cuba and the United States of America is increased by the addition of the crime of immoral abuses made criminal by the laws of both countries, said number being drafted to read as follows:

10. Rape; bigamy; immoral abuses when made criminal by the laws of both countries.

ARTICLE II

The following punishable acts are hereby added to the aforementioned list of crimes:

18. Abortion.

19. Seduction and corruption of minors if made criminal by the laws of both countries.

20. Crimes against bankruptcy and suspension of payment laws if made criminal by the laws of both countries.

21. Crimes against the laws for the suppression of the traffic in narcotic products.

¹ U. S. Treaty Series, No. 737.

22. Infractions of the customs laws or ordinances which may constitute crimes.

ARTICLE III

The present treaty shall be considered as an integral part of the aforementioned extradition treaty signed April 6, 1904, which shall be read as if the list of crimes therein contained had originally comprised the additional crimes added to it under the numbers which appear in articles I and II of this treaty.

ARTICLE IV

This treaty shall be ratified by the high contracting parties in accordance with their respective laws, ratifications to be exchanged in the City of Havana, as soon as it may be possible and it shall take effect from the date of the exchange of ratifications and shall remain in force for a period of six months after either of the high contracting parties shall have given notice of a desire to terminate it to the other party.

In witness whereof, the plenipotentiaries above mentioned have signed the two originals of the present treaty and have affixed their respective seals thereto.

Done in two copies of the same text and legal force in the English and Spanish languages in the City of Havana, on this fourteenth day of January, nineteen hundred and twenty-six.

[SEAL] ENOCH H. CROWDER

[SEAL] CARLOS MANUEL DE CÉSPEDES

CONVENTION BETWEEN THE UNITED STATES AND CUBA FOR THE PREVENTION OF SMUGGLING OPERATIONS¹

Signed at Habana, March 4, 1926; ratifications exchanged, June 18, 1926

The United States of America and the Republic of Cuba, being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States of America on the subject of alcoholic beverages, have decided to conclude a convention for that purpose and have appointed as their respective plenipotentiaries:

The President of the United States of America, Mister Enoch H. Crowder, Ambassador Extraordinary and Plenipotentiary of the United States of America in Cuba and

The President of the Republic of Cuba, Mister Carlos Manuel de Céspedes y de Quesada, Secretary of State of the Republic of Cuba, who, having communicated to each other their respective full powers, which were found to be in good and proper form, have agreed to the following articles:

¹ U. S. Treaty Series, No. 738.

ARTICLE I

The high contracting parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.

ARTICLE II

The Republic of Cuba agrees:

(1) That it will raise no objection to the boarding of private vessels under the Cuban flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions, in order that inquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions, in violation of the laws there in force. When such inquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions, prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions, for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions, than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

ARTICLE III

No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions, on board Cuban vessels voyaging to or from ports of the United States, its territories or possessions, or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panamá Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall

at any time or place be unladen within the United States, its territories or possessions.

ARTICLE IV

Any claim by a Cuban vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this convention or on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the high contracting parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Permanent Court of Arbitration at The Hague described in the Convention for the Pacific Settlement of International Disputes, concluded at The Hague, October 18, 1907. The arbitral tribunal shall be constituted in accordance with Article 87 (Chapter IV) and with Article 59 (Chapter III) of the said convention. The proceedings shall be regulated by so much of Chapter IV of the said convention and of Chapter III thereof (special regard being had for Articles 70 and 74, but excepting Articles 53 and 54) as the tribunal may consider to be applicable and to be consistent with the provisions of this agreement.

All sums of money which may be awarded by the tribunal on account of any claim shall be paid within eighteen months after the date of the final award without interest and without deduction, save as hereafter specified.

Each government shall bear its own expense. The expenses of the tribunal shall be defrayed by a ratable deduction of the amount of the sums awarded by it, at a rate of five per centum on such sums, or at such lower rate as may be agreed upon between the two governments; the deficiency, if any, shall be defrayed in equal moieties by the two governments.

ARTICLE V

This convention shall be subject to ratification and shall remain in force for a period of one year from the date of exchange of ratifications.

Three months before the expiration of the said period of one year; either of the high contracting parties may give notice of its desire to propose modifications in the terms of the convention.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the convention shall lapse.

If no notice is given on either side of the desire to propose modifications, the convention shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the convention, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the convention shall lapse.

ARTICLE VI

In the event that either of the high contracting parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present convention the said convention shall automatically lapse, and, on such lapse or whenever this convention shall cease to be in force, each high contracting party shall enjoy all the rights which it would have possessed had this convention not been concluded.

The present convention shall be duly ratified by the high contracting parties in accordance with their respective laws; and the ratifications shall be exchanged at the City of Habana as soon as possible.

In witness whereof the plenipotentiaries above mentioned have signed the two originals of the present convention, and have affixed their respective seals thereto.

Done in two copies of the same text and legal force in the English and Spanish languages in the City of Habana, on this fourth day of March, nineteen hundred and twenty-six.

[SEAL] ENOCH H. CROWDER

[SEAL] CARLOS MANUEL DE CÉSPEDES

[EXCHANGE OF NOTES]

[Translation]

[*The Secretary of State of Cuba to the American Ambassador at Habana*]

No. 185

REPUBLICA DE CUBA
SECRETARIA DE ESTADO
Habana, March 4, 1926

MR. AMBASSADOR:

With reference to the convention signed today between the Republic of Cuba and the United States of America to obviate the occurrence of difficulties between both countries arising out of the application of the laws in force in the United States of America relating to alcoholic beverages, and as supplementary to the said convention and to the negotiations and correspondence which we have had on this subject, I have the honor to advise Your Excellency that the Government of the Republic of Cuba understands that in the event of the adherence of the United States of America to the protocol of December 16, 1920, which created the Permanent Court of International Justice at The Hague, the Government of the United States will not refuse to consider modifying the aforementioned convention, or the conclusion of a separate agreement, in which it shall be stipulated that the claims mentioned in Article IV of the said convention, which may not be settled in the manner indicated in the first paragraph of the said article, shall be submitted to the Permanent Court of International Justice instead of to the Permanent Court of Arbitration.

The Government of the Republic of Cuba likewise understands that each time that the authorities of the United States seize any Cuban vessel in conformity with the stipulations contained in Article II of the convention above referred to, the said authorities of the United States shall be obliged to communicate very promptly a notification of what has occurred to the diplomatic representative of the Republic of Cuba in Washington giving the name of the vessel, the place of the occurrence, the circumstances of the case and the reasons therefor.

I hope to have the pleasure of receiving from Your Excellency in the name and on behalf of the Government of the United States of America confirmation of this understanding.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

CARLOS MANUEL DE CÉSPEDES

To His Excellency

General ENOCH H. CROWDER

Ambassador Extraordinary and

Plenipotentiary of the United States of America

etc. etc. etc.

[*The American Ambassador at Habana to the Secretary of State of Cuba*]

No. 675

EMBASSY OF THE UNITED STATES OF AMERICA

Habana, March 4, 1926

EXCELLENCY:

I have the honor to acknowledge the receipt of your note of today's date, in which you were so good as to inform me in connection with the signing this day of the convention between the United States and Cuba to aid in the prevention of the smuggling of intoxicating liquors into the United States that the Government of Cuba understands: (1) That in the event of the adhesion by the Government of the United States to the protocol of December 16, 1920, under which the Permanent Court of International Justice has been created at The Hague, the Government of the United States will not be averse to considering a modification of the said convention, or the making of a separate agreement, providing that claims mentioned in Article IV of that convention which can not be settled in the way indicated in the first paragraph of that article shall be referred to the Permanent Court of International Justice instead of to the Permanent Court of Arbitration; and (2) that in case Cuban vessels are seized by the authorities of the United States under the provisions of Article II of this convention, a notification thereof shall be promptly transmitted to the diplomatic representative of Cuba at Washington, giving the name of the vessel, the place of seizure and a brief statement of the grounds therefor.

Complying with your request for confirmation of these understandings I

have the honor to state that the Cuban Government's understanding of the attitude of the Government of the United States in this respect is correct, and that in the event of the adhesion by the United States to the protocol of December 16, 1920, under which the Permanent Court of International Justice has been created at The Hague, the Government of the United States will not be averse to considering a modification of the convention this day signed, or the making of a separate agreement, providing for the reference of claims mentioned in Article IV of the convention which can not be settled in the way indicated in the first paragraph of that article, to the Permanent Court of International Justice instead of to the Permanent Court of Arbitration.

I also confirm your understanding regarding the notification that is to be given to the diplomatic representative of the Cuban Government at Washington in case Cuban vessels are seized by the authorities of the United States.

Accept, Excellency, the renewed assurance of my highest consideration.

E. H. CROWDER

His Excellency

CARLOS MANUEL DE CÉSPEDES

Secretary of State, Habana

CONVENTION BETWEEN THE UNITED STATES AND CUBA FOR THE SUPPRESSION
OF SMUGGLING OPERATIONS¹

Signed at Habana, March 11, 1926; ratifications exchanged, June 18, 1926

The United States of America and the Republic of Cuba, being desirous of aiding each other in the suppression of smuggling from the territory of one state to the other, have agreed to enter into the present convention and for this purpose have appointed as their respective plenipotentiaries:

The President of the United States of America, Mr. Enoch H. Crowder, Ambassador Extraordinary and Plenipotentiary of the United States of America in Cuba, and

The President of the Republic of Cuba, Mr. Carlos Manuel de Céspedes y de Quesada, Secretary of State of the Republic of Cuba,

Who, having communicated to each other their respective full powers, found to be in due and proper form, have agreed upon the following articles:

ARTICLE I

The high contracting parties agree to aid each other mutually in the manner provided in this convention in the prevention, discovery and punishment of violations of their respective laws, decrees or regulations with respect to the importation of narcotics, intoxicating liquors and other merchandise and the entry and departure of aliens.

¹ U. S. Treaty Series, No. 739.

ARTICLE II

The high contracting parties agree that clearance of shipments of merchandise by water, air, or land, from any of the ports of either country to a port of entry of the other country, shall be denied when such shipment comprises articles the importation of which is prohibited or restricted in the country to which such shipment is destined, unless in this last case there has been a compliance with the requisites demanded by the laws of both countries.

The high contracting parties likewise bind themselves to prevent by all means possible, in accordance with the laws of their respective countries, the clearance of any vessel or vehicle laden with merchandise or having on board aliens destined to any port or place, when it is evident by reason of the tonnage, size, type of vessel, or vehicle, length of the voyage, perils or conditions of navigation or transportation, that it is impossible for it to transport said merchandise or persons to the place of destination mentioned in the request for clearance, or when the repetition of alleged accidents in prior voyages or the antecedents of or information concerning the vessel or vehicle furnish evidence that said merchandise or any part of the same or any person, whatever the ostensible point of destination thereof might be, is intended to be illegally introduced into the territory of the other high contracting party.

When one of the high contracting parties gives notice to the other that it suspects that a specified vessel in a port of the other high contracting party, although ostensibly destined to a port in a third country, is likely to attempt to introduce unlawfully into its territory merchandise or persons whose entry is prohibited or restricted, the other high contracting party shall require from the master or person in charge of the vessel—in accordance with the laws in force in the respective countries and such additional arrangements as may be agreed upon and incorporated in regulations by the appropriate authorities of the high contracting parties—a bond to produce a duly authenticated landing certificate showing such merchandise or persons actually to have been discharged at the port for which the vessel cleared. If any such vessel fails to produce the certificate in proof of lawful discharge of such merchandise or persons or produces a false certificate or evidence the bond shall be forfeited and thereafter for a period of five years the vessel shall be denied the right to enter or clear from any port of either of the high contracting parties with merchandise or persons of the same nature.

ARTICLE III

The high contracting parties agree to employ all reasonable measures—in accordance with the laws of their respective countries—to prevent the departure of persons destined to the territory of either of them who do not effect such departure through the ports of departure and are not destined to a port of entry in the other country.

Persons who are not nationals of either of the high contracting parties and who, coming from the territory of one of them, have attempted to enter unlawfully into the territory of the other and are returned to the territory of the high contracting party from which they proceeded, shall be returned in accordance with the laws in force in the country from which they are returned and such additional arrangements as may be agreed upon or incorporated in regulations by the appropriate authorities of the high contracting parties in order that such persons may be deported to the country of their origin.

ARTICLE IV

Each of the high contracting parties agrees with the other that property of all kinds in its possession which, having been stolen in the territory of the other and brought into its territory, is seized by its customs authorities, shall, when the owners are nationals of the other country, be returned to such owners, subject to satisfactory proof of such ownership and the absence of any collusion, and subject moreover to payment of the expenses of the seizure and detention and to the abandonment of any claims by the owners against the customs, or the customs officers, warehousemen or agents, for compensation or damages for the seizure, detention, warehousing or keeping of the property.

ARTICLE V

The high contracting parties mutually agree that they will exchange or furnish when requested information concerning:

(a) The transportation of cargoes or the shipment of merchandise between said countries,

(b) The names and activities of the persons or vessels which are known to be or suspected of being engaged in the violation of the laws, decrees and regulations mentioned in Article I of this convention,

(c) Persons leaving their territories who are destined to the territory of the other high contracting party or the activities of any persons in either country, when there are reasonable grounds to believe that said persons are engaged in unlawful migration activities or in conspiracies against the other government or its institutions, when not incompatible with the public interest,

(d) The existence and extent of contagious and infectious diseases of persons, animals, birds, or plants, and the ravages of insect pests and the measures being taken to prevent their spreading, and

(e) The study and use of the most effective scientific and administrative methods for the suppression and eradication of said diseases and insect pests.

ARTICLE VI

The officials of the high contracting parties whose duty it may be to prevent or report the violation of the laws, decrees and regulations mentioned

in Article I of this convention are obliged, as soon as they have knowledge of preparations to smuggle or that smuggling has been effected, to do everything possible to prevent the same through all the means within their power in the first case, and to bring the matter to the attention of the proper authorities of their own country, in either of the two circumstances.

The appropriate authorities of each of the high contracting parties shall notify the appropriate authorities of the other high contracting party of violations of the laws, decrees and regulations mentioned in Article I of this convention which have been communicated to them relative to attempts at smuggling or actual smuggling, and will furnish all information which they may have been able to gather with regard to the facts and circumstances thereof.

Such notification and information may be furnished and received only by appropriate officials who shall be designated by the respective governments.

ARTICLE VII

It is agreed that the customs and other administrative officials of the respective governments of the United States of America and of the Republic of Cuba shall upon request be directed to attend as witnesses before the courts in the other country and to produce such available records and files or certified copies thereof as may be considered essential to the trial of civil or criminal cases arising out of violation of the laws, decrees or regulations mentioned in Article I of this convention and as may be produced compatibly with the public interest. It shall be considered in these cases that they appear as agents of their respective governments, to inform the courts on matters upon which questioned, and when they so appear their character as such agents shall be recognized. Original records or documents produced by said officials shall not be retained by the courts, but legal copies thereof may be taken if necessary.

The cost of transcripts of records, depositions, certificates and letters rogatory in civil or criminal cases, and the cost of first-class transportation both ways, maintenance and other proper expenses involved in the attendance of such witnesses shall be paid by the nation requesting their attendance at the time of their discharge by the court from further attendance at such trial. Letters rogatory and commissions shall be executed with all possible despatch and copies of official records or documents shall be certified promptly by the appropriate officials in accordance with the provisions of the laws of the respective countries.

ARTICLE VIII

This convention shall be ratified, and the ratifications shall be exchanged in the City of Habana as soon as possible. The convention shall come into effect at the expiration of ten days from the date of the exchange of ratifications, and it shall remain in force for one year. If upon the expiration of one

year no notice is given by either party of a desire to terminate the same, it shall continue in force until thirty days after either party shall have given notice to the other of a desire to terminate it.

In witness whereof, the plenipotentiaries above mentioned have signed the two originals of the present convention and have affixed their respective seals thereto.

Done in two copies of the same text and legal force in the English and Spanish languages in the City of Habana, this eleventh day of March in the year one thousand nine hundred and twenty-six.

[SEAL] ENOCH H. CROWDER

[SEAL] CARLOS MANUEL DE CÉSPEDES

CONVENTION RELATIVE TO THE DEVELOPMENT OF HYDRAULIC POWER
AFFECTING MORE THAN ONE STATE, AND PROTOCOL OF SIGNATURE¹

*Signed at Geneva, December 9, 1923; registered with the Secretariat of the League of Nations on June 30, 1925, the date of its entry into force*²

Austria, Belgium, the British Empire (with New Zealand), Bulgaria, Chile, Denmark, the Free City of Danzig, France, Greece, Hungary, Italy, Lithuania, Poland, Kingdom of the Serbs, Croats and Slovenes, Siam and Uruguay,

Desirous of promoting international agreement for the purpose of facilitating the exploitation and increasing the yield of hydraulic power;

Having accepted the invitation of the League of Nations to take part in the conference which met at Geneva on November 15, 1923;

Wishing to conclude a general convention for the above purpose,

The high contracting parties have appointed as their plenipotentiaries:

The President of the Austrian Republic:

M. Emerich Pflügl, Resident Minister, representative of the Federal Government accredited to the League of Nations, delegate at the Second General Conference on Communications and Transit;

His Majesty the King of the Belgians:

M. Xavier Neujean, Minister of Railways, Mercantile Marine, Posts, Telegraphs and Telephones of Belgium, delegate at the Second General Conference on Communications and Transit;

¹ League of Nations Treaty Series, No. 905 (Vol. XXXVI, p. 77).

² *Deposit of ratification*: British Empire, April 1, 1925; New Zealand (including the mandated territory of Western Samoa), April 1, 1925; Siam, January 9, 1925; Denmark, April 27, 1926.

Adhesion by His Britannic Majesty as from April 28, 1925, for Southern Rhodesia and Newfoundland, and as from September 22, 1925, for the following colonies, protectorates and mandated territories: British Guiana, British Honduras, Brunei, Federated Malay States (Perak, Selangor, Negri Sembilan, Pahang), Gambia, Gold Coast, Hong Kong, Kenya, Malay States (unfederated Johore, Kedah, Perlis, Kelantan, Trengganu), Nigeria, Northern Rhodesia, Nyasaland, Palestine, Sierra Leone, Straits Settlements, Tanganyika Territory.

(League of Nations Treaty Series, Vol. XXXVI, p. 77; League of Nations Official Journal, June, 1926, p. 731.)

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India:

Sir Hubert Llewellyn Smith, G.C.B., Chief Economic Adviser of the British Government, delegate at the Second General Conference on Communications and Transit;

For the Dominion of New Zealand:

The Honorable Sir James Allen, K.C.B., High Commissioner for New Zealand in the United Kingdom;

His Majesty the King of the Bulgarians:

M. D. Mikoff, Chargé d'Affaires at Berne;

The President of the Republic of Chile:

M. Francisco Rivas Vicuña, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council, to the President of the Czechoslovak Republic, to the President of the Austrian Federal Republic and to His Serene Highness the Governor of Hungary, delegate at the Second General Conference on Communications and Transit;

His Majesty the King of Denmark:

M. P. A. Holck-Colding, Director of Section at the Ministry of Public Works, member of the Advisory and Technical Committee for Communications and Transit, delegate at the Second General Conference on Communications and Transit;

The President of the Polish Republic (for the Free City of Danzig):

Professor Bohdan Winiarski, vice-chairman of the Advisory and Technical Committee for Communications and Transit, delegate at the Second General Conference on Communications and Transit;

The President of the French Republic:

M. Maurice Sibille, Member of Parliament, member of the Advisory and Technical Committee for Communications and Transit, delegate at the Second General Conference on Communications and Transit;

His Majesty the King of Hellenes:

M. A. Politis, technical representative of the Hellenic Government in Paris, delegate at the Second General Conference on Communications and Transit; and

- M. Demetre G. Phocas, captain in the Hellenic navy, delegate at the Second General Conference on Communications and Transit;

His Serene Highness the Governor of Hungary:

M. Emile de Walter, Ministerial Counsellor at the Royal Hungarian Ministry for Foreign Affairs, delegate at the Second General Conference on Communications and Transit;

His Majesty the King of Italy;

M. Paolo Bignami, former Under-Secretary of State, former Member of the Chamber of Deputies, delegate at the Second General Conference on Communications and Transit;

The President of the Republic of Lithuania:

M. C. Dobkevicius, Counsellor at the Lithuanian Legation in Paris, delegate at the Second General Conference on Communications and Transit;

The President of the Polish Republic:

Professor Bohdan Winiarski, vice-chairman of the Advisory and Technical Committee for Communications and Transit, delegate at the Second General Conference on Communications and Transit;

His Majesty the King of the Serbs, Croats, and Slovenes:

M. B. Voukovitch, Director of the State Railways, delegate at the Second General Conference on Communications and Transit;

His Majesty the King of Siam:

M. Phya Sanpakitch Preecha, Envoy Extraordinary and Minister Plenipotentiary to His Majesty the King of Spain and to his Majesty the King of Italy, delegate at the Second General Conference on Communications and Transit;

The President of the Republic of Uruguay:

M. Benjamin Fernandez y Medina, Envoy Extraordinary and Minister Plenipotentiary to His Majesty the King of Spain, chairman of the Advisory and Technical Committee for Communications and Transit;

who, after communicating their full powers, found in good and due form, have agreed as follows:

ARTICLE 1

The present convention in no way affects the right belonging to each state, within the limits of international law, to carry out on its own territory any operations for the development of hydraulic power which it may consider desirable.

ARTICLE 2

Should reasonable development of hydraulic power involve international investigation, the contracting states concerned shall agree to such investigation, which shall be carried out conjointly at the request of any one of them, with a view to arriving at the solution most favorable to their interests as a whole, and to drawing up, if possible, a scheme of development, with due regard for any works already existing, under construction, or projected.

Any contracting state desirous of modifying a programme of development so drawn up shall, if necessary, apply for a fresh investigation, under the conditions laid down in the preceding paragraph.

No state shall be obliged to carry out a programme of development unless it has formally accepted the obligation to do so.

ARTICLE 3

If a contracting state desires to carry out operations for the development of hydraulic power, partly on its own territory and partly on the territory of

another contracting state or involving alterations on the territory of another contracting state, the states concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be executed.

ARTICLE 4

If a contracting state desires to carry out operations for the development of hydraulic power which might cause serious prejudice to any other contracting state, the states concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be executed.

ARTICLE 5

The technical methods adopted in the agreements referred to in the foregoing articles shall, within the limits of the national legislation of the various countries, be based exclusively upon considerations which might legitimately be taken into account in analogous cases of development of hydraulic power affecting only one state, without reference to any political frontier.

ARTICLE 6

The agreements contemplated in the foregoing articles may provide, amongst other things, for

- (a) General conditions for the establishment, upkeep and operation of the works;
- (b) Equitable contributions by the states concerned towards the expenses, risks, damage and charges of every kind incurred as a result of the construction and operation of the works, as well as for meeting the cost of upkeep;
- (c) The settlement of questions of financial coöperation;
- (d) The methods for exercising technical control and securing public safety;
- (e) The protection of sites;
- (f) The regulation of the flow of water;
- (g) The protection of the interests of third parties;
- (h) The method of settling disputes regarding the interpretation or application of the agreements.

ARTICLE 7

The establishment and operation of works for the exploitation of hydraulic power shall be subject, in the territory of each state, to the laws and regulations applicable to the establishment and operation of similar works in that state.

ARTICLE 8

So far as regards international waterways which, under the terms of the general Convention on the Régime of Navigable Waterways of Inter-

national Concern,^{*} are contemplated as subject to the provisions of that convention, all rights and obligations which may be derived from agreements concluded in conformity with the present convention shall be construed subject to all rights and obligations resulting from the general convention and the special instruments which have been or may be concluded, governing such navigable waterways.

ARTICLE 9

This convention does not prescribe the rights and duties of belligerents and neutrals in time of war. The convention shall, however, continue in force in time of war so far as such rights and duties permit.

ARTICLE 10

This convention does not entail in any way the withdrawal of facilities which are greater than those provided for in the statute and which have been granted to international traffic by rail under conditions consistent with its principles. This convention also entails no prohibition of such grant of greater facilities in the future.

ARTICLE 11

The present convention does not in any way affect the rights and obligations of the contracting states arising out of former conventions or treaties on the subject-matter of the present convention, or out of the provisions on the same subject-matter in general treaties, including the Treaties of Versailles, Trianon and other treaties which ended the war of 1914-18.

ARTICLE 12

If a dispute arise between contracting states as to the application or interpretation of the present statute, and if such dispute cannot be settled either directly between the parties or by some other amicable method of procedure, the parties to the dispute may submit it for an advisory opinion to the body established by the League of Nations as the advisory and technical organization of the members of the League in matters of communications and transit, unless they have decided or shall decide by mutual agreement to have recourse to some other advisory, arbitral or judicial procedure.

The provisions of the preceding paragraph shall not be applicable to any state which represents that the development of hydraulic power would be seriously detrimental to its national economy or security.

ARTICLE 13

It is understood that this convention must not be interpreted as regulating in any way rights and obligations *inter se* of territories forming part of or placed under the protection of the same sovereign state, whether or not these territories are individually contracting states.

^{*} Printed in Supplement to this JOURNAL, Vol. 18, pp. 151, 165.

ARTICLE 14

Nothing in the preceding articles is to be construed as affecting in any way the rights or duties of a contracting state as member of the League of Nations.

ARTICLE 15

The present convention, of which the French and English texts are both authentic, shall bear this day's date, and shall be open for signature until October 31, 1924, by any state represented at the conference of Geneva, by any member of the League of Nations and by any states to which the Council of the League of Nations shall have communicated a copy of the convention for this purpose.

ARTICLE 16

The present convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the League of Nations, who shall notify their receipt to every state signatory of or acceding to the convention.

ARTICLE 17

On and after November 1, 1924, the present convention may be acceded to by any state represented at the conference of Geneva, by any member of the League of Nations, or by any state to which the Council of the League of Nations shall have communicated a copy of the convention for this purpose.

Accession shall be effected by an instrument communicated to the Secretary-General of the League of Nations to be deposited in the archives of the Secretariat. The Secretary-General shall at once notify such deposit to every state signatory of or acceding to the convention.

ARTICLE 18

The present convention will not come into force until it has been ratified in the name of three states. The date of its coming into force shall be the ninetieth day after the receipt by the Secretary-General of the League of Nations of the third ratification. Thereafter, the present convention will take effect in the case of each party ninety days after the receipt of its ratification or of the notification of its accession.

In compliance with the provisions of Article 18 of the Covenant of the League of Nations, the Secretary-General will register the present convention upon the day of its coming into force.

ARTICLE 19

A special record shall be kept by the Secretary-General of the League of Nations showing, with due regard to the provisions of Article 21, which of the parties have signed, ratified, acceded to or denounced the present convention. This record shall be open to the members of the League at all times;

it shall be published as often as possible, in accordance with the directions of the Council.

ARTICLE 20

Subject to the provisions of Article 11 above, the present convention may be denounced by any party thereto after the expiration of five years from the date when it came into force in respect of that party. Denunciation shall be effected by notification in writing addressed to the Secretary-General of the League of Nations. Copies of such notification shall be transmitted forthwith by him to all the other parties, informing them of the date on which it was received.

A denunciation shall take effect one year after the date on which the notification thereof was received by the Secretary-General and shall operate only in respect of the notifying state.

ARTICLE 21

Any state signing or adhering to the present convention may declare, at the moment either of its signature, ratification or accession, that its acceptance of the present convention does not include any or all of its colonies, overseas possessions, protectorates, or overseas territories, under its sovereignty or authority, and may subsequently accede, in conformity with the provisions of Article 17, on behalf of any such colony, overseas possession, protectorate or territory excluded by such declaration.

Denunciation may also be made separately in respect of any such colony, overseas possession, protectorate or territory, and the provisions of Article 20 shall apply to any such denunciation.

ARTICLE 22

A request for the revision of the present convention may be made at any time by one-third of the contracting states.

In faith whereof the above-named plenipotentiaries have signed the present convention.

Done at Geneva, the ninth day of December, one thousand nine hundred and twenty-three, in a single copy which shall remain deposited in the archives of the Secretariat of the League of Nations.

Austria:	EMERICH PFLÜGL.
Belgium:	XAVIER NEUJEAN.
British Empire:	H. LLEWELLYN SMITH.
New Zealand:	J. ALLEN.
Bulgaria:	D. MIKOFF.
Chile:	FRANCISCO RIVAS VICUÑA
Denmark:	A. HOLCK-COLDING.

Free City of Danzig:

BOHDAN WINIARSKI.

France:

MAURICE SIBILLE.

Subject to the reservation contained in Article 21 of the present convention to the effect that its provisions do not apply to the various protectorates, colonies, possessions or overseas territories under the sovereignty or authority of the French Republic.
(Translation).

Greece:

A. POLITIS.

D. G. PHOCAS.

Hungary:

WALTER

Italy:

PAOLO BIGNAMI.

Lithuania:

DOBKEVICIUS.

Poland:

BOHDAN WINIARSKI.

Kingdom of the Serbs, Croats and Slovenes:

B. VOUKOVITCH.

Siam:

PHYA SANPAKITCH PREECHA.

Uruguay:

B. FERNANDEZ Y MEDINA.

PROTOCOL OF SIGNATURE OF THE CONVENTION RELATING TO THE DEVELOPMENT OF HYDRAULIC POWER AFFECTING MORE THAN ONE STATE

At the moment of signing the convention of today's date relating to the development of hydraulic power affecting more than one state, the undersigned, duly authorized, have agreed, as follows:

The provisions of the convention do not in any way modify the responsibility or obligations imposed on states, as regards injury done by the construction of works for development of hydraulic power, by the rules of international law.

The present protocol will have the same force, effect and duration as the convention of today's date, of which it is to be considered as an integral part.

In faith whereof the above-named plenipotentiaries have signed the present protocol.

Done at Geneva, the ninth day of December, one thousand nine hundred and twenty-three, in a single copy, which will remain deposited in the archives of the Secretariat of the League of Nations; certified copies will be transmitted to all the states represented at the conference.

[Here follow the same signatures as those appearing at the end of the convention]

TREATY OF FRIENDSHIP, COMMERCE AND CONSULAR RIGHTS BETWEEN THE UNITED STATES AND ESTHONIA¹

Signed at Washington, December 23, 1925; ratifications exchanged, May 22, 1926

The United States of America and the Republic of Esthonia, desirous of strengthening the bond of peace which happily prevails between them, by

¹ U. S. Treaty Series, No. 736.

arrangements designed to promote friendly intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the peoples thereof, have resolved to conclude a treaty of friendship, commerce and consular rights and for that purpose have appointed as their plenipotentiaries.

The President of the United States of America:

Frank B. Kellogg, Secretary of State of the United States of America; and

The Government of the Republic of Esthonia:

Antonius Piip., Envoy Extraordinary and Minister Plenipotentiary,

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles:

ARTICLE I

The nationals of each of the high contracting parties shall be permitted to enter, travel and reside in the territories of the other; to exercise liberty of conscience and freedom of worship; to engage in scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; to engage in every trade, vocation and profession not reserved exclusively to nationals of the country; to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes; to employ agents of their choice, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the state of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established.

The nationals of either high contracting party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.

The nationals of each high contracting party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each high contracting party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

Nothing contained in this treaty shall be construed to affect existing statutes of either of the high contracting parties in relation to the immigration of aliens or the right of either of the high contracting parties to enact such statutes.

ARTICLE II

With respect to that form of protection granted by national, state or provincial laws establishing civil liability for injuries or for death, and giving to relatives or heirs or dependents of an injured party a right of action or a pecuniary benefit, such relatives or heirs or dependents of the injured party, himself a national of either of the high contracting parties and within any of the territories of the other, shall regardless of their alienage or residence outside of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions.

ARTICLE III

The dwellings, warehouses, manufactories, shops, and other places of business, and all premises thereto appertaining of the nationals of each of the high contracting parties in the territories of the other, used for any purposes set forth in Article I, shall be respected. It shall not be allowable to make a domiciliary visit to, or search of any such buildings and premises, or there to examine and inspect books, papers or accounts, except under the conditions and in conformity with the forms prescribed by the laws, ordinances and regulations for nationals.

ARTICLE IV

Where, on the death of any person holding real or other immovable property or interests therein within the territories of one high contracting party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other high contracting party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either high contracting party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether residents or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the high contracting party within whose territories such property may be or belong shall be liable to pay in like cases.

ARTICLE V

The nationals of each of the high contracting parties in the exercise of the right of freedom of worship, within the territories of the other, as hereinabove provided, may, without annoyance or molestation of any kind by reason of their religious belief or otherwise, conduct services either within their own houses or within any appropriate buildings which they may be at liberty to erect and maintain in convenient situations, provided their teachings or practices are not contrary to public order or public morals; and they may also be permitted to bury their dead according to their religious customs in suitable and convenient places established and maintained for the purpose, subject to the reasonable mortuary and sanitary laws and regulations of the place of burial.

ARTICLE VI

In the event of war between either high contracting party and a third state, such party may draft for compulsory military service nationals of the other having a permanent residence within its territories and who have formally, according to its laws, declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent party within sixty days after a declaration of war.

ARTICLE VII

Between the territories of the high contracting parties there shall be freedom of commerce and navigation. The nationals of each of the high contracting parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation. Nothing in this treaty shall be construed to restrict the right of either high contracting party to impose, on such terms as it may see fit, prohibitions or restrictions of a sanitary character designed to protect human, animal, or plant life, or regulations for the enforcement of police or revenue laws.

Each of the high contracting parties binds itself unconditionally to impose no higher or other duties or conditions and no prohibition on the importation of any article, the growth, produce or manufacture of the territories of the other than are or shall be imposed on the importation of any like article, the growth, produce or manufacture of any other foreign country.

Each of the high contracting parties also binds itself unconditionally to impose no higher or other charges or other restrictions or prohibitions on goods exported to the territories of the other high contracting party than are imposed on goods exported to any other foreign country.

Any advantage of whatsoever kind which either high contracting party may extend to any article, the growth, produce, or manufacture of any

other foreign country shall simultaneously and unconditionally, without request and without compensation, be extended to the like article, the growth, produce or manufacture of the other high contracting party.

All articles which are or may be legally imported from foreign countries into ports of the United States or are or may be legally exported therefrom in vessels of the United States may likewise be imported into those ports or exported therefrom in Esthonian vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported or exported in vessels of the United States; and, reciprocally, all articles which are or may be legally imported from foreign countries into the ports of Esthonia or are or may be legally exported therefrom in Esthonian vessels may likewise be imported into these ports or exported therefrom in vessels of the United States without being liable to any other or higher duties or charges whatsoever than if such articles were imported or exported in Esthonian vessels.

With respect to the amount and collection of duties on imports and exports of every kind, each of the two high contracting parties binds itself to give to the nationals, vessels and goods of the other the advantage of every favor, privilege or immunity which it shall have accorded to the nationals, vessels and goods of a third state, whether such favored state shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treatment. Every such favor, privilege or immunity which shall hereafter be granted the nationals, vessels or goods of a third state shall simultaneously and unconditionally, without request and without compensation, be extended to the other high contracting party, for the benefit of itself, its nationals and vessels.

The stipulations of this article do not extend to the treatment which is accorded by the United States to the commerce of Cuba under the provisions of the commercial convention concluded by the United States and Cuba on December 11, 1902, or any other commercial convention which hereafter may be concluded by the United States with Cuba, or to the commerce of the United States with any of its dependencies and the Panama Canal Zone under existing or future laws, or to the treatment which Esthonia accords or may hereafter accord to the commerce of Finland, Latvia, Lithuania, Russia, and / or to the states in custom or economic union with Esthonia, or to all of those states, so long as such special treatment is not accorded to any other state.

ARTICLE VIII

The nationals and merchandise of each high contracting party within the territories of the other shall receive the same treatment as nationals and merchandise of the country with regard to internal taxes, transit duties, charges in respect to warehousing and other facilities and the amount of drawbacks and bounties.

ARTICLE IX

No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels. Such equality of treatment shall apply reciprocally to the vessels of the two countries respectively from whatever place they may arrive and whatever may be their place of destination.

ARTICLE X

Merchant vessels and other privately owned vessels under the flag of either of the high contracting parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other high contracting party and on the high seas, be deemed to be the vessels of the party whose flag is flown.

ARTICLE XI

Merchant vessels and other privately owned vessels under the flag of either of the high contracting parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other high contracting party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the high contracting parties is exempt from the provisions of this article and from the other provisions of this treaty, and is to be regulated according to the laws of each high contracting party in relation thereto. It is agreed, however, that the nationals of either high contracting party shall within the territories of the other enjoy with respect to the coasting trade the most favored nation treatment.

ARTICLE XII

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, national, state or provincial, of either high contracting party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other high contracting party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity

on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

The right of such corporations and associations of either high contracting party so recognized by the other to establish themselves within its territories, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such party as expressed in its national, state, or provincial laws.

ARTICLE XIII

The nationals of either high contracting party shall enjoy within the territories of the other, reciprocally and upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other state with respect to the organization of and participation in limited liability and other corporations and associations, for pecuniary profit or otherwise, including the rights of promotion, incorporation, purchase and ownership and sale of shares and the holding of executive or official positions therein. In the exercise of the foregoing rights and with respect to the regulation or procedure concerning the organization or conduct of such corporations or associations, such nationals shall be subjected to no condition less favorable than those which have been or may hereafter be imposed upon the nationals of the most favored nation. The rights of any of such corporations or associations as may be organized or controlled or participated in by the nationals of either high contracting party within the territories of the other to exercise any of their functions therein, shall be governed by the laws and regulations, national, state or provincial, which are in force or may hereafter be established within the territories of the party wherein they propose to engage in business. The foregoing stipulations do not apply to the organization of and participation in political associations.

The nationals of either high contracting party shall, moreover, enjoy within the territories of the other, reciprocally and upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other state with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain of the other.

ARTICLE XIV

Commercial travelers representing manufacturers, merchants and traders domiciled in the territories of either high contracting party shall on their entry into and sojourn in the territories of the other party and on their departure therefrom be accorded the most favored nation treatment in respect of customs and other privileges and of all charges and taxes of whatever denomination applicable to them or to their samples.

ARTICLE XV

There shall be complete freedom of transit through the territories including territorial waters of each high contracting party on the routes most convenient for international transit, by rail, navigable waterway, and canal, other than the Panama Canal and waterways and canals which constitute international boundaries, to persons and goods coming from or going through the territories of the other high contracting party, except such persons as may be forbidden admission into its territories or goods of which the importation may be prohibited by law. Persons and goods in transit shall not be subjected to any transit duty, or to any unnecessary delays or restrictions, and shall be given national treatment as regards charges, facilities, and all other matters.

Goods in transit must be entered at the proper custom house, but they shall be exempt from all customs or other similar duties.

All charges imposed on transport in transit shall be reasonable, having regard to the conditions of the traffic.

ARTICLE XVI

Each of the high contracting parties agrees to receive from the other, consular officers in those of its ports, places and cities, where it may be convenient and which are open to consular representatives of any foreign country.

Consular officers of each of the high contracting parties shall after entering upon their duties, enjoy reciprocally in the territories of the other all the rights, privileges, exemptions and immunities which are enjoyed by officers of the same grade of the most favored nation. As official agents, such officers shall be entitled to the high consideration of all officials, national or local, with whom they have official intercourse in the state which receives them.

The governments of each of the high contracting parties shall furnish free of charge the necessary exequatur of such consular officers of the other as present a regular commission signed by the chief executive of the appointing state and under its great seal; and they shall issue to a subordinate or substitute consular officer duly appointed by an accepted superior consular officer with the approbation of his government, or by any other competent officer of that government, such documents as according to the laws of the respective countries shall be requisite for the exercise by the appointee of the consular function. On the exhibition of an exequatur, or other document issued in lieu thereof to such subordinate, such consular officer shall be permitted to enter upon his duties and to enjoy the rights, privileges and immunities granted by this treaty.

ARTICLE XVII

Consular officers, nationals of the state by which they are appointed, shall be exempt from arrest except when charged with the commission of

offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty thereof to punishment. Such officers shall be exempt from military billetings, and from service of any military or naval, administrative or police character whatsoever.

In criminal cases the attendance at the trial by a consular officer as a witness may be demanded by the prosecution or defence. The demand shall be made with all possible regard for the consular dignity and the duties of the officer; and there shall be compliance on the part of the consular officer.

Consular officers shall be subject to the jurisdiction of the courts in the state which receives them in civil cases, subject to the proviso, however, that when the officer is a national of the state which appoints him and is engaged in no private occupation for gain, his testimony shall be taken orally or in writing at his residence or office and with due regard for his convenience. The officer should, however, voluntarily give his testimony at the trial whenever it is possible to do so without serious interference with his official duties.

ARTICLE XVIII

Consular officers, including employees in a consulate, nationals of the state by which they are appointed other than those engaged in private occupations for gain within the state where they exercise their functions shall be exempt from all taxes, national, state, provincial and municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the territories of the state within which they exercise their functions. All consular officers and employees, nationals of the state appointing them shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services.

Lands and buildings situated in the territories of either high contracting party, of which the other high contracting party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, national, state, provincial and municipal, other than assessments levied for services or local public improvements by which the premises are benefited.

ARTICLE XIX

Consular officers may place over the outer door of their respective offices the arms of their state with an appropriate inscription designating the official office. Such officers may also hoist the flag of their country on their offices including those situated in the capitals of the two countries. They may likewise hoist such flag over any boat or vessel employed in the exercise of the consular function.

The Consular offices and archives shall at all times be inviolable. They shall under no circumstances be subjected to invasion by any authorities of

any character within the country where such offices are located. Nor shall the authorities under any pretext make any examination or seizure of papers or other property deposited within a consular office. Consular offices shall not be used as places of asylum. No consular officers shall be required to produce official archives in court or testify as to their contents.

Upon the death, incapacity, or absence of a consular officer having no subordinate consular officer at his post, secretaries or chancellors, whose official character may have previously been made known to the government of the state where the consular function was exercised, may temporarily exercise the consular function of the deceased or incapacitated or absent consular officer; and while so acting shall enjoy all the rights, prerogatives and immunities granted to the incumbent.

ARTICLE XX

Consular officers, nationals of the state by which they are appointed, may, within their respective consular districts, address the authorities, national, state, provincial or municipal, for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise. Complaint may be made for the infraction of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative, a consul general or the consular officer stationed at the capital may apply directly to the government of the country.

ARTICLE XXI

Consular officers may, in pursuance of the laws of their own country, take, at any appropriate place within their respective districts, the depositions of any occupants of vessels of their own country, or of any national of, or of any person having permanent residence within the territories of, their own country. Such officers may draw up, attest, certify and authenticate unilateral acts, deeds, and testamentary dispositions of their countrymen, and also contracts to which a countryman is a party. They may draw up, attest, certify and authenticate written instruments of any kind purporting to express or embody the conveyance or encumbrance of property of any kind within the territory of the state by which such officers are appointed, and unilateral acts, deeds, testamentary dispositions and contracts relating to property situated, or business to be transacted within, the territories of the state by which they are appointed, embracing unilateral acts, deeds, testamentary dispositions or agreements executed solely by nationals of the state within which such officers exercise their functions.

Instruments and documents thus executed and copies and translations thereof, when duly authenticated under his official seal by the consular officer shall be received as evidence in the territories of the contracting parties as original documents or authenticated copies, as the case may be, and

shall have the same force and effect as if drawn by and executed before a notary or other public officer duly authorized in the country by which the consular officer was appointed; provided always that such documents shall have been drawn and executed in conformity to the laws and regulations of the country where they are designed to take effect.

ARTICLE XXII

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

When an act committed on board of a private vessel under the flag of the state by which the consular officer has been appointed and within the territorial waters of the state to which he has been appointed constitutes a crime according to the laws of that state, subjecting the person guilty thereof to punishment as a criminal, the consular officer shall not exercise jurisdiction except in so far as he is permitted to do so by the local law.

A consular officer may freely invoke the assistance of the local police authorities in any matter pertaining to the maintenance of internal order on board of a vessel under the flag of his country within the territorial waters of the state to which he is appointed, and upon such a request the requisite assistance shall be given.

A consular officer may appear with the officers and crews of vessels under the flag of his country before the judicial authorities of the state to which he is appointed to render assistance as an interpreter or agent.

ARTICLE XXIII

In case of the death of a national of either high contracting party in the territory of the other without having in the territory of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the state of which the deceased was a national of the fact of his death, in order that necessary information may be forwarded to the parties interested.

In case of the death of a national of either of the high contracting parties without will or testament, in the territory of the other high contracting party, the consular officer of the state of which the deceased was a national and within whose district the deceased made his home at the time of death, shall, so far as the laws of the country permit and pending the appointment of an administrator and until letters of administration have been granted, be deemed qualified to take charge of the property left by the decedent for the

preservation and protection of the same. Such consular officer shall have the right to be appointed as administrator within the discretion of a tribunal or other agency controlling the administration of estates provided the laws of the place where the estate is administered so permit.

Whenever a consular officer accepts the office of administrator of the estate of a deceased countryman, he subjects himself as such to the jurisdiction of the tribunal or other agency making the appointment for all necessary purposes to the same extent as a national of the country where he was appointed.

ARTICLE XXIV

A consular officer of either high contracting party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called workmen's compensation laws or other like statutes provided he remit any funds so received through the appropriate agencies of his government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.

ARTICLE XXV

A consular officer of either high contracting party shall have the right to inspect within the ports of the other high contracting party within his consular district, the private vessels of any flag destined or about to clear for ports of the country appointing him in order to observe the sanitary conditions and measures taken on board such vessels, and to be enabled thereby to execute intelligently bills of health and other documents required by the laws of his country, and to inform his government concerning the extent to which its sanitary regulations have been observed at ports of departure by vessels destined to its ports, with a view to facilitating entry of such vessels therein.

ARTICLE XXVI

Each of the high contracting parties agrees to permit the entry free of all duty of all furniture, equipment and supplies intended for official use in the consular offices of the other, and to extend to such consular officers of the other and their families and suites as are its nationals, the privilege of entry free of duty of their baggage and all other personal property, accompanying the officer to his post; provided, nevertheless, that no article, the importation of which is prohibited by the law of either of the high contracting parties, may be brought into its territories. Personal property imported by consular officers, their families or suites during the incumbency of the officers in office shall be accorded the customs privileges and exemptions accorded to consular officers of the most favored nation.

It is understood, however, that the privileges of this article shall not be extended to consular officers who are engaged in any private occupation for

gain in the countries to which they are accredited, save with respect to governmental supplies.

ARTICLE XXVII

All proceedings relative to the salvage of vessels of either high contracting party wrecked upon the coast of the other shall be directed by the consular officer of the country to which the vessel belongs and within whose district the wreck may have occurred. Pending the arrival of such officer, who shall be immediately informed of the occurrence, the local authorities shall take all necessary measures for the protection of persons and the preservation of wrecked property. The local authorities shall not otherwise interfere than for the maintenance of order, the protection of the interests of the salvors, if these do not belong to the crews that have been wrecked and to carry into effect the arrangements made for the entry and exportation of the merchandise saved. It is understood that such merchandise is not to be subjected to any custom house charges, unless it be intended for consumption in the country where the wreck may have taken place.

The intervention of the local authorities in these different cases shall occasion no expense of any kind, except such as may be caused by the operations of salvage and the preservation of the goods saved, together with such as would be incurred under similar circumstances by vessels of the nation.

ARTICLE XXVIII

Subject to any limitation or exception hereinabove set forth, or hereafter to be agreed upon, the territories of the high contracting parties to which the provisions of this treaty extend shall be understood to comprise all areas of land, water, and air over which the parties respectively claim and exercise dominion as sovereign thereof, except the Panama Canal Zone.

ARTICLE XXIX

Except as provided in the third paragraph of this article the present treaty shall remain in full force for the term of ten years from the date of the exchange of ratifications, on which date it shall begin to take effect in all of its provisions.

If within one year before the expiration of the aforesaid period of ten years neither high contracting party notifies to the other an intention of modifying by change or omission, any of the provisions of any of the articles in this treaty or of terminating it upon the expiration of the aforesaid period, the treaty shall remain in full force and effect after the aforesaid period and until one year from such a time as either of the high contracting parties shall have notified to the other an intention of modifying or terminating the treaty.

The fifth paragraph of Article VII and Articles IX and XI shall remain in force for twelve months from the date of exchange of ratification, and if not then terminated on ninety days' previous notice shall remain in force

until either of the high contracting parties shall enact legislation inconsistent therewith when the same shall automatically lapse at the end of sixty days from such enactment, and on such lapse each high contracting party shall enjoy all the rights which it would have possessed had such paragraphs or articles not been embraced in the treaty.

ARTICLE XXX

The present treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington or Tallinn as soon as possible.

In witness whereof the respective plenipotentiaries have signed the same and have affixed their seals thereto.

Done in duplicate, at Washington, this 23rd day of December, 1925.

FRANK B. KELLOGG

[SEAL]

A. PIIP

[SEAL]

PROTOCOL ACCOMPANYING TREATY OF FRIENDSHIP, COMMERCE AND CONSULAR RIGHTS

At the moment of signing the treaty of friendship, commerce and consular rights between the United States of America and the Republic of Esthonia, the undersigned plenipotentiaries duly authorized by their respective governments have agreed as follows:

1. Exemptions from requirements of giving security or making deposits for costs in judicial proceedings (*cautio judicatum solvi*) and the benefit of free judicial aid are not embraced within the provisions of paragraph 3 of Article 1 of the treaty, but in respect of these matters nationals of the United States in Esthonia and nationals of Esthonia in the United States shall be subject to the municipal laws applicable to aliens in general. It is, however, understood that inasmuch as in the United States privileges of this character are regulated largely by the laws of the several States, nationals of the United States, domiciled in states which accord such exemptions and benefits to nationals of Esthonia freely or on the basis of reciprocity shall be accorded the exemptions and benefits authorized by Esthonian law.

2. If either high contracting party shall deem necessary the presentation of an authentic document establishing the identity and authority of commercial travelers representing manufacturers, merchants or traders domiciled in the territories of the other party in order that such commercial traveler may enjoy in its territories the privileges accorded under Article XIV of this treaty, the high contracting parties will agree by exchange of notes on the form of such document and the authorities or persons by whom it shall be issued.

3. The provisions of Article XV do not prevent the high contracting parties from levying on traffic in transit dues intended solely to defray expenses of supervision and administration entailed by such transit, the rate of which shall correspond as nearly as possible with the expenses which such

dues are intended to cover and shall not be higher than the rates charged on other traffic of the same class on the same routes.

4. Wherever the term "consular officer" is used in this treaty it shall be understood to mean Consuls General, Consuls, Vice Consuls and Consular Agents to whom an exequatur or other document of recognition has been issued pursuant to the provisions of paragraph 3 of Article XVI.

5. In addition to consular officers, attachés, chancellors and secretaries, the number of employees to whom the privileges authorized by Article XVIII shall be accorded shall not exceed five at any one post.

In faith whereof the undersigned plenipotentiaries have signed the present protocol and affixed thereto their respective seals.

Done in duplicate at Washington the 23rd day of December, 1925.

FRANK B. KELLOGG

[SEAL]

A. PIIP

[SEAL]

CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN CONCERNING
RIGHTS IN THE CAMEROONS ¹

Signed at London, February 10, 1925; ratifications exchanged, July 8, 1926

Whereas His Britannic Majesty has accepted a mandate for the administration of part of the former German protectorate of the Cameroons, the terms of which have been defined by the Council of the League of Nations as follows:

ARTICLE 1

The territory for which a mandate is conferred upon His Britannic Majesty comprises that part of the Cameroons which lies to the west of the line laid down in the declaration signed on the 10th July, 1919, of which a copy is annexed hereto.

This line may, however, be slightly modified by mutual agreement between His Britannic Majesty's Government and the Government of the French Republic where an examination of the localities shows that it is undesirable, either in the interests of the inhabitants or by reason of any inaccuracies in the map, Moisel 1:300,000, annexed to the declaration, to adhere strictly to the line laid down therein.

The delimitation on the spot of this line shall be carried out in accordance with the provisions of the said declaration.

The final report of the mixed commission shall give the exact description of the boundary line as traced on the spot; maps signed by the commissioners shall be annexed to the report. This report, with its annexes, shall be drawn up in triplicate; one of these shall be deposited in the archives of the League of Nations, one shall be kept by His Britannic Majesty's Government, and one by the Government of the French Republic.

ARTICLE 2

The mandatory shall be responsible for the peace, order and good government of the territory, and for the promotion to the utmost of the material and moral well-being and the social progress of its inhabitants.

ARTICLE 3

The mandatory shall not establish in the territory any military or naval bases, nor erect any fortifications, nor organise any native military force except for local police purposes and for the defence of the territory.

¹ U. S. Treaty Series, No. 743.

ARTICLE 4

The mandatory:

1. Shall provide for the eventual emancipation of all slaves, and for as speedy an elimination of domestic and other slavery as social conditions will allow;
2. Shall suppress all forms of slave trade;
3. Shall prohibit all forms of forced or compulsory labour, except for essential public works and services, and then only in return for adequate remuneration;
4. Shall protect the natives from abuse and measures of fraud and force by the careful supervision of labour contracts and the recruiting of labour;
5. Shall exercise a strict control over the traffic in arms and ammunition and the sale of spirituous liquors.

ARTICLE 5

In the framing of laws relating to the holding or transfer of land, the mandatory shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests of the native population.

No native land may be transferred, except between natives, without the previous consent of the public authorities, and no real rights over native land in favour of non-natives may be created, except with the same consent.

The mandatory shall promulgate strict regulations against usury.

ARTICLE 6

The mandatory shall secure to all nationals of states members of the League of Nations the same rights as are enjoyed in the territory by his own nationals in respect of entry into and residence in the territory, the protection afforded to their person and property, and acquisition of property, movable and immovable, and the exercise of their profession or trade, subject only to the requirements of public order, and on condition of compliance with the local law.

Further, the mandatory shall ensure to all nationals of states members of the League of Nations, on the same footing as to his own nationals, freedom of transit and navigation, and complete economic, commercial and industrial equality; except that the mandatory shall be free to organise essential public works and services on such terms and conditions as he thinks just.

Concessions for the development of the natural resources of the territory shall be granted by the mandatory without distinction on grounds of nationality between the nationals of all states members of the League of Nations, but on such conditions as will maintain intact the authority of the local Government.

Concessions having the character of a general monopoly shall not be granted. This provision does not affect the right of the mandatory to create monopolies of a purely fiscal character in the interest of the territory under mandate and in order to provide the territory with fiscal resources which seem best suited to the local requirements; or, in certain cases, to carry out the development of natural resources, either directly by the state or by a controlled agency, provided that there shall result therefrom no monopoly of the natural resources for the benefit of the mandatory or his nationals, directly or indirectly, nor any preferential advantage which shall be inconsistent with the economic, commercial and industrial equality hereinbefore guaranteed.

The rights conferred by this article extend equally to companies and associations organised in accordance with the law of any of the members of the League of Nations, subject only to the requirements of public order, and on condition of compliance with the local law.

ARTICLE 7

The mandatory shall ensure in the territory complete freedom of conscience and the free exercise of all forms of worship which are consonant with public order and morality; missionaries who are nationals of states members of the League of Nations shall be free to

enter the territory and to travel and reside therein, to acquire and possess property, to erect religious buildings and to open schools throughout the territory; it being understood, however, that the mandatory shall have the right to exercise such control as may be necessary for the maintenance of public order and good government, and to take all measures required for such control.

ARTICLE 8

The mandatory shall apply to the territory any general international conventions applicable to his contiguous territory.

ARTICLE 9

The mandatory shall have full powers of administration and legislation in the area, subject to the mandate. This area shall be administered in accordance with the laws of the mandatory as an integral part of his territory and subject to the above provisions.

The mandatory shall therefore be at liberty to apply his laws to the territory under the mandate, subject to the modifications required by local conditions, and to constitute the territory into a customs, fiscal or administrative union or federation with the adjacent territories under his sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of this mandate.

ARTICLE 10

The mandatory shall make to the Council of the League of Nations an annual report, to the satisfaction of the Council, containing full information concerning the measures taken to apply the provisions of this mandate.

ARTICLE 11

The consent of the Council of the League of Nations is required for any modification of the terms of this mandate.

ARTICLE 12

The mandatory agrees that, if any dispute whatever should arise between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

And whereas the Government of His Britannic Majesty and the Government of the United States of America are desirous of reaching a definite understanding as to the rights of their respective governments and of their nationals in the said territory:

The President of the United States of America and His Britannic Majesty have decided to conclude a convention to this effect, and have named as their plenipotentiaries:

The President of the United States of America:

His Excellency the Honourable Frank B. Kellogg, Ambassador Extraordinary and Plenipotentiary of the United States at London:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India:

The Right Honourable Joseph Austen Chamberlain, M. P., His Majesty's Principal Secretary of State for Foreign Affairs:

who, after having communicated to each other their respective full powers, found in good and due form, have agreed as follows:

ARTICLE 1

Subject to the provisions of the present convention, the United States consents to the administration by His Britannic Majesty, pursuant to the aforesaid mandate, of the former German territory described in Article 1 of the mandate, hereinafter called the mandated territory.

ARTICLE 2

The United States and its nationals shall have and enjoy all the rights and benefits secured under the terms of Articles 2, 3, 4, 5, 6, 7, 8 and 9 of the mandate to members of the League of Nations and their nationals, notwithstanding the fact that the United States is not a member of the League of Nations.

ARTICLE 3

Vested United States property rights in the mandated territory shall be respected and in no way impaired.

ARTICLE 4

A duplicate of the annual report to be made by the mandatory under Article 10 of the mandate shall be furnished to the United States.

ARTICLE 5

Nothing contained in the present convention shall be affected by any modification which may be made in the terms of the mandate as recited above, unless such modification shall have been assented to by the United States.

ARTICLE 6

The extradition treaties and conventions in force between the United States and the United Kingdom shall apply to the mandated territory.

ARTICLE 7

The present convention shall be ratified in accordance with the respective constitutional methods of the high contracting parties. The ratifications shall be exchanged at London as soon as practicable. It shall take effect on the date of the exchange of ratifications.

In witness whereof, the undersigned have signed the present convention, and have thereunto affixed their seals.

Done in duplicate at London, this 10th day of February, 1925.

[SEAL] FRANK B. KELLOGG

[SEAL] AUSTEN CHAMBERLAIN

CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN CONCERNING
RIGHTS IN EAST AFRICA¹

Signed at London, February 10, 1925; ratifications exchanged, July 8, 1926

Whereas His Britannic Majesty has accepted a mandate for the adminis-

¹ U. S. Treaty Series, No. 744.

tration of part of the former German colony of East Africa, the terms of which have been defined by the Council of the League of Nations as follows:

ARTICLE 1

The territory over which a mandate is conferred upon His Britannic Majesty (hereinafter called the mandatory) comprises that part of the territory of the former colony of German East Africa situated to the east of the following line:—

From the point where the frontier between the Uganda Protectorate and German East Africa cuts the River Mavumba, a straight line in a south-easterly direction to point 1640, about 15 kilom. south-south-west of Mount Gabiro;

Thence a straight line in a southerly direction to the north shore of Lake Mohazi, where it terminates at the confluence of a river situated about 2½ kilom. west of the confluence of the River Msilala;

If the trace of the railway on the west of the River Kagera between Bugufi and Uganda approaches within 16 kilom. of the line defined above, the boundary will be carried to the west, following a minimum distance of 16 kilom. from the trace, without, however, passing to the west of the straight line joining the terminal point on Lake Mohazi and the top of Mount Kivisa, point 2100, situated on the Uganda-German East Africa frontier about 5 kilom. south-west of the point where the River Mavumba cuts this frontier;

Thence a line south-eastwards to meet the southern shore of Lake Mohazi;

Thence the watershed between the Taruka and the Mkarange and continuing southwards to the north-eastern end of Lake Mugesera;

Thence the median line of this lake and continuing southwards across Lake Ssake to meet the Kagera;

Thence the course of the Kagera downstream to meet the western boundary of Bugufi;

Thence this boundary to its junction with the eastern boundary of Urundi;

Thence the eastern and southern boundary of Urundi to Lake Tanganyika.

The line described above is shown on the attached British 1: 1,000,000 map. G. S. G. S. 2932, sheet Ruanda and Urundi. The boundaries of Bugufi and Urundi are drawn as shown in the Deutscher Kolonialatlas (Dietrich-Reimer), scale 1: 1,000,000, dated 1906.

ARTICLE 2

Boundary commissioners shall be appointed by His Britannic Majesty and His Majesty the King of the Belgians to trace on the spot the line described in Article 1 above.

In case any dispute should arise in connection with the work of these commissioners, the question shall be referred to the Council of the League of Nations, whose decision shall be final.

The final report by the boundary commission shall give the precise description of this boundary as actually demarcated on the ground; the necessary maps shall be annexed thereto and signed by the commissioners. The report, with its annexes, shall be made in triplicate; one copy shall be deposited in the archives of the League of Nations, one shall be kept by the Government of His Majesty the King of the Belgians and one by the Government of His Britannic Majesty.

ARTICLE 3

The mandatory shall be responsible for the peace, order and good government of the territory, and shall undertake to promote to the utmost the material and moral well-being and the social progress of its inhabitants. The mandatory shall have full powers of legislation and administration.

ARTICLE 4

The mandatory shall not establish any military or naval bases, nor erect any fortifications, nor organise any native military force in the territory except for local police purposes and for the defense of the territory.

ARTICLE 5

The mandatory:

1. Shall provide for the eventual emancipation of all slaves and for as speedy an elimination of domestic and other slavery as social conditions will allow;
2. Shall suppress all forms of slave trade;
3. Shall prohibit all forms of forced or compulsory labour, except for essential public works and services, and then only in return for adequate remuneration;
4. Shall protect the natives from abuse and measures of fraud and force by the careful supervision of labour contracts and the recruiting of labour;
5. Shall exercise a strict control over the traffic in arms and ammunition and the sale of spirituous liquors.

ARTICLE 6

In the framing of laws relating to the holding or transfer of land, the mandatory shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests of the native population.

No native land may be transferred, except between natives, without the previous consent of the public authorities, and no real rights over native land in favour of non-natives may be created, except with the same consent.

The mandatory will promulgate strict regulations against usury.

ARTICLE 7

The mandatory shall secure to all nationals of states members of the League of Nations the same rights as are enjoyed in the territory by his own nationals in respect of entry into and residence in the territory, the protection afforded to their person and property, the acquisition of property, movable and immovable, and the exercise of their profession or trade, subject only to the requirements of public order, and on condition of compliance with the local law.

Further, the mandatory shall ensure to all nationals of states members of the League of Nations, on the same footing as to his own nationals, freedom of transit and navigation, and complete economic, commercial and industrial equality; provided that the mandatory shall be free to organise essential public works and services on such terms and conditions as he thinks just.

Concessions for the development of the natural resources of the territory shall be granted by the mandatory without distinction on grounds of nationality between the nationals of all states members of the League of Nations, but on such conditions as will maintain intact the authority of the local government.

Concessions having the character of a general monopoly shall not be granted. This provision does not affect the right of the mandatory to create monopolies of a purely fiscal character in the interest of the territory under mandate, and in order to provide the territory with fiscal resources which seem best suited to the local requirements; or, in certain cases, to carry out the development of natural resources either directly by the state or by a controlled agency, provided that there shall result therefrom no monopoly of the natural resources for the benefit of the mandatory or his nationals, directly or indirectly, nor any preferential advantage which shall be inconsistent with the economic, commercial and industrial equality hereinbefore guaranteed.

The rights conferred by this article extend equally to companies and associations organised in accordance with the law of any of the members of the League of Nations, subject only to the requirements of public order, and on condition of compliance with the local law.

ARTICLE 8

The mandatory shall ensure in the territory complete freedom of conscience and the free exercise of all forms of worship which are consonant with public order and morality; mis-

sionaries who are nationals of states members of the League of Nations shall be free to enter the territory and to travel and reside therein, to acquire and possess property, to erect religious buildings and to open schools throughout the territory; it being understood, however, that the mandatory shall have the right to exercise such control as may be necessary for the maintenance of public order and good government, and to take all measures required for such control.

ARTICLE 9

The mandatory shall apply to the territory any general international conventions already existing, or which may be concluded hereafter, with the approval of the League of Nations, respecting the slave trade, the traffic in arms and ammunition, the liquor traffic and the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation, railways, postal, telegraphic and wireless communication and industrial, literary and artistic property.

The mandatory shall co-operate in the execution of any common policy adopted by the League of Nations for preventing and combating disease, including diseases of plants and animals.

ARTICLE 10

The mandatory shall be authorised to constitute the territory into a customs, fiscal and administrative union or federation with the adjacent territories under his own sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of this mandate.

ARTICLE 11

The mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information concerning the measures taken to apply the provisions of this mandate.

A copy of all laws and regulations made in the course of the year and affecting property, commerce, navigation of the moral and material well-being of the natives shall be annexed to this report.

ARTICLE 12

The consent of the Council of the League of Nations is required for any modification of the terms of this mandate.

ARTICLE 13

The mandatory agrees that if any dispute whatever should arise between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

States members of the League of Nations may likewise bring any claims on behalf of their nationals for infractions of their rights under this mandate before the said court for decision.

And whereas at its meeting of the 31st August, 1923, the Council of the League of Nations approved certain modifications of Article 1 of the aforesaid mandate, which now reads as follows:

ARTICLE 1

The territory over which a mandate is conferred upon His Britannic Majesty (hereinafter called the mandatory) comprises that part of the territory of the former colony of German East Africa, situated to the east of the following line:—

The mid-stream of the Kagera River from the Uganda boundary to the point where the Kagera River meets the western boundary of Bugufi;

Thence this boundary to its junction with the eastern boundary of Urundi;

Thence the eastern and southern boundary of Urundi to Lake Tanganyika.

And whereas the Government of His Britannic Majesty and the Government of the United States of America are desirous of reaching a definite understanding as to the rights of their respective governments and of their nationals in the said territory:

The President of the United States of America and His Britannic Majesty have decided to conclude a convention to this effect, and have named as their plenipotentiaries:

The President of the United States of America:

His Excellency the Honourable Frank B. Kellogg, Ambassador Extraordinary and Plenipotentiary of the United States at London:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India:

The Right Honourable Joseph Austen Chamberlain, M. P., His Majesty's Principal Secretary of State for Foreign Affairs:

who, after having communicated to each other their respective full powers, found in good and due form, have agreed as follows:

ARTICLE 1

Subject to the provisions of the present convention, the United States consents to the administration by His Britannic Majesty, pursuant to the aforesaid mandate, of the former German territory described in Article 1 of the mandate, hereinafter called the mandated territory.

ARTICLE 2

The United States and its nationals shall have and enjoy all the rights and benefits secured under the terms of Articles 3, 4, 5, 6, 7, 8, 9 and 10 of the mandate to members of the League of Nations and their nationals, notwithstanding the fact that the United States is not a member of the League of Nations.

ARTICLE 3

Vested United States property rights in the mandated territory shall be respected and in no way impaired.

ARTICLE 4

A duplicate of the annual report to be made by the Mandatory under Article 11 of the mandate shall be furnished to the United States.

ARTICLE 5

Nothing contained in the present convention shall be affected by any modification which may be made in the terms of the mandate as recited above, unless such modification shall have been assented to by the United States.

ARTICLE 6

The extradition treaties and conventions in force between the United States and the United Kingdom shall apply to the mandated territory.

ARTICLE 7

The present convention shall be ratified in accordance with the respective constitutional methods of the high contracting parties. The ratifications shall be exchanged at London as soon as practicable. It shall take effect on the date of the exchange of ratifications.

In witness whereof, the undersigned have signed the present convention, and have thereunto affixed their seals.

Done in duplicate at London, this 10th day of February, 1925.

[SEAL] FRANK B. KELLOGG

[SEAL] AUSTEN CHAMBERLAIN

CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN CONCERNING
RIGHTS IN TOGOLAND ¹

Signed at London, February 10, 1925; ratifications exchanged, July 8, 1926

Whereas His Britannic Majesty has accepted a mandate for the administration of part of the former German protectorate of Togoland, the terms of which have been defined by the Council of the League of Nations as follows:

ARTICLE 1

The territory for which a mandate is conferred upon His Britannic Majesty comprises that part of Togoland which lies to the west of the line laid down in the declaration signed on the 10th July, 1919, of which a copy is annexed hereto.

This line may, however, be slightly modified by mutual agreement between His Britannic Majesty's Government and the Government of the French Republic where an examination of the localities shows that it is undesirable, either in the interests of the inhabitants or by reason of any inaccuracies in the map Sprigade 1:200,000 annexed to the declaration, to adhere strictly to the line laid down therein.

The delimitation on the spot of this line shall be carried out in accordance with the provisions of the said declaration.

The final report of the mixed commission shall give the exact description of the boundary line as traced on the spot; maps signed by the commissioners shall be annexed to the report. This report, with its annexes, shall be drawn up in triplicate; one of these shall be deposited in the archives of the League of Nations, one shall be kept by His Britannic Majesty's Government, and one by the Government of the French Republic.

ARTICLE 2

The mandatory shall be responsible for the peace, order and good government of the territory, and for the promotion to the utmost of the material and moral well-being and the social progress of its inhabitants.

ARTICLE 3

The mandatory shall not establish in the territory any military or naval bases, nor erect

¹ U. S. Treaty Series, No. 745.

any fortifications, nor organise any native military force except for local police purposes and for the defence of the territory.

ARTICLE 4

The mandatory:

1. Shall provide for the eventual emancipation of all slaves, and for as speedy an elimination of domestic and other slavery as social conditions will allow;
2. Shall suppress all forms of slave trade;
3. Shall prohibit all forms of forced or compulsory labour, except for essential public works and services, and then only in return for adequate remuneration;
4. Shall protect the natives from abuse and measures of fraud and force by the careful supervision of labour contracts and the recruiting of labour;
5. Shall exercise a strict control over the traffic in arms and ammunition and the sale of spirituous liquors.

ARTICLE 5

In the framing of laws relating to the holding or transfer of land, the mandatory shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests of the native population.

No native land may be transferred, except between natives, without the previous consent of the public authorities, and no real rights over native land in favour of non-natives may be created, except with the same consent.

The mandatory shall promulgate strict regulations against usury.

ARTICLE 6

The mandatory shall secure to all nationals of states members of the League of Nations the same rights as are enjoyed in the territory by his own nationals in respect of entry into and residence in the territory, the protection afforded to their person and property and acquisition of property, movable and immovable, and the exercise of their profession or trade, subject only to the requirements of public order, and on condition of compliance with the local law.

Further, the mandatory shall ensure to all nationals of states members of the League of Nations, on the same footing as to his own nationals, freedom of transit and navigation, and complete economic, commercial and industrial equality, except that the mandatory shall be free to organise essential public works and services on such terms and conditions as he thinks just.

Concessions for the development of the natural resources of the territory shall be granted by the mandatory without distinction on grounds of nationality between the nationals of all states members of the League of Nations, but on such conditions as will maintain intact the authority of the local government.

Concessions having the character of a general monopoly shall not be granted. This provision does not affect the right of the mandatory to create monopolies of a purely fiscal character in the interest of the territory under mandate and in order to provide the territory with fiscal resources which seem best suited to the local requirements; or, in certain cases, to carry out the development of natural resources, either directly by the state or by a controlled agency, provided that there shall result therefrom no monopoly of the natural resources for the benefit of the mandatory or his nationals, directly or indirectly, nor any preferential advantage which shall be inconsistent with the economic, commercial and industrial equality hereinbefore guaranteed.

The rights conferred by this article extend equally to companies and associations organised in accordance with the law of any of the members of the League of Nations, subject only to the requirements of public order, and on condition of compliance with the local law.

ARTICLE 7

The mandatory shall ensure in the territory complete freedom of conscience and the free exercise of all forms of worship which are consonant with public order and morality; missionaries who are nationals of states members of the League of Nations shall be free to enter the territory and to travel and reside therein, to acquire and possess property, to erect religious buildings and to open schools throughout the territory; it being understood, however, that the mandatory shall have the right to exercise such control as may be necessary for the maintenance of public order and good government, and to take all measures required for such control.

ARTICLE 8

The mandatory shall apply to the territory any general international conventions applicable to his contiguous territory.

ARTICLE 9

The mandatory shall have full powers of administration and legislation in the area, subject to the mandate. This area shall be administered in accordance with the laws of the mandatory as an integral part of his territory and subject to the above provisions.

The mandatory shall therefore be at liberty to apply his laws to the territory subject to the mandate with such modifications as may be required by local conditions, and to constitute the territory into a customs, fiscal or administrative union or federation with the adjacent territories under his sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of this mandate.

ARTICLE 10

The mandatory shall make to the Council of the League of Nations an annual report, to the satisfaction of the Council, containing full information concerning the measures taken to apply the provisions of this mandate.

ARTICLE 11

The consent of the Council of the League of Nations is required for any modification of the terms of this mandate.

ARTICLE 12

The mandatory agrees that, if any dispute whatever should arise between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

And whereas the Government of His Britannic Majesty and the Government of the United States of America are desirous of reaching a definite understanding as to the rights of their respective governments, and of their nationals in the said territory:

The President of the United States of America and His Britannic Majesty have decided to conclude a convention to this effect, and have named as their plenipotentiaries:

The President of the United States of America:

His Excellency the Honourable Frank B. Kellogg, Ambassador Extraordinary and Plenipotentiary of the United States at London:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India:

The Right Honourable Joseph Austen Chamberlain, M. P., His Majesty's Principal Secretary of State for Foreign Affairs:

who, after having communicated to each other their respective full powers, found in good and due form, have agreed as follows:

ARTICLE 1

Subject to the provisions of the present convention, the United States consents to the administration by His Britannic Majesty, pursuant to the aforesaid mandate, of the former German territory described in Article 1 of the mandate, hereinafter called the mandated territory.

ARTICLE 2

The United States and its nationals shall have and enjoy all the rights and benefits secured under the terms of Articles 2, 3, 4, 5, 6, 7, 8 and 9 of the mandate to members of the League of Nations and their nationals, notwithstanding the fact that the United States is not a member of the League of Nations.

ARTICLE 3

Vested United States property rights in the mandated territory shall be respected and in no way impaired.

ARTICLE 4

A duplicate of the annual report to be made by the mandatory under Article 10 of the mandate shall be furnished to the United States.

ARTICLE 5

Nothing contained in the present convention shall be affected by any modification which may be made in the terms of the mandate as recited above, unless such modification shall have been assented to by the United States.

ARTICLE 6

The extradition treaties and conventions in force between the United States and the United Kingdom shall apply to the mandated territory.

ARTICLE 7

The present convention shall be ratified in accordance with the respective constitutional methods of the high contracting parties. The ratifications shall be exchanged at London as soon as practicable. It shall take effect on the date of the exchange of ratifications.

In witness whereof, the undersigned have signed the present convention, and have thereunto affixed their seals.

Done in duplicate at London, this 10th day of February, 1925.

[SEAL] FRANK B. KELLOGG

[SEAL] AUSTEN CHAMBERLAIN

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE CIRCULATION OF
AND TRAFFIC IN OBSCENE PUBLICATIONS.¹

Signed at Geneva, September 12, 1923; registered with the Secretariat of the League of Nations, August 7, 1924, on which date the convention came into force.²

Albania, Germany, Austria, Belgium, Brazil, the British Empire (with the Union of South Africa, New Zealand, India and the Irish Free State), Bulgaria, China, Colombia, Costa Rica, Cuba, Denmark, Spain, Finland, France, Greece, Haiti, Honduras, Hungary, Italy, Japan, Latvia, Lithuania, Luxemburg, Monaco, Panama, the Netherlands, Persia, Poland (with Danzig), Portugal, Roumania, Salvador, Kingdom of the Serbs, Croats and Slovenes, Siam, Switzerland, Czechoslovakia, Turkey and Uruguay:

Being equally desirous of making as effective as possible the means of suppressing the circulation of and traffic in obscene publications,

Having accepted the invitation of the Government of the French Republic to take part in a conference, under the auspices of the League of Nations, convened in Geneva on August 31st, 1923, for the examination of the draft convention drawn up in 1910,³ the examination of the observations presented by the various states and the elaboration and signature of the final text of a convention,

Have nominated as their plenipotentiaries for this purpose,

The President of the Supreme Council of Albania:

M. B. Blinishti, Director of the Albanian Secretariat accredited to the League of Nations.

¹ League of Nations Treaty Series, No. 685 (Vol. XXVII, p. 215).

² *Deposit of ratifications*: Bulgaria, July 1, 1924; Italy, July 8, 1924; Siam, July 28, 1924; Albania, Oct. 13, 1924; Spain, Dec. 19, 1924; Austria, Jan. 12, 1925; Germany, May 11, 1925; Monaco, May 11, 1925; Finland, June 29, 1925; Latvia, Oct. 7, 1925; Great Britain and Northern Ireland, New Zealand (including the mandated territory of Western Samoa), Union of South Africa (including the mandated territory of Southwest Africa), India, Dec. 11, 1925 [in accordance with the letter to which the instrument of ratification by His Britannic Majesty was annexed: "... the ratification does not apply to the Dominion of Canada or the Commonwealth of Australia, which have not signed the convention, and that the Irish Free State, which has signed the convention, is, as you will observe, expressly excluded in the instrument of ratification. Further, the ratification does not cover the colonies, overseas possessions, protectorates and territories under His Britannic Majesty's sovereignty or authority which were excluded from Sir Archibald Bodkin's signature. It follows therefore that this ratification is in respect of Great Britain and Northern Ireland, the Dominion of New Zealand (including the mandated territory of Western Samoa), the Union of South Africa (including the mandated territory of Southwest Africa), and India; Switzerland, Jan. 20, 1926; China, Feb. 24, 1926; Free City of Danzig, Mar. 31, 1926; Roumania, June 7, 1926; Belgium, July 31, 1926.

Adhesions: Canada, May 23, 1924; Egypt, Oct. 29, 1924; Peru (*ad referendum*), Sept. 15, 1924; Newfoundland, Southern Rhodesia, Dec. 31, 1925; San Marino, April 21, 1926.

(League of Nations Treaty Series, Vol. XXVII, p. 215, Vol. XXXI, p. 261, Vol. XXXV, p. 315, Vol. XXXIX, p. 190; League of Nations Official Journal, Nov. 1925, p. 1569; Dec. 1925, p. 1725; March, 1926, p. 371; May, 1926, p. 647; and June, 1926, p. 731; Annex to the Supplementary Report on the work of the Council and the Secretariat to the Seventh Assembly of the League, A. 6 (a). 1926. Annex.)

³ Printed in Supplement to this JOURNAL, Vol. 5, p. 167.

The President of the German Reich:

M. Gottfried Aschmann, Counsellor of Legation, in charge of the German Consulate at Geneva.

The President of the Austrian Republic:

M. Emeric Pflügl, Resident Minister, representative of the Federal Government accredited to the League of Nations.

His Majesty the King of the Belgians:

M. Maurice Dullaert, delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of the United States of Brazil:

Dr. Afranio de Mello Franco, President of the Brazilian delegation at the Fourth Assembly of the League of Nations.

His Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas; Emperor of India:

Sir Archibald Bodkin, Director of Public Prosecutions; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications;

Mr. S. W. Harris, C.B., C.V.O., Technical Adviser of the British delegation at the said conference; and
for the Union of South Africa:

The Right Hon. Lord Parmoor, representative of the British Empire on the Council of the League of Nations;

for the Dominion of New Zealand:

The Hon. Sir James Allen, K.C.B., High Commissioner for New Zealand in the United Kingdom;

for India:

Sir Prabhashankar D. Pattani, K.C.I.E.;

for the Irish Free State:

Mr. Michael MacWhite, representative of the Free State accredited to the League of Nations.

His Majesty the King of the Bulgarians:

M. Ch. Kalfoff, Minister for Foreign Affairs, first delegate of Bulgaria at the Fourth Assembly of the League of Nations.

The President of the Chinese Republic:

Mr. Teheng Loh, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Colombia:

M. Francisco José Urrutia, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Costa Rica:

M. Manuel M. de Peralta, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Cuba:

M. Cosme de la Torriente y Peraza, Senator; president of the Cuban delegation at the Fourth Assembly of the League of Nations; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Denmark:

M. A. Oldenburg, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; representative of Denmark accredited to the League of Nations; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Spain:

M. E. de Palacios, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Finland:

M. Urho Toivola, secretary at the Finnish Legation in Paris.

The President of the French Republic:

M. Gaston Deschamps, Deputy; president of the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

M. J. Hennequin, Honorary Director at the Ministry for Home Affairs; substitute delegate at the said conference.

His Majesty the King of the Hellenes:

M. N. Politis, former Minister for Foreign Affairs; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

M. D. E. Castorkis, former Director of Criminal Affairs at the Ministry of Justice; substitute delegate at the said conference.

The President of the Republic of Haiti:

M. Bonamy, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Honduras:

M. Carlos Gutierrez, Chargé d'Affaires in Paris; delegate at the Fourth Assembly of the League of Nations.

His Serene Highness the Governor of Hungary:

M. Zoltán Baranyai, head of the Royal Hungarian Secretariat accredited to the League of Nations; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Italy:

M. Stefano Cavazzoni, Deputy; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the Emperor of Japan:

Mr. Y. Sugimura, assistant head of the Japanese League of Nations Office in Paris.

The President of the Republic of Latvia:

M. Julijs Feldmans, head of the League of Nations Section of the Ministry for Foreign Affairs; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Lithuania:

M. Ignace Jonynas, Director of the Ministry for Foreign Affairs; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

Her Royal Highness the Grand Duchess of Luxemburg:

M. Charles Vermaire, Consul of the Grand-Duchy at Geneva; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Serene Highness the Prince of Monaco:

M. Rodolphe Ellès-Privat, Vice-Consul of the Principality at Geneva; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Panamá:

M. R. A. Amador, Chargé d'Affaires in Paris; delegate at the Fourth Assembly of the League of Nations.

Her Majesty the Queen of the Netherlands:

M. A. de Graaf, president of the Netherlands Committee for the Suppression of the White Slave Traffic; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Imperial Majesty the Shah of Persia:

His Highness Prince Mirza Riza Kahn Arfa-ed-Dovleh, representative of the Imperial Government accredited to the League of Nations; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Polish Republic:

M. F. Sokal, Inspector-General of Labor; delegate at the International

Conference for the Suppression of the Circulation of and Traffic in
Obscene Publications; and
for the Free City of Danzig:

M. J. Modzelewski, Envoy Extraordinary and Minister Plenipotentiary
to the Swiss Federal Council.

The President of the Portuguese Republic.

Dr. Augusto C. d'Almeida Vasconcellos Correa, Minister Plenipotentiary; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Roumania.

M. N. P. Comnène, Envoy Extraordinary and Minister Plenipotentiary
to the Swiss Federal Council.

The President of the Republic of Salvador:

M. J. G. Guerrero, Envoy Extraordinary and Minister Plenipotentiary
to the President of the French Republic and to His Majesty the
King of Italy; delegate at the Fourth Assembly of the League of
Nations.

His Majesty the King of the Serbs, Croats and Slovenes:

Dr. Milutin Jovanovitch, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Siam:

His Serene Highness Prince Damras Damrong; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The Swiss Federal Council:

M. Ernest Béguin, Deputy to the States Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Czechoslovak Republic:

Dr. Robert Flieder, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Turkish Republic:

Ruchdy Bey, Chargé d'Affaires at Berne.

The President of the Republic of Uruguay:

M. Benjamin Fernandez y Medina, Envoy Extraordinary and Minister Plenipotentiary to His Majesty the King of Spain; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

Who, having communicated their full powers, found in good and due form,

And having taken cognizance of the Final Act of this conference and of the agreement of May 4th, 1910,
-Have agreed upon the following provisions:

ARTICLE 1

The high contracting parties agree to take all measures to discover, prosecute and punish any person engaged in committing any of the following offences, and accordingly agree that:—

It shall be a punishable offence:

- (1) For purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects;
- (2) For the purposes above mentioned, to import, convey or export or cause to be imported, conveyed or exported any of the said obscene matters or things, or in any manner whatsoever to put them into circulation;
- (3) To carry on or take part in a business, whether public or private, concerned with any of the said obscene matters or things, or to deal in the said matters or things in any manner whatsoever, or to distribute them or to exhibit them publicly or to make a business of lending them;
- (4) To advertise or make known by any means whatsoever, in view of assisting in the said punishable circulation or traffic, that a person is engaged in any of the above punishable acts, or to advertise or to make known how or from whom the said obscene matters or things can be procured either directly or indirectly.

ARTICLE 2

Persons who have committed an offence falling under Article 1 shall be amenable to the courts of the contracting party in whose territories the offence, or any of the constitutive elements of the offence, was committed. They shall also be amenable, when the laws of the country shall permit it, to the courts of the contracting party whose nationals they are, if they are found in its territories, even if the constitutive elements of the offence were committed outside such territories.

Each contracting party shall, however, have the right to apply the maxim *non bis in idem* in accordance with the rules laid down in its legislation.

ARTICLE 3

The transmission of rogatory commissions relating to offences falling under the present convention shall be effected either:

- (1) By direct communication between the judicial authorities; or
- (2) Through the diplomatic or the consular representative of the country making the request in the country to which the request is made;

this representative shall send the rogatory commission direct to the competent judicial authority or to the authority appointed by the government of the country to which the request is made, and shall receive direct from such authority the papers showing the execution of the rogatory commission.

In each of the above cases a copy of the rogatory commission shall always be sent to the supreme authority of the country to which application is made.

(3) Or through diplomatic channels.

Each contracting party shall notify to each of the other contracting parties the method or methods of transmission mentioned above which it will recognize for rogatory commissions of such party.

Any difficulties which may arise in connection with transmission by methods (1) and (2) of the present article shall be settled through diplomatic channels.

Unless otherwise agreed, the rogatory commission shall be drawn up in the language of the authority to which request is made, or in a language agreed upon by the two countries concerned, or shall be accompanied by a translation in one of these two languages certified by a diplomatic or consular agent of the country making the request or certified on his oath by a translator of the country to which request is made.

Execution of rogatory commissions shall not be subject to payment of taxes or expenses of any nature whatsoever.

Nothing in this article shall be construed as an undertaking on the part of the contracting parties to adopt in their courts of law any form or methods of proof contrary to their laws.

ARTICLE 4

Those of the contracting parties whose legislation is not at present adequate to give effect to the present convention undertake to take, or to propose to their respective legislatures, the measures necessary for this purpose.

ARTICLE 5

The contracting parties whose legislation is not at present sufficient for the purpose agree to make provision for the searching of any premises where there is reason to believe that the obscene matters or things mentioned in Article 1 or any thereof are being made or deposited for any of the purposes specified in the said article, or in violation of its provisions, and for their seizure, detention and destruction.

ARTICLE 6

The contracting parties agree that, in case of any violation of the provisions of Article 1 on the territory of one of the contracting parties where it appears that the matter or thing in respect of which the violation of such article has occurred was produced in or imported from the territory of any

other of the contracting parties, the authority designated in pursuance of the agreement of May 4th, 1910, of such contracting party shall immediately render to the corresponding authority of the other contracting party, from whose country such matter or thing is believed to have come or in which it is believed to have been produced, full information so as to enable such authority to adopt such measures as shall appear to be suitable.

ARTICLE 7

The present convention, of which the French and English texts are authoritative, shall bear this day's date, and shall be open for signature until March 31st, 1924, by any state represented at the conference, by any member of the League of Nations, and by any state to which the Council of the League of Nations shall have communicated a copy of the convention for this purpose.

ARTICLE 8

The present convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the League of Nations, who shall notify the receipt of them to members of the League who are signatories of the convention and to other signatory states.

The Secretary-General of the League of Nations shall immediately communicate a certified copy of each of the instruments deposited, with reference to this convention, to the Government of the French Republic.

In compliance with the provisions of Article 18 of the Covenant of the League of Nations, the Secretary-General will register the present convention upon the day of its coming into force.

ARTICLE 9

After March 31, 1924, the present convention may be adhered to by any state represented at the conference which has not signed the convention, by any member of the League of Nations, or by any state to which the Council of the League of Nations shall have communicated a copy of the convention for this purpose.

Adhesion shall be effected by an instrument communicated to the Secretary-General of the League of Nations to be deposited in the archives of the Secretariat. The Secretary-General shall at once notify such deposit to all members of the League of Nations signatories of the convention and to other signatory states.

ARTICLE 10

Ratification of or adhesion to the present convention shall *ipso facto*, and without special notification, involve concomitant and full acceptance of the agreement of May 4th, 1910, which shall come into force on the same date as the convention itself in the whole of the territory of the ratifying or adhering member of the League or state.

Article 4 of the above-mentioned agreement of May 4th, 1910, shall not, however, be invalidated by the preceding provision, but shall remain applicable should any state prefer to adhere to that agreement only.

ARTICLE 11

The present convention shall come into force on the thirtieth day after the deposit of two ratifications with the Secretary-General of the League of Nations.

ARTICLE 12

The present convention may be denounced by an instrument in writing addressed to the Secretary-General of the League of Nations. The denunciation shall become effective one year after the date of the receipt of the instrument of denunciation by the Secretary-General, and shall operate only in respect of the member of the League of Nations or state which makes it.

The Secretary-General of the League of Nations shall notify the receipt of any such denunciation to all members of the League of Nations signatories of or adherents to the convention and to other signatory or adherent states.

Denunciation of the present convention shall not, *ipso facto*, involve the concomitant denunciation of the agreement of May 4, 1910, unless this is expressly stated in the instrument of notification.

ARTICLE 13

Any member of the League of Nations or state signing or adhering to the present convention may declare that its signature or adhesion does not include any or all of its colonies, overseas possessions, protectorates or territories under its sovereignty or authority, and may subsequently adhere separately on behalf of any such colony, overseas possession, protectorate or territory so excluded in its declaration.

Denunciation may also be made separately in respect of any such colony, overseas possession, protectorate or territory under its sovereignty or authority, and the provisions of Article 12 shall apply to any such denunciation.

ARTICLE 14

A special record shall be kept by the Secretary-General of the League of Nations, showing which of the parties have signed, ratified, adhered to or denounced the present convention. This record shall be open at all times to any of the members of the League of Nations or any state which has signed or adhered to the convention. It shall be published as often as possible.

ARTICLE 15

Disputes between the parties relating to the interpretation or application of this convention shall, if they cannot be settled by direct negotiation, be referred for decision to the Permanent Court of International Justice. In case either or both of the parties to such a dispute should not be parties to

the protocol of signature of the Permanent Court of International Justice, the dispute shall be referred, at the choice of the parties, either to the Permanent Court of International Justice or to arbitration.

ARTICLE 16

Upon a request for a revision of the present convention by five of the signatory or adherent parties to the convention, the Council of the League of Nations shall call a conference for that purpose. In any event, the Council will consider the desirability of calling a conference at the end of each period of five years.

In faith whereof the above-named plenipotentiaries have agreed to the present convention.

Done at Geneva the twelfth day of September, one thousand nine hundred and twenty-three, in two originals of which one shall remain deposited in the archives of the League of Nations and the other shall remain deposited in the archives of the Government of the French Republic.

Albania: B. BLINISHTI.

Germany:

Subject to ratification.

GOTTFRIED ASCHMANN.

Austria:

E. PFLÜGL (*ad referendum*).

Belgium:

MAURICE DULLAERT.

Brazil:

AFRANIO DE MELLO FRANCO.

British Empire:

I declare that my signature does not include any of the colonies, overseas possessions, protectorates or territories under His Britannic Majesty's sovereignty or authority.—A. H. B.

A. H. BODKIN.

S. W. HARRIS.

Union of South Africa: PARMOOR.*

New Zealand:

My signature includes the mandated territory of Western Samoa.—J. A.

J. ALLEN.

India:

PRABHASHANKAR D. PATTANI.

Irish Free State:

MICHAEL MACWHITE.

Bulgaria:

CH. KALFOFF.

China:

TCHENG LOH.

Colombia:

Subject to the subsequent approval of Parliament. (Translation.)

FRANCISCO JOSÉ URRUTIA.

Costa Rica:

MANUEL M. DE PERALTA (*ad referendum*).

*Lord Parmoor's signature includes the Territory under His Britannic Majesty's mandate of South-West Africa.

Cuba:

COSME DE LA TORRIENTE.

Denmark:

In signing the convention drawn up by the International Conference on Obscene Publications, I, the undersigned delegate of the Danish Government, make, with regard to Article 4 (see also Article 1) the following declaration: "The acts mentioned in Article 1 are punishable under the rules of Danish law only if they fall within the provisions of Article 184 of the Danish Penal Code, which inflicts penalties upon any person publishing obscene writings, or placing on sale, distributing, or otherwise circulating or publicly exposing obscene images. Further, it is to be observed that the Danish legislation relating to the press contains special provisions on the subject of the persons who may be prosecuted for press offences. The latter provisions apply to the acts covered by Article 184 in so far as these acts can be considered as press offences. Application of Danish legislation on these points must await the revision of the Danish Penal Code, which is likely to be effected in the near future."—A. O.

A. OLDENBURG.

Spain:

EMILIO DE PALACIOS.

Finland:

URHO TOIVOLA.

France:

GASTON DESCHAMPS.

J. HENNEQUIN.

Greece:

N. POLITIS.

D. E. CASTORKIS.

Haiti:

M. BONAMY.

Honduras:

CARLOS GUTIERREZ (*ad referendum*).

Hungary:

DR. ZOLTÁN BARANYAI.

Italy:

CAVAZZONI STEFANO.

Japan:

In signing the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, I, the undersigned, declare that my signature is not binding in respect of Taiwan, Chosen, the leased territory of Kwantung, Karafuto or the territories under Japanese mandate, and that the provisions of Article 15 of the present convention are not in any way derogatory to the acts of the Japanese judicial authorities in the application of Japanese laws and decrees. (Translation.)

Y. SUGIMURA.

Latvia:

J. FELDMANS.

Lithuania:

IG. JONYNAS.

Luxemburg:

CH. G. VERMAIRE.

Monaco:

R. ELLÈS-PRIVAT.

Panamá:

R. A. AMADOR.

Netherlands:

A. DE GRAAF.

Persia:

PRINCE ARFA-ED-DOVLEH (*ad referendum*).

Poland:

F. SOKAL.

Free City of Danzig:

J. MODZELEWSKI.

Portugal:

AUGUSTO DE VASCONCELLOS.

Roumania: N. P. COMNÈNE.
Salvador: J. GUSTAVO GUERRERO.
Kingdom of the Serbs, Croats and Slovenes:
M. JOVANOVITCH.
Siam:

The Siamese Government reserve full right to enforce the provisions of the present convention against foreigners in Siam in accordance with the principles prevailing for applying Siamese legislation to such foreigners.

DAMRAS.
Switzerland: E. BÉGUIN.
Czechoslovakia: DR. ROBERT FLIEDER.
Turkey: RUCHDY.
Uruguay: B. FERNANDEZ Y MEDINA.

PROVISIONAL COMMERCIAL AGREEMENT BETWEEN THE UNITED STATES OF
AMERICA AND LATVIA¹

*Signed February 1, 1926; ratification by Latvian Saeima
notified April 30, 1926*

The undersigned,

Mr. F. W. B. Coleman, Envoy Extraordinary and Minister Plenipotentiary of the United States of America to Latvia, and

Mr. K. Ulmanis, Prime Minister of Latvia, desiring to confirm and make a record of the understanding which they have reached through recent conversations on behalf of their respective governments with reference to the treatment which the United States shall accord to the commerce of Latvia and which Latvia shall accord to the commerce of the United States, have signed this provisional agreement:

§ 1

It is understood that in respect of import and export duties and all other duties and all other charges affecting commerce, as well as in respect to transit, warehousing and other facilities and the treatment of commercial travellers' samples, the United States will accord to Latvia, and Latvia will accord to the United States, its territories and possessions, unconditional most favored nation treatment, and that in the matter of licensing or prohibitions of imports or exports each country so far as it at any time maintains such a system will accord to the commerce of the other treatment as favorable with respect to commodities, valuations and quantities as may be accorded to the commerce of any other country.

§ 2

It is understood that no higher or other duties shall be imposed on the importation into or disposition in the United States, its territories or pos-

¹ U. S. Treaty Series, No. 740.

sessions, of any articles the produce or manufacture of Latvia than are or shall be payable on like articles the produce or manufacture of any foreign country.

§ 3

It is understood that no higher or other duties shall be imposed on the importation into or disposition in Latvia of any articles the produce or manufacture of the United States, its territories or possessions, than are or shall be payable on like articles the produce or manufacture of any foreign country.

§ 4

It is understood that similarly no higher or other duties shall be imposed in the United States, its territories or possessions, or in Latvia, on the exportation of any article to the other or to any territory or possession of the other than are payable on the exportation of like articles to any foreign country.

§ 5

It is understood that every concession with respect to any duty, charge or regulation affecting commerce now accorded or that may hereafter be accorded by the United States or by Latvia by law, proclamation, decree, or commercial treaty or agreement, to the products of any third country will become immediately applicable without request and without compensation to the commerce of Latvia and of the United States and its territories and possessions, respectively.

§ 6

This understanding does not relate to:

A. The treatment which the United States accords or may hereafter accord to the commerce of Cuba or any of the territories or possessions of the United States, or the Panama Canal Zone, or to the treatment which is or may hereafter be accorded to the commerce of the United States with any of its territories or possessions, or to the commerce of its territories or possessions with one another.

B. The treatment which Latvia has accorded or may accord to the commerce of Esthonia, Finland, Lithuania or Russia so long as any advantages arising from such treatment are not accorded by Latvia to the commerce of states other than Esthonia, Finland, Lithuania and Russia.

C. Prohibitions or restrictions of a sanitary character or designed to protect human, animal or plant life, or regulations for the enforcement of police or revenue laws.

§ 7

It is further understood that the present arrangement shall become operative on the day when the ratification of the present agreement by the Latvian

Saeima will be notified to the Government of the United States, and unless sooner terminated by mutual agreement, shall continue in force until thirty days after notice of its termination shall have been given by either government; but should either government be prevented by future action of its legislature from carrying out the terms of this arrangement the obligations thereof shall thereupon lapse.

Signed at Riga, this first day of February nineteen hundred and twenty-six.

[SEAL] F. W. B. COLEMAN

[SEAL] K. ULMANIS

AGREEMENT BETWEEN LITHUANIA AND THE UNITED STATES ACCORDING MOST-FAVORED-NATION TREATMENT IN CUSTOMS MATTERS¹

Exchange of notes between Frank B. Kellogg, Secretary of State, and K. Bizauskas, Minister of Lithuania, December 23, 1925; ratification by the Lithuanian Seimas notified July 10, 1926

These conversations have disclosed a mutual understanding between the two governments which is that, in respect of import and export duties and other duties and charges affecting commerce, as well as in respect of transit, warehousing and other facilities, and the treatment of commercial travelers' samples, the United States will accord to Lithuania, and Lithuania will accord to the United States, its territories and possessions, unconditional most-favored-nation treatment; and that in the matter of licensing or prohibitions of imports and exports, each country, so far as it at any time maintains such a system, will accord to the commerce of the other treatment as favorable, with respect to commodities, valuations and quantities, as may be accorded to the commerce of any other country.

It is understood that

No higher or other duties shall be imposed on the importation into or disposition in the United States, its territories or possessions, of any articles the produce or manufacture of Lithuania than are or shall be payable on like articles the produce or manufacture of any foreign country;

No higher or other duties shall be imposed on the importation into or disposition in Lithuania of any articles the produce or manufacture of the United States, its territories or possessions, than are or shall be payable on like articles the produce or manufacture of any foreign country;

Similarly, no higher or other duties shall be imposed in the United States, its territories or possessions, or in Lithuania, on the exportation of any articles to the other or to any territory or possession of the other, than are payable on the exportation of like articles to any foreign country;

Every concession with respect to any duty, charge or regulation affecting commerce now accorded or that may hereafter be accorded by the United

¹ U. S. Treaty Series, No. 742.

States or by Lithuania, by law, proclamation, decree or commercial treaty or agreement, to the products of any third country will become immediately applicable without request and without compensation to the commerce of Lithuania and of the United States and its territories and possessions, respectively;

Provided that this understanding does not relate to

(1) The treatment which the United States accords or may hereafter accord to the commerce of Cuba or any of the territories or possessions of the United States or the Panama Canal Zone, or to the treatment which is or may hereafter be accorded to the commerce of the United States with any of its territories or possessions or to the commerce of its territories or possessions with one another.

(2) The treatment which Lithuania accords or may hereafter accord to the commerce of Finland, Esthonia, Latvia and/or Russia, so long as such special treatment is not accorded to any other State.

(3) Prohibitions or restrictions of a sanitary character or designed to protect human, animal or plant life or regulations for the enforcement of police or revenue laws.

The present arrangement shall become operative on the day when the ratification thereof by the Lithuanian Seimas shall be notified to the Government of the United States, and, unless sooner terminated by mutual agreement, shall continue in force until thirty days after notice of its termination shall have been given by either party; but should either party be prevented by future action of its legislature from carrying out the terms of this arrangement, the obligations thereof shall thereupon lapse.

SUPPLEMENTARY EXTRADITION CONVENTION BETWEEN THE
UNITED STATES AND MEXICO¹

*Signed at Washington, December 23, 1925;
ratifications exchanged, June 30, 1926*

The United States of America and the United States of Mexico being desirous of enlarging the list of crimes on account of which extradition may be granted under the conventions concluded between the two countries on February 22, 1899, and June 25, 1902, with a view to the better administration of justice and the prevention of crime in their respective territories and jurisdictions, have resolved to conclude a supplementary convention for this purpose and have appointed as their plenipotentiaries, to wit:

The President of the United States of America:

Frank B. Kellogg, Secretary of State of the United States of America, and
The President of the United States of Mexico:

¹ U. S. Treaty Series, No. 741.

His Excellency Señor Don Manuel C. Téllez, Ambassador Extraordinary and Plenipotentiary of the United States of Mexico at Washington:

Who, after having exhibited to each other their respective full powers, which were found to be in due and proper form, have agreed to and concluded the following articles:

ARTICLE I

The high contracting parties agree that the following crimes are added to the list of crimes numbered 1 to 21 in the second article of the treaty of extradition of the 22nd of February, 1899, and the crime designated in the supplementary extradition treaty, concluded between the United States and Mexico on the 25th of June, 1902; that is to say:

22. Crimes and offenses against the laws for the suppression of the traffic in and use of narcotic drugs.

23. Crimes and offenses against the laws relating to the illicit manufacture of or traffic in substances injurious to health, or poisonous chemicals.

24. Smuggling. Defined to be the act of wilfully and knowingly violating the customs laws with intent to defraud the revenue by international traffic in merchandise subject to duty.

ARTICLE II

The present convention shall be considered as an integral part of the said extradition treaty of the 22nd of February, 1899, and it is agreed that the crime of bribery added to said original treaty by the supplemental extradition convention of the 25th of June, 1902, shall be numbered twenty-one (21); that the paragraph or crime numbered 21 in Article II of the original treaty and relating to "Attempts" shall now be numbered 25 and be applicable under appropriate circumstances to all the crimes and offenses now numbered 1 to 24 inclusive.

ARTICLE III

The present convention shall be ratified and the ratifications shall be exchanged either at Washington or at Mexico City as soon as possible.

It shall go into force ten days after its publication in conformity with the laws of the high contracting parties, and it shall continue and terminate in the same manner as the said convention of February 22, 1899.

In testimony whereof the respective plenipotentiaries have signed the present convention in duplicate, and have hereunto affixed their seals.

Done in duplicate at the City of Washington, in the English and Spanish languages, this twenty-third day of December, one thousand nine hundred and twenty-five.

FRANK B. KELLOGG [SEAL]

MANUEL C. TÉLLEZ [SEAL]

PROTOCOL ON ARBITRATION CLAUSES IN COMMERCIAL MATTERS¹

*Signed at Geneva, September 24, 1923; registered by the
Secretariat of the League of Nations, July 28, 1924, following
its entry into force.²*

The undersigned, being duly authorized, declare that they accept, on behalf of the countries which they represent, the following provisions:

(1) Each of the contracting states recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different contracting states by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each contracting state reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any contracting state which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other contracting states may be so informed.

(2) The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The contracting states agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

(3) Each contracting state undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

(4) The tribunals of the contracting parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement whether referring to present or future

¹ League of Nations Treaty Series, No. 678 (Vol. XXVII, p. 158).

² *Deposit of ratifications*: Finland, July 10, 1924; Italy, July 28, 1924; Albania, Aug. 29, 1924; Belgium, Sept. 23, 1924; Great Britain and Northern Ireland, Sept. 27, 1924; Germany, Nov. 5, 1924; Roumania, Mar. 12, 1925; Denmark, April 6, 1925; The Netherlands and the Netherlands Indies, Surinam and Curaçao, Aug. 6, 1925; Greece, May 26, 1926; New Zealand, June 9, 1926; Spain, July 29, 1926.

Accessions: Southern Rhodesia, Dec. 18, 1924; Newfoundland, June 22, 1925; British Guiana, British Honduras, Jamaica, Leeward Islands, Grenada, Saint Lucia, Saint Vincent, Gambia, Gold Coast, Kenya, Zanzibar, Northern Rhodesia, Ceylon, Mauritius, Gibraltar, Malta, Falkland Islands, Iraq and Palestine, March 12, 1926; Tanganyika, June 17, 1926; St. Helena, July 29, 1926.

(League of Nations Treaty Series No. 678, Vol. XXVII, p. 158, Vol. XXXI, p. 260, Vol. XXXV, p. 315; League of Nations Official Journal, Nov. 1925, pp. 1575-1576, and May, 1926, p. 648. Annex to the Supplementary Report on the Work of the Council and the Secretariat to the Seventh Assembly of the League, A. (6)a. 1926. Annex.)

differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

(5) The present protocol, which shall remain open for signature by all states, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory states.

(6) The present protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each contracting state, one month after the notification by the Secretary-General of the deposit of its ratification.

(7) The present protocol may be denounced by any contracting state on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory states and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General and shall operate only in respect of the notifying state.

(8) The contracting states may declare that their acceptance of the present protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said states may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory states. They will take effect one month after the notification by the Secretary-General to all signatory states.

The contracting states may also denounce the protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

A certified copy of the present protocol will be transmitted by the Secretary-General to all the contracting states.

Done at Geneva on the twenty-fourth day of September, one thousand nine hundred and twenty-three, in a single copy, of which the French and English texts are both authentic, and which will be kept in the archives of the Secretariat of the League.

In conformity with the second paragraph of Article 1, Belgium reserves the right to limit the obligation mentioned in the first paragraph of Article 1 to contracts which are considered as commercial under its national law.

PAUL HYMANS, *First Delegate of Belgium*
V. SIDZIKAIUSKAS, *First Delegate of Lithuania*
A. MICHALAKOPOULOS, *Delegate of Greece*

(Subject to the reservation in Article 1.)

I declare that my signature applies only to Great Britain and Northern Ireland and consequently does not include any of the colonies, overseas possessions or protectorates under His Britannic Majesty's sovereignty or authority or any territory in respect of which His Majesty's Government exercises a mandate.

ROBERT CECIL, *First Delegate of the British Empire*

AFRANIO DE MELLO-FRANCO, *Delegate of Brazil*

JUAN J. AMEZAGA,

B. FERNÁNDEZ Y MEDINA } *Uruguay*

By virtue of paragraph 2 of Article 1 of the present convention, the French Government reserves the right to limit the obligation mentioned in the aforesaid article to contracts which are considered commercial under its national law.

In virtue of Article 8 of the present convention, the French Government declares that its acceptance of the present protocol does not include the colonies, overseas possessions or territories, or the protectorates or territories in respect of which France exercises a mandate. (Translation.)

G. HANOTAUX.

R. A. AMADOR, *Delegate of Panama*

GARBASSO (*for Italy*)

The Principality of Monaco reserves the right to limit its obligation to contracts which are considered as commercial under its national law. (Translation.)

R. ELLÈS-PRIVAT (*for the Principality of Monaco*,
March 29, 1924)

GOTTFRIED ASCHMANN (*for Germany*)

On behalf of the Royal Roumanian Government, I sign the present convention, subject to the reservation that the Royal Government may in all circumstances limit the obligation mentioned in Article 1, paragraph 2, to contracts which are considered as commercial under its national law. (Translation.)

N. P. COMNÈNE (*for Roumania*)

In virtue of Article 8 of the present protocol, the Japanese Government declares that its acceptance of the present protocol does not include its territories mentioned hereinafter: Chosen, Taiwan, Karafuto, the leased territory of Kwantung, and the territories in respect of which Japan exercises a mandate. (Translation.)

K. ISHII (*for Japan*)

By virtue of paragraph 2 of Article 1 of the present protocol the Government of His Majesty the King of Spain reserves the right to limit the obligation mentioned in the aforesaid article to contracts which are considered as commercial under its national law.

In virtue of Article 8 of the protocol the Government of His Majesty the King of Spain declares that its acceptance of the present protocol does not include the Spanish possessions in Africa and the territories of the Spanish protectorate in Morocco. (Translation.)

• J. QUINONES DE LEON, *August 30, 1924*

The Government of the Netherlands reserves the right to restrict the obligation mentioned in the first paragraph of Article 1 to contracts which are considered as commercial under Netherlands law.

Further, it declares its opinion that the recognition in principle of the validity of arbitration clauses in no way affects either the restrictive provisions at present existing under Netherlands law or the right to introduce other restrictions in the future. (Translation.)

W. DOUDE VAN TROOSTWIJK, *Netherlands (for the Kingdom in Europe)*

HEIKKI RENVALL *(for Finland)*

On signing the protocol on arbitration clauses done at Geneva on September 24, 1923, I, the undersigned representative of the Danish Government, accredited to the Secretariat of the League of Nations, make the following declaration in respect of Article 3: "Under Danish law, arbitral awards made by an arbitral tribunal do not immediately become operative; it is necessary in each case, in order to make an award operative, to apply to the ordinary courts of law. In the course of the proceedings, however, the arbitral award will generally be accepted by such courts without further examination, as a basis for the final judgment in the affair."

Subject to ratification. (Translation.)

A. OLDENBURG *(for Denmark, Geneva, May 30, 1924)*

CHR. L. LANGE *(for Norway, August 5, 1924)*

MOTTA *(for the Swiss Confederation, September 10, 1924;*

By virtue of paragraph 2 of Article 1 of the present protocol the Latvian Government reserves the right to limit the obligation mentioned in the aforesaid article to contracts which are considered as commercial under its national law. (Translation.)

L. SEJA *(for Latvia, September 12, 1924)*

J. GUSTAVO GUERERRO *(for Salvador, September 13, 1924)*

ARMANDO QUEZADA A. E. VILLEGAS *(for Chile, September 16, 1924)*

Netherlands.

For the three territories, beyond the seas, Netherlands Indies, Surinam and Curaçao:

The Government of the Netherlands reserves its right to restrict the obligation mentioned in the first paragraph of Article 1 to contracts which are considered as commercial under Netherlands law.

Further, it declares its opinion "that the recognition in principle of the validity of arbitration clauses in no way affects either the restrictive provisions at present existing under Netherlands law or the right to introduce other restrictions in the future." (Translation.)

W. DOUDE VAN TROOSTWIJK. *September 20, 1924*

R. V. CABALLERO *(for Paraguay, Geneva, September 29, 1924)*

E. PFLÜGL *(for Austria, Geneva, November 24, 1924)*

The Siamese Government in signing this protocol does so under reservation that it thereby assumes no obligation to enforce the provisions of this convention in violation of existing or future treaty provisions granting to foreigners exemption from Siamese jurisdiction.

PHYA SANPAKITCH PREECHA, *19th May, 1925*

[League of Nations Treaty Series, Vol. XXXV, p. 315.]

On behalf of the Government of the Polish Republic I sign the present protocol subject to the reservation that in accordance with paragraph 2 of Article 1 the obliga-

tion contemplated in the said article will apply only to contracts which are declared to be commercial under national Polish law.

GABRIEL D. MORAWSKI, *Geneva, September 22, 1925.*

[League of Nations Treaty Series, Vol. XXXIX, p. 190.]

New Zealand, March 11, 1926.

[League of Nations Official Journal, May, 1926, p. 648.]

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